RESERVED WATER RIGHTS COMPACT COMMISSION

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February 2, 2015

Senator Chas Vincent
Montana Senate
PO Box 200500
Helena, MT 59620-0500

Dear Senator Vincent,

You have asked me to respond to assertions made in a letter addressed to Montana Legislators on January 12, 2015, from Mr. Richard Simms, on behalf of the Montana Land and Water Alliance regarding the proposed CSKT Compact. Mr. Simms makes a number of incorrect statements pertaining to both the Compact itself and to historic irrigation practices on the Flathead Indian Reservation. For ease of reference, I have reproduced Mr. Simms' numbered claims and addressed them in the order in which he raised them in his letter and accompanying "Executive Summary.

Mr. Simms claims at the outset that The Compact transforms "Federal reserved water rights under *Winters v. United States*, 207 U.S. 564 (1908), into Indian reserved water rights, greatly expanding the nature and scope of the permissible claims that Indian tribes can make under the Winters Doctrine."

To support his initial premise, Mr. Simms describes arguments made in the context of litigation by the Tribes as to their ownership of land and water on and underneath the Reservation and attributes that legal position to the Commission, going further to state that the Compact ratifies that position. The articulated position of the Tribes that Mr. Simms attributes also to the Compact Commission likely reflects the Tribes' legal position should their filed claims go forward in the Adjudication if the Compact fails. They do not, however, reflect a position agreed to by the parties in the Compact, nor do they accurately represent the underlying premise of the Compact. The proposed Compact, on the contrary, quantifies usufructuary rights for the Tribes, and contains nothing inconsistent with Article IX, Section 3 of the Montana Constitution providing that "waters within the boundaries of the state are the property of the state for the use of its people."

Mr. Simms' assertion that the Compact Commission has adopted "the legal proposition that the Tribes reserved their own Reservation with a 'time immemorial' water rights priority" appears to lie at the heart of his argument that the Compact transforms federal reserved rights into Indian reserved rights. It is also incorrect. Fundamental to the Commission's negotiating position is the proposition that the United States withdrew the Flathead Indian Reservation from the public

domain, that appurtenant water rights have a July 16, 1855 priority date, and that the Tribes retained some "aboriginal" rights while ceding the majority of their aboriginal territory to the United States. This is reflected in the proposed Compact and attached abstracts, which recognize rights with both a July 16, 1855 priority date and those with a "time immemorial" priority date. This recognition is consistent with controlling legal precedent determining that rights held by the Tribes prior to the treaty date and not ceded by them, carry a time immemorial priority date.[1]

Ultimately, Simms' arguments are based on a manifestly false assumption: namely that the Tribes have the ability to claim—and by extension that the State has the ability to negotiate—only so called *"Winters"* rights, those rights created through the reservation of land from the public domain. This premise ignores the fact that state and federal courts have determined that not only do aboriginal rights carrying a time-immemorial priority date exist, but they are also part and parcel of the category of "reserved rights" for purposes of McCarran Amendment adjudicatory jurisdiction, and for purposes of the Montana General Stream Adjudication.[2]

1. **"The Tribes claimed and the 2013 Compact would have awarded 179,539 acre feet of water, measured at the farm turnouts, for the irrigation of 128,241.73 acres of land in the Flathead Irrigation Project. The historical duty of water in the Project was 4.7 acre feet per acre. The 2013 Compact reduced the historical duty by 3.3 acre feet per acre to 1.4 acre feet, diminishing the amount of water historically available to the irrigators on farm by 423,200 acre feet annually. This reduction in supply is carried into the new Compact."**

At the outset, Mr. Simms does not identify the source from which he derives a "historic duty" of 4.7 acre feet per acre, citing only a 1938 Bureau of Indian Affairs report as support for the numbers used throughout his argument on this point. Mr. Simms also fails to note that the 1.4 acre-feet per acre—the amount that represented the maximum Farm Turnout Allowance under the former Water Use Agreement—is not part of the current proposed Compact.[3]

It appears that the most likely source for Mr. Simms' claims is a document referred to as the "Clotts" report in the BIA's "Operation and Maintenance Guidelines for the Flathead Indian Irrigation Project." The report is attached as Appendix A to those Guidelines.[4] Mr. Simms claims, based on this report, that 490,859 acre-feet of water was available for the irrigation of 104,859 project acres, equaling a "historic duty" of 4.7 acre-feet per acre. The clear implication is that this "historic duty" was actually delivered to irrigators on the project. In fact, the 490,859 referred to in the report represents a tally of *the total supply of water theoretically available for irrigation of the project*, and is not only predicated on diversion and pumping structures that had yet to be built but actually counts at least 48,000 acre-feet of water from the Jocko twice,

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[1] *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 92 (1985).
[2] *See Greely*, 219 Mont. 76, 99; *Joint Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. U.S.*, 832 F.2d 1127, 1131 (9th cir.1987).
[3] Neither is it a correct characterization of the limitations of the 2013 FIIP Water Use Agreement, which also provided for a Measured Water Use Allowance to allow delivery of up to two acre-feet per acre.
[4] *Operation and Maintenance Guidelines, Flathead Indian Irrigation Project, Flathead Agency*, available at: http://projects.battelle.org/fiipea/BIA_Operation_and_Maintenance_Guidelines.pdf.

anticipating that it could be made available in the Mission after construction of the Flathead pumping station.

The irrigated acreage cited by Simms is equally hypothetical. The Clotts report does not contain a reference to 104,859 acres, but does reference 104,490 acres of land "Under Constructed Works." The actual number of acres irrigated in 1938, according to the report, was only 76,002. The amount of 4.7 acre-feet per acre derived by Mr. Simms is a purely imaginary one based on a division of all sources of water in the project area by the total acres at the time that were physically capable of being served by the project.

Two other reports reference historically delivered amounts and associated quotas reported contemporaneously with the Clotts report. The first is a 1939 Department of Interior, U.S. Indian Irrigation Service report titled "Report on Water Supply of the Flathead Irrigation Project Montana," prepared by P.V Hodges. The second report expands the period of record addressed in the Hodges report to include a period following the construction of the Flathead pumping plant, and is referenced here as the Kollenborn report.[5] Both of these sources cite historic delivery amounts of much less than 4.7 acre-feet per acre.[6] Both reports demonstrate that even prior to the implementation of interim instream flow requirements, the FIIP was a deficit irrigation system, and both current and historic quotas reflect that fact.[7]

All of the referenced sources cite delivery amounts for a time when the acreage irrigated by the project was significantly less than it is today, which would in theory have resulted in a larger per-acre quota. This is somewhat offset by the fact that the Flathead River pumping plant had not yet been completed, thus reducing the supply available to the Mission Valley relative to the present. It is also important to view these sources in light of the fact that the interim instream flows—instituted as a result of a 1987 judicial decision—had not yet been implemented.[8]

One of the difficulties faced by the negotiating parties was to accurately quantify historic farm deliveries on the project in the face of missing or incomplete records of water actually delivered to individual farm turnouts. The method used to calculate allocations between instream flow rights and project deliveries used measured data from the period from 1983 to 2002 to create a water budget for the entire project. The water budget was then input unto the HYDROSS water accounting model, which was used to create water budgets for individual service areas and ultimately to determine water savings that could be achieved through improvements to the project and added to instream flows while maintaining farm delivery values.[9]

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[5] H.S. Kollenborn, 1945. *Report on Water Supply and Water Use for the Flathead Irrigation Project Montana.* United Stated Department of the Interior Office of Indian Affairs Irrigation Division Agricultural Economics Unit.

[6] For example, according to the Hodges Report, average deliveries to the Mission Valley in the period from 1934 through 1938 were 1.45, 1.17, 1.26, 3.40, and 1.54 acre-feet per acre for Mission, Post, Pablo, and Hillside Lands respectively. Memo from Seth Makepeace, dated January 22, 2015, p. 2, citing the Hodges Report.

[7] Makepeace Memo.

[8] *Id.*

[9] CSKT Compact Technical Working Group, *Report of Findings: Technical review of proposed CSKT water rights settlement for the Water Policy Interim Committee*, August 26, 2014 (hereinafter Technical Working Group Report"), available at: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/wpic/tech-work-group_findings-sept23.pdf

Mr. Simms cites the 2013 proposed abstracts for the FIIP water rights for the proposition that the total quantification for the project equals 179,538 acre-feet, resulting in a "duty" of 1.4 acre feet per acre. Those abstracts were limited by the maximum Farm Turnout Allowance agreed to in the FIIP Water Use Agreement. As demonstrated in the State's technical review, the Farm Turnout Allowances accurately reflect historic farm deliveries when aggregated and averaged across a service area.[10] They do not, however, form an appropriate "duty" or quota at the individual farm turnout because they do not accurately reflect individual variations in crop consumption and application efficiency across the project.

Partially as a result of the State's analysis, the Farm Turnout Allowance is not a provision of the current proposed Compact. The Compact clearly states that the River Diversion Allowances supply the FIIP Water Use Right.[11] The River Diversion Allowances, which are set forth in Appendix 3.2 to the 2015 proposed Compact, add up to a maximum RDA of 302,250 acre-feet.[12] The 2015 proposed compact uses the RDAs as evaluated using Historic Farm Deliveries set forth in Appendix 3.3 to satisfy the FIIP Water Use Right. These numbers are consistent with historic use on the FIIP. In the event that RDAs are not sufficient to meet Historic Farm Deliveries, they can be adjusted.[13]

2. **"The 2013 Compact, discussed above, would have permanently reduced the irrigators' water supply by 423,200 acre feet annually. The new Compact, released on January 7, 2015, preserves what would have been done by the 2013 Compact, but exacerbates the permanent reduction in the irrigators' water supply by 35,908 to 71,816 more acre feet annually by changing the measurement of the water delivered to the irrigators from the farm turnouts to a River Diversion Allowance."**

Mr. Simms' assertion on this point is incorrect. The RDA numbers are identical to the 2013 RDA numbers. The key change in the 2015 proposed Compact is that the RDAs, as evaluated using Historic Farm Deliveries, and not the FTAs, are the limiting factors for FIIP deliveries. The cumulative RDA, as illustrated above, is a much larger amount of water than the FTA for the three project service areas precisely *because* it was quantified to take into account project inefficiencies between the River Diversion point and the farm turnout, and to be capable of supplying excess water on top of the FTA, even after these carriage inefficiencies are accounted for. This change was in direct response to irrigator requests for verification that the modeled numbers were capable of supplying historic delivery amounts. The evaluation process is also intended to address this point. In the unlikely event that RDAs are incapable of supplying Historic Farm Deliveries within a service area, those RDAs may be adjusted using pumped water.

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[10] *Instream Flow and Irrigation Diversion Aspects of the FIIP Water Use Agreement: State of Montana Evaluation and Recommendations*, August 4, 2014, available at: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/state_wua_evaluation_8-4-14.pdf.

[11] See Compact Article II.58.

[12] Not included in this number is the 65,000 acre foot RDA for the Flathead pumping station. RDAs are quantified for wet, normal, and dry years. The cumulative RDAs are 302,250 (wet), 278,000 (normal), and 256,900 (dry).

[13] Compact Article IV.D.3.

3. **"The on-Reservation instream flows were created: 1) to provide a basis upon which to exercise Tribal control over all of the water entering the Reservation; 2) to impose numerous conservation measures on the Irrigation Project irrigators and to convert the water thus saved to Tribal instream flows 3) to make it possible to control the "secretarial water rights" within the Irrigation Project; and 4) to make it possible to control all of the state-based, private diversions on the Reservation outside of the Irrigation Project to minimize their use of water. These four objectives are accomplished through the Tribes' on-Reservation instream flow claims, which are adopted in the Compact."**

The basis of Mr. Simms' argument appears to be that fisheries instream flow water rights may only be used to preclude upstream diversions by junior users and to prevent new development. Therefore, he argues, to quantify water rights for the Tribes for the sole purpose of exerting control over all of the water on the Reservation is an illegal use of such rights. He appears to derive this theory—once again—from the Tribes' articulated litigation position as to ownership of water on the Reservation. He concludes, based on this reasoning, and without any legal citations to support his argument, that the Supreme Court would not recognize the types of instream flow rights quantified under the Compact, and that the Compact "eliminates the State of Montana's constitutional mandate to administer public waters on the Flathead Reservation.

The Compact manifestly represents not an adoption of the Tribes' legal argument but a significant compromise of their legal positions on ownership and instream flow needs for fisheries. The instream flow rights quantified to the Tribes under the compact for the purposes of maintaining fisheries were almost universally calculated, located, or conditioned to protect existing uses rather than to maximize flows for fish or exert control over water resources. This is clear from a close look at the three types of on-Reservation instream flows categorized by the compact and criticized by Simms. Finally, the Compact, by implementing a system of shared administration over waters on the Reservation that must be adopted by the Montana legislature, comports with Article IX, Section 3(4) of the Montana Constitution.

a. Natural Instream Flows

Simms asserts that the "Natural Instream Flows" quantified in Compact Article III.C.1.d.i and Appendix 10, were "designed to make it possible for the CSKT to exercise control over all of the natural runoff from the Mission Mountains that enters the Reservation." This is manifestly untrue. These flows were established in a way that overtly protects existing uses. This is demonstrated by the fact that every one of the enforcement points for these flows is located *upstream* of existing diversions. This means that these rights *cannot* be used to make a call against any existing uses. The argument that these rights are somehow intended to "exert control" over all natural runoff is senseless.

b. FIIP Instream Flows

The FIIP instream flows quantified by Compact Article III.C.1.d.ii and Appendix 11, were derived based not on optimal fisheries conditions but rather on the existing water budget for

streams feeding the FIIP, taking into account relatively modest gains in efficiency that would be achieved through State and federal contributions to settlement.[14] Simms implies that these increases in efficiency are obtained at the expense of "conservation measures" imposed on FIIP irrigators. To the contrary, the majority of both Operational Improvements and Rehabilitation and Betterment activities will be implemented using State and federal dollars that will not be available without the settlement. Projects affecting FIIP infrastructure will be implemented without the imposition of any conditions or requirements on individual irrigators. Ultimately, the extent to which the irrigators participate in project improvements relating to on-farm measurement and efficiency will directly impact the ability to evaluate the sufficiency of RDAs, to provide direct benefits to irrigators in terms of on-farm efficiency upgrades, and to achieve satisfaction of the Tribes' target instream flows which will allow additional saved water to be shared between instream flows and the project.

Simms is correct that the FIIP instream flows, as opposed to the interim instream flows that are currently in place were not calculated using "three commonly accepted fishery methodologies to determine minimum instream flows." Rather, the FIIP instream flows were quantified based on "streamflow remaining after irrigation diversions have occurred" and taking into account efficiency increases from Operational Improvements.[15] When compared to streamflows generated using a "commonly accepted fishery methodology," the compacted FIIP instream flows are *lower* than those generated using the type of methodology of which Simms appears to approve.[16] This is precisely the type of concession that is possible through the Compact as opposed to litigation. The Tribes' filed claims will almost certainly be calculated based on "commonly accepted fishery methodologies" and will undoubtedly represent much larger claimed instream flows than those quantified by the Compact.

c. Other Instream Flows

Simms next asserts that 82 instream flow rights quantified under the compact were created to "exercise Tribal control over the 'Secretarial water rights' within the Flathead Irrigation Project and the 'private water rights' outside of the Project. This section of the letter is titled "The Other Reservation Instream Flows" and presumably Simms is referring to the "Other" category of instream flows quantified under Article III.C.1.d.iii and Appendix 12 of the Compact, given that he previously addressed both the FIIP and Natural instream flow categories. It is difficult to determine that this is the case, however, as there are only 49 "Other" instream flows, not 82, and the terminology used in the letter and attached map is only partially consistent with that used in the Compact.

Presuming, nonetheless, that the "Other" instream flows are at least in part the rights to which Simms refers, he fails to mention a critical protection for existing uses. Namely, the "Other" instream flows, while quantified in the Compact,[17] cannot be enforced until a final decree for the

[14] *Technical Working Group Report* at 46.
[15] *Id.*
[16] *Id. at 46-47.* (The Report notes that "in some stream reaches, the use of streams to convey water to or from storage reservoirs inflates these numbers above that which would have naturally occurred.")
[17] Compact Article III.C.1.d.iii, Appendix 12.

relevant basin has been issued by the Montana Water Court *and* an enforceable schedule has been established pursuant to Section 2-1-115 of the Unitary Management Ordinance. The process for setting an enforceable schedule requires notice and one or more public meetings, as well as extensive technical work to establish the extent of existing uses and the proposed enforceable schedule. Most important, the enforceable schedule must be "based on a water budget that allows valid water rights to be exercised,"[18] meaning that these flows, just like the Natural flows, by definition protect existing uses rather than controlling them, as Simms asserts.

4. **"In the guise of off-reservation instream flows, the Compact would award the Tribes control over almost all of the water west of the Continental Divide in Montana, the use of which was previously under the control of the State of Montana for the Beneficial Use of its Citizens."**

Mr. Simms once again appears to base his argument the Tribes' articulated litigation position. As previously explained, the Tribes' litigation position, to the extent it is represented by the document cited by Mr. Simms, is neither representative of the Commission's position on these issues nor reflective of the settlement provisions contained in the Compact. On the contrary, the Tribes made substantial concessions on their legal claims in the Compact.

Mr. Simms asserts that Article III of the Treaty of Hellgate cannot be interpreted to provide off-Reservation instream flow water rights for the Tribes. The language at issue reads: "The exclusive right of taking fish in all streams running through or bordering said reservation is further secured to said Indians; *as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory...*" (emphasis added). Simms asserts that the italicized language provides the Tribes with no greater rights than are held by non-Indians in the State of Montana: "A right owned in common is a right owned or shared equally by all members of the common group, which in this case includes the Tribes and the non-Indian citizens of Washington Territory, who today are the non-CSKT citizens of the State of Montana." (Simms, pp. 11-12).

Simms' literal interpretation has been considered and explicitly rejected by the U.S. Supreme Court: "The Court has interpreted the fishing clause in these treaties on six prior occasions. In all of these cases the Court placed a relatively broad gloss on the Indians' fishing rights and—more or less explicitly—rejected the State's "equal opportunity" approach."[19] Simms further maintains that there is no legal precedent for recognizing off-reservation rights with a "time immemorial" priority date, and that Article III and its reference to "usual and accustomed places" is limited to the areas ceded by the Tribes west of the Continental divide. Simms provides no legal precedent in support of either proposition.[20]

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[18] UMO Section 2-1-115(3).

[19] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

[20] The citation to the Indian Claims Commission Findings of Fact for Docket No. 61, available as 8 Ind. Cl. Com. 40 is misplaced. Findings of fact no. 17 through 19 make no reference to Article III or the rights it conveys but instead represent general historical observations about the territories the various tribes considered to be part of their exclusive ownership.

The off-Reservation rights quantified under the Compact reflect the underlying uncertainty in this area of the law. It is precisely this uncertainty and the associated risks to both parties that the off-Reservation rights are intended to resolve. The Commission has consistently emphasized this fact and its importance to the negotiated provisions ultimately agreed to in the Compact. While there is substantial precedent for the existence of on-Reservation instream flows with a time-immemorial priority date,[21] limited precedent exists for or against the extension of these types of rights to the Tribes' ceded aboriginal territory off the Reservation.

What precedent does exist is conflicting. Idaho's Snake River Basin Adjudication Court determined that the Nez Perce tribes lacked rights to off-Reservation instream flows with the exception of a limited number of named springs.[22] The Tribes' claims were never considered on appeal as the State of Idaho entered into a settlement with the Tribes that included the recognition of a number of state-based instream flow water rights, among other concessions. By contrast, the Washington Supreme Court affirmed a state trial court decision that despite congressional diminishment of the Tribes' off-reservation rights, the Yakima Tribes nonetheless possess time-immemorial off-Reservation rights in the Yakima River and its tributaries to preserve the fishery.[23]

Because there is no controlling precedent on the issue of whether the Article III language provides a minimum instream flow water right to sustain off-Reservation fisheries, the Commission looked to the limited existing state court precedent on this point as well as to existing federal precedent interpreting other aspects of this treaty language.[24] In doing so, it concluded that there is enough uncertainty about the meaning of this language that settlement of the Tribal claims in a way that effectively mitigates adverse impacts to state water users and does not create legal precedent is far preferable to the time, expense, economic impact, and risk of litigation. This is particularly true given that existing precedent does provide support for tribal claims, and it is well established that ambiguity in treaty language must be resolved in favor of tribal interests.[25]

Conclusion

Simms closes with a refrain of his first argument, stating that the Compact gives "control of the public water supply to the Tribes" and violates Article IX, Section 3 of the Montana Constitution. The Commission has previously addressed this argument in numerous documents and in response to Simms' first point above. Contrary to Simms' assertion, the Compact, far from giving the Tribes control over all water on the Reservation or in Western Montana, precluding the continued use of existing state based rights, preventing changes of use of existing rights, and preventing the development of new uses under state law, does precisely the opposite. The Compact protects existing uses while complying with the State's obligation under federal

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[21] *See U.S. v. Adair, 723 F.2d 1394*, (9th Cir. 1983), *cert. denied* 104 U.S. 3536 (1984); *Greely,* 219 Mont. at 99.
[22] *In re. SRBA Case No. 39576, Consolidated Subcase 03-10022*, Idaho Fifth Judicial District Court (Nov. 10, 1999).
[23] *State, Dept. of Ecology v. Yakima Reservation Irr. Dist.*, 121 Wash.2d (1993).
[24] See pp. 2-4 of RWRCC letter to Chairman Vincent and the Water Policy Interim Committee, dated 12/16/2013, available at: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/wpic/rwrcc_letter_to_vincent.pdf
[25] *Greely,* 219 Mont. at 90; *see also* Memo from Helen Thigpen, Staff Attorney, to Montana Water Policy Interim Committee, Dated August 22, 2014 at p. 29.

law to recognize Tribal reserved rights; it provides for changes of use on the Reservation—something that has not been legally possible since 1996; and it provides a large supply of newly available water from the Flathead River system and Hungry Horse reservoir that will allow for new development of water uses both on and off the Reservation.

Sincerely,

Melissa Hornbein
Staff Attorney
Montana Reserved Water Rights Compact Commission

C: Governor Steve Bullock
Attorney General Tim Fox
John Tubbs
Chris Tweeten