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Baker Land & Cattle

RECEIVED
JUL - 1 2013
D.N.R.C.

June 27, 2013

RWRCC
1625 Eleventh Ave,
PO Box 201601
Helena, MT 59620-1601

Dear RWRCC Commissioners:

I have been asked to make comments on the proposed compact of the CSKT. I am a commissioner on the Flathead Joint board of Control and I represent the irrigators of the Camas division. The irrigators here and across the project are not satisfied with the proposed compact agreement. After many meetings and conversations, these reasons have come to the forefront.

- The Irrigation districts should maintain their water rights for the Flathead Irrigation Project these have been filed and adjudicated through the state. Individual water rights should also be given importance and protection through our state.
- We should have a quota system instead of a Farm Turnout Allowance. This is very important to irrigators, as the land and soil are not the same in all areas. In addition, most of our water is stored off of the reservation we do not receive the same amount of water every year due to weather conditions or the amount of storage available.
- A unitary management board will be an unbalanced entity that will have tribal jurisdiction over non-tribal members and make decisions that other boards already have been the deciding factor on. This will be an excessive governing entity that will have to be budgeted for.
- The Federal government and the state have not quantified the Federal reserved water right. This has not determined how much the CSKT will need and how much the irrigators will use for irrigation. How can irrigators agree to something that has yet to be decided?
- Many irrigators both tribal and non-tribal believe that the state should hold the decision-making on the water disputes not the federal government.

Many of the irrigators and myself are not against a compact, but need to have a direct and fair agreement, one that protects our water and property rights. The currant compact and water use agreement does not protect out water and property rights. This compact needs to be transparent and definitive before we as irrigators can be in favor of it.

Sincerely,

Jim L. Baker

Jim L. Baker
Camas commissioner
Flathead Joint Board of Control

Wick, Arne

From: Merrill Bradshaw [merrill@blackfoot.net]
Sent: Monday, June 17, 2013 7:16 PM
To: Wick, Arne
Subject: Compact Commission/draft

Arne Wick, RWRCC

Good day,

After attended various meetings, listened to stakeholders, conducted independent research on the issues, I have come to the conclusion that the Reserved Water Rights Compact, should go forward. I don't share the fear and paranoia expressed by the anti- compact movement, but support CSKT Tribes to continue to manage successfully, the natural resources in this area.

Despite the angry and loud voices of the anti-compact irrigators, the process was fair, conducted in good faith, and in my opinion, meets the needs of water users, Tribes and the State of Montana. Unfortunately, the public discourse about the draft compact has been saturated with false and misinformation

One notable issue that has been omitted is how much marginal land there is being farmed and watered. When irrigation was first introduced, any water was good water. As the project expanded, the demand for irrigation water expanded as well. Nobody questioned whether the land being irrigated was worth the water and the associated expenses to deliver the water. Over time, thousands of acres were brought into the project. The introduction of chemical fertilizer and sprinklers brought a boom-like growth in local agriculture. The BIA dewatered creeks, streams, and rivers to provide for the demand. That all came to a halt with the U.S. Ninth Circuit Court of Appeals rulings in1987 that established minimum in-stream flows that were intended to preserve Native American rights as outlined in the 1855 Hellgate Treaty.

I think many irrigators still believe that because there is water to use and chemicals to apply, that their ground is productive. Coupled with the notion of extra water duty for marginal land (and the old notion of flood irrigation), they expect this continued flow. Unfortunately, the adopted agricultural practices were not based upon the viability of the soil to produce and sustain agricultural production in the region.

The real questions to ask is how best to utilize this scarce and valuable resource in this region? How efficient is the cattle industry? Are there alternative crops that use less or no water that can provide prosperity, food value, and a quality lifestyle? The days of sloppy, wasteful over watering are coming to an end. If you consider the CSKT Tribal treaty rights, already confirmed, then what is left can be used for irrigation. In 1987, the U.S. 9th Circuit Court of Appeals noted in JOINT BOARD OF CONTROL OF the FLATHEAD, MISSION AND JOCKO IRRIGATION DISTRICTS, Plaintiff/Appellee v.UNITED STATES of America and Confederated Salish And Kootenai Tribes of the Flathead Reservation Defendant-intervenor-Appellent; et. al., (832 F.2d 1127) that : "...Only after the fishery waters are protected does the BIA, acting as Officer- in- Charge of the irrigation project, have a duty to distribute fairly and equitably the remaining waters among irrigators of equal priority...".

On another note, what you might not realize is that any new information received from the Flathead Joint Board of Control, requested by Governor Bullock, does not represent those who discussed the FJBC water stipulation agreement presented to the commission. Due to a recent and contentious election of district water users in two districts, in my opinion the new FJBC, has now leaned towards what can be described as radical extremism.

The FJBC is once again, a strong proponent of challenging the tribal rights through those litigations surrounding "minimum stream flow, treaty rights, water volume, and other issues, including some that were previously litigated and ruled upon by the U.S. 9th Circuit Court of Appeals. The FJBC discussed the litigation option on June 10, 2013, FJBC meeting and hoped to have cost estimates for litigation in a couple of months. In my opinion, this new board is also in the process of intimidating the current CME (Cooperative Management Entity). By removing several previously appointed members and replacing them with their like-minded members, the current FJBC members will do anything to get its way.

The Reserved Water Rights Compact is the obvious solution at this time.

I'm at your service, a Jocko District water user.

Merrill Bradshaw

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July1, 2013

Arne Wick, RWRCC
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RE: Report re: the Proposed CSKT – Montana Compact

Dear FJBC:

The Center for Water Advocacy appreciates the opportunity to submit questions and concerns regarding the report addressing the water rights compact (Compact) negotiated between the state of Montana and the Confederated Salish and Kootenai Tribes (CSKT). In general, we are concerned that the Compact was drafted under the spector of the inability of the U. S. government to recognize water as a fundamental human right which has resulted in political divisions and competition for water in the Western part of the country, which grows daily with ever-increasing demands on water resources for human consumption, agriculture, commercial and industrial uses. At the same time, the population of Montana is rapidly expanding, putting increased pressure on water and energy needs in the state. In addition, adding to water scarcity in the State is the looming specter of climate change that results in reduced snowpack and depleted river flows. Many of these problems are the result of the history of water use and management in Montana which is characterized by a reluctance of state and federal agencies and the general public to come to terms with the finite nature of water. In part, as a result of such attitudes, some experts conclude that the global water crises will continue to remain humanities most important challenge over the next century, and the terms "human rights" and "water," at least outside of the United States, have appeared together in an increasing number of contexts.

Our specific concerns and questions include the following:

I. The Compact Negatively Impacts Threatened and Endangered Species

There are streams occupied by Threatened, Endangered, or Sensitive (TES) fish in the watersheds that are impacted by the Compact. According to the U.S. Department of Agriculture, for example, "Montana bull trout are considered secure in only 2 percent of the stream segments they inhabit. Fish biologists consider bull trout at moderate risk of

extinction in 65 percent of their Montana range and at high risk of extinction in 33 percent of their range."[1] In addition, habitat degradation is a significant part of the threat to Bull trout due to "[d]ewatering of streams during the irrigation season prevents bull trout movements to and from spawning habitat. Irrigation diversion structures often act as fish passage barriers and cause bull trout to enter irrigation ditches where they are lost to the population. Improper placement of road culverts also impedes bull trout movements."[2]

Under the Compact, however:

> To arrive at the instream flow levels identified in the Compact, we started with what was a biologically healthy flow level for fish (using Fish Wildlife and Parks data for the upper inflection points), stemming from the Tribes' treaty rights. But those numbers were comparatively high, so we sought to reduce those flows to ensure that existing and future consumptive uses could continue to be exercised. The instream flow numbers in the Compact therefore represent a compromise on the part of the Tribes.[3]

In fact at the expense of bull trout habitat the Compact:

> Completely protects all current water users of non-irrigation rights in all water basins on- and off-reservation from the Triges' exercise of their senior water rights [by] providing protection from call of an amount of water use similar to that provided for FIIP irrigators or...through specific limitations on the enforceable levels of tribal instream flow rights to ensure protection of irrigation rights decreed in the Adjudication.[4]

Therefore, as currently written, the Compact would impact flows needed for aquatic habitat as illustrated by the most recent biological evaluations of listed species and biological analyses of threatened, endangered, management indicator, and Region 1 sensitive species for which occupied habitat or suitable unoccupied habitat exists within streams Reservation lands. The Compact, therefore, must be rewritten to allow enforcement of tribal instream water rights sufficient to not only prevent jeopardy of bull trout populations but for harvestable populations for the use of the tribal membership.

Further, it will be important to ensure that all potential impacts from the Compact on Bull trout will be fully analyzed and considered. The state should consider whether irrigation activity will alter trend or otherwise prevent such habitat from reaching a level making it suitable for particular species.

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[1] http://www.mt.nrcs.usda.gov/news/factsheets/bulltrout.html.
[2] *Id.*
[3] HB629 CSKT-MT Compact Jay Weiner, RWRCC Staff Attorney 40, p.1 (March 27. 2013)
[4] Montana Reserved Water Rights Compact Commission LC 0867, Summary-Implement Negotiated Water Compacts with Montana Tribal Governments; CSKT-Montana Water Rights Compact (March 15, 2013). (MRWRCC Summary)

Moreover, maintaining connectivity or reconnecting core areas is crucial to recovering bull trout. A comprehensive critical habitat for bull trout provides benefits to other aquatic species and protects or restores water quality for peoples. Usual and accustomed traditional hunting, fishing and gathering lifeways and territories of the Indian Tribes that have historic and modern water rights, and treaty and historic rights must be included in Bull trout critical habitat designations.

II. Tribal Customary and Traditional Lifeways of Subsistence Fishing and Gathering must be specifically honored as a matter of Federal Trust Duty

The Compact should acknowledge the on reservation, and off reservation hunting and fishing treaty rights and traditional territories of the various Indian Tribes and tribal governments of the Northwest region. The Bureau of Indian Affairs is transferring management authority of the Flathead Indian Irrigation Project to a new Combined Management Entity, denigrating and precluding senior Tribal reserved water rights. The Flathead Indian Irrigation (FIIP) is the biggest quantity water use on the Flatead Reservation; and is essential to agriculture, grazing of livestock, and the customary and traditional subsistence fishery of tribes of the Confederated Salish - Kootenai Tribes of the Flathead Nation. The Bureau of Indian Affairs is transferring management authority of the Flathead Indian Irrigation Project to a questionable new Combined Management Entity, denigrating and precluding senior Tribal reserved water rights. The Flathead Indian Irrigation (FIIP) is the largest quantity water use on the Flathead Reservation; and is essential to agriculture, grazing of livestock, and the customary and traditional subsistence fishery of the distinct tribal cultures of the Confederated Salish - Kootenai Tribes of the Flathead Nation.

III. Tribal Water Rights and Critical Habitat Designation

On the Flathead Indian Reservation, there is an intersection between Federal Reserved (Hellgate Treaty) Water Rights and the Compact's proposed expansion of the Critical Habitat for Bull trout. The Compact, therefore, should emphasis implementation of the recommendations in the Department of the Interior's Report of the Working Group on the Endangered Species Act and Indian Water Rights, which proposes several measures to ensure that tribal water rights are not unfairly hampered in application of the ESA. Final Report and Recommendations of The Working Group on the Endangered Species Act and Indian Water Rights, 65 Fed. Reg. 41,709-01 (July 6, 2000) [hereinafter Working Group Report]. The Working Group Report recommends limiting future distribution of water rights to non-Indians, when endangered species and tribal water rights may be impacted, in order to prevent the appropriation of water needed for survival of listed species even before tribal rights can be exercised.

While the Working Group does not address in stream water rights for the purpose of protecting fishing rights and related activities, it outlines future Interior policies designed to prevent the current disproportionate burden on tribal consumptive use water rights in the context of ESA implementation. *Id.* at 9. In general, the report recommends that tribal water rights receive priority over often more junior non-Indian water rights

before ESA limitations are applied. The Working Group Report represents a significant step toward recognition that water appropriations and development projects sponsored by the federal government in the West have been largely implemented in disregard of Indian rights. *Id.* at 12. The proposal recommends, for example, that ESA section 7 consultation, establishing environmental baselines, address the potential future exercise of tribal water rights. It also authorizes agencies to "reinitiate" ESA consultation on projects when new developments occur that will potentially impact tribal water rights. *Id.* at 13. In addition, the Working Group recommends that Interior anticipate and account for the future exercise of tribal water rights in the context of protecting listed species and critical habitat in the planning stages of consultation. *Id.* at 9-10.[5] That the Interior's recommendations are apply directly to the Critical Habitat designation in this case is illustrated by the fact that many of the substantive directives apply to apply solely to the USFWS. Id. at 8, 10.

The Compact, therefore, should acknowledge that the need to designate and expand critical habitat for Bull trout is not because of the actions of CKST and other Indian tribes, but due to the combined efforts of federal water development agencies and off-reservation water users. The Compact should call for and support water development projects that restore river conditions and listed species, rather than those which harm fish, wildlife, and tribal water rights. This includes restricting or prohibiting current and future water withdrawals or management actions that currently or potentially result in damage to listed species, especially when such actions may result in a direct or indirect conflict with tribal water rights.

In addition, Bull trout need cold, clean water with little fine sediment to successfully spawn and rear. At about two years of age they migrate from their spawning stream and mature in lakes or rivers, traveling as far as 150 miles. The Bull trout species stringent habitat requirements make them an excellent indicator of water quality. A critical habitat designation that incorporates the five C's: Clean, Cold, Complex, Connected and Comprehensive will facilitate the survival and recovery of Bull trout. The current Compact falls short of that goal. The Compact should acknowledge the on reservation, and off reservation hunting and fishing treaty rights and traditional territories of the various Indian Tribes and tribal governments of the Northwest region.

IV. Water Quality and Riparian Areas

The Compact should accommodate for the areas of highest concern on the Flathead Reservation including those with a PFC rating of "not properly functioning",

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[5] The Recommendations state that 1) when an agency action requiring a section 7 consultation is proposed for a federal project in ariver basin where unexercised Indian water rights exist, the agency should consider conducting such consultation on multiple federal water projects within the basin; 2) to the maximum extent possible, FWS and action agencies should identify reasonable and prudent alternatives which potentially affect the future exercise of Indian Water rights; 3) when FWS enters formal consultations on an action by any Interior Department agency that may affect an Indian tribe's ability to exercise its water rights, FWS should treat the tribe as a full participant in the consultation process; and 4) FWS should ensure that its staff understand Indian water issues and, together with the action agency, should utilize the services of the Office of the Solicitor and officials of other agencies during ESA section 7 consultation in river basins where there are Indian water rights. Id. at 9-10.

and State Water Quality Standard 303(d) listed streams as well as those with channel stability concerns. The Compact should address these areas of special concern and the effects of irrigation activity on water quality and all aspects of the riparian conditions. CWA will be concerned about any activities that would exacerbate current water quality or riparian condition problems. The state government should also consider how and when TMDLs or water quality management plans should be applied to address any water quality bodies not in compliance with state standards.

Finally, the parties should consider the need to maintain riparian conditions, including vegetation, and aquatic habitats that are currently functioning properly and improve riparian conditions and aquatic habitats in locations which have been degraded by past management activities. These needs require taking a hard look at the impact to riparian conditions and considering improvement measures.

V. Impact on Tribal Water Rights

According to the Reserved Water Rights Compact Commission (RWRCC), the Compact:

> Settles off-reservation instream flow rights for the Tribes, to which they have strong legal claims as a result of particular language in the 1855 Hellgate Treaty (the right to "take fish" in the Tribes' usual and accustomed" locations). Federal case law interprets this treaty language to include water rights outside the reservation to maintain fisheries flows....CSKT are the only tribes in Montana with treaty language supporting off-reservation instream flow water rights.[6]

In addition the Compact currently provides for limitations on enforcement of "[o]ff-reservation time immemorial instream flow rights on mainstems of Kootenai, Swan and Lower Clark Fork Rivers and Placid Creek" in order to protect "[r]ights set at levels that protect existing uses and allow for future growth."[7]

This is contrary to the CSKT water right under *Winters v. United States,* 207 U.S. 564 (1908). In *Winters*, the Court held that when the federal government sets aside lands for an Indian reservation, it reserves by implication unappropriated, appurtenant water to the extent needed to accomplish the purpose of the reservation. Id. at 576-77. Federal courts have subsequently concluded that when a reservation is created, water and other rights necessary to carry out the purposes of the reservation are also created, whether or not specifically referred to in the treaty or authorizing documents. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968).

`This right has been interpreted as reserving water necessary for the "purpose for which a federal reservation was created," *United States v. New Mexico*, 438 U.S. 696, 702 (1978), "to satisfy the future as well as the present needs of the Indian Reservations,"

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[6] MRWRCC Summary.
[7] *Id.* at 2.

Arizona v. California, 373 U.S. 546, 600 (1963), and "so much as, but not more than, is necessary to provide the Indians with a moderate living." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979). Based on these principles, tribes retain federally reserved water rights for numerous purposes, including agriculture, *Winters*, 207 U.S. at 577, protection of reserved treaty rights, *E.g., United States v. Adair,* 478 F. Supp. 336, 345 (D. Or, 1979), aff'd 723 F.2d 1394 (9th Cir. 1983) livestock watering, *In Re Big Horn River*, 753 P.2d at 1414 and municipal, domestic, and commercial purposes. *Arizona v. California*, 373 U.S. at 566.

As a result, regardless of language in the Compact which provides that it will not affect tribal treaty rights, the document is in Violation of the Hellgate Treaty of 1855 because it will impact the Confederated Salish – Kootenai Tribes of the Flathead Nation's (Tribe's) senior reserved water rights and which water rights are first in line and first in time in relation to the Compact and the relationship of the Tribes' off -Reservation water rights to the Compact. Specifically, the Compact will negatively impact flows needed for the off - Reservation property rights of the Tribe guaranteed and retained by the Hellgate Treaty of July 16, 1855 including rights to water of any Indian tribe, or any federally derived water right of an individual, or of the United States on behalf of such tribe or individual, currently quantified or as may be quantified after the Effective Date of the Compact with a priority date before the Effective Date of this Compact, including aboriginal rights, if any, in the basin. In addition, the Compact will affect the nature, extent or manner of administration of the water rights of any Indian tribe or tribal member that may be affected by the Compact.

VI. NEPA Analysis

Prior to authorizing the use of water related to the Compact, the federal government should conduct a full NEPA analysis, which may include implementation of adequate mitigation measures in order to compensate for impacts to tribal interests. 42 U.S.C. §§ 4321-4370e (1994 & Supp. III 1997); 40 C.F.R. § 1502.2. The trust duty's higher standard of protection potentially enhances the federal government's obligation under NEPA in relation to the Project in a number of ways. While NEPA, for example, applies only to "major federal actions," 42 U.S.C. § 4332(2)(c), the trust obligation applies to any federal action potentially impacting tribal interests. *Pyramid Lake Paiute Tribe of Indians v. United States Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). Therefore, when tribal water rights are affected the trust duty requires the Secretary to "ensure to the extent of his power" that all available water is used to satisfy the tribe's interest. 40 C.F.R. § 1506.6 (1999).

A common NEPA issue regarding tribal water right settlements, for example, is the application of project water to irrigation or other purposes that may reduce instream flows needed by fish upon which a tribe depends for subsistence and other uses. Shepherd at 942. In many such cases, because the irrigator, as the requesting party, must pay for the NEPA analysis, the parties may be under a lot of pressure not to conduct a full Environmental Impact Statement (EIS) even though the project may involve significant impacts. *Id.*

In most cases involving NEPA, therefore, the federal government may not proceed without drafting an EIS unless it modifies the proposal "prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal." *Cabinet Mountain Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C.C. 1982). The obligation to mitigate in the event an EIS will not be produced, therefore, should be all the more relevant when, as in this case, Indian trust assets may be affected by the failure to fully analyze the environmental consequences of the proposed action.

Further, federal agencies' have a continuing responsibility to ensure that NEPA standards are satisfied because an "action" under NEPA includes "new and continuing activities including projects or programs entirely or partly...approved by federal agencies..." Danny Reinke & Lucinca Swartz, The NEPA Reference Guide § 1508.18(a) (1999). Further, the NEPA process must occur "early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decision already made."

VII. U.S. Fish and Wildlife Compact's (USFWS's) federal reserved water rights.

The United States' and various branches retain a fiduciary duty to preserve and protect the Tribe's Treaty fishing rights on usual and accustomed fishing places encompassing USFWS lands and waters throughout the State of Montana. The Compact may impact the United State's federal reserved water rights available to apply water from springs and seeps in relation to the Reservation. The Compact may affect the United State's federal reserved water rights available for consumptive use for wildlife purposes and the specific elements of these rights including United State's federal reserved water rights for springs and seeps for largely non-consumptive uses to maintain forage, riparian habitat, and nesting habitat for birds in relation to the Reservation.

Further, the Compact opens the possibility of diverting Reservation federal reserved water rights to development under state law for agriculture building subdivisions, highways, municipal uses or any other use, under the Montana State Water Code. Documentation addressing what water is needed to protect the Reservation's health and how the Compact protects that water.

The priority date for baseflows or natural flows for the Reservation as authorized by the Compact and any water rights that the State of Montana will seek to appropriate for the Reservation and the priority date for peak flows through the state's instream flow will impact individual and tribal water rights. The original Reservation Quantification Application does not include an explanation of the needs for base, peak and shoulder flows to meet the Reservation's purposes and any legal or scientific justification of whether the Compact would meet Reservation purposes as determined in such Application. The Compact does not adequately explain any departure from the Quantification Application, the Reservation's aesthetic cultural qualities, traditional or subsistence uses, wildlife habitat, and scientific value or how much of the Reservation's water right claims the Reservation is relinquishing under the Compact and which

identifies, if any, the state's obligation or authorization to seek additional water for the Reservation.

VIII. The Compact Affects the Federal Trust Duty to the Tribe and it's Members

The federal government owes a duty to protect and preserve the Tribe's Winter's Rights but does not owe a duty to manage water for irrigation purposes. The Hellgate Treaty of 1856 reserves the waters flowing onto and through the reservation for the needs of the reservation. The Compact, therefore, amounts to little more than an accommodation that allocates water between the state and federal government in a manner that hopefully all parties can live with in the future. The burden, rests on the federal government to justify any diversion of water from the Tribe with precision. The federal government, has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with members of the Tribe, should therefore, be judged by the most exacting fiduciary standards.

Of particular concern is the federal government's disregard of federal statutes and the depletion of tribal water resources due to a failure to exercise it's authority to prevent unnecessary waste within the Reservation without legal justification. The parties should ensure, therefore, that the Compact is consistent with the standards in the APA and demonstrates an adequate recognition of federal government's fiduciary duty to the Tribe. The government remains under a firm obligation to represent the Tribe's interest forcefully [and its] failure to do so might well give rise to some claim for breach of duty.

The Snake River Basin Adjudication (SRBA) settlement is one of the best examples, of how such Compacts may not only be applied to provide assurances to non-Indian agricultural interest, but can protect stream flows needed for fisheries. The Nez Perce Tribe initiated the adjudication of the Snake River and its tributaries in 1993, by filing a claim in the Idaho Water Court, asserting that the treaties of 1855 and 1863 which granted the Tribe its off-reservation instream flows, including most of the flow in the Snake River, and claiming a priority date of "time immemorial."

Eventually incorporated into the settlement was ongoing litigation under the Wilderness Act, the Organic Act, the Multiple Use and Sustained Yield Act, the Wild and Scenic Act, and the Deer Flat Federal Refuge and the National Recreation Area acts. Each of the claims under these statutes were eventually either litigated or negotiated to a resolution. The key to the success of the Nez Perce settlement negotiations, therefore, was the water quantities that the federal agencies claimed were needed under the federal environmental laws which coincidentally, would have resulted in similar, impacts to the state and individual water rights, as would the tribe's claims. The turning point in the negotiations, therefore, occurred when the non-Indian water-right holders discovered that if they prevailed against the tribe in the adjudication process, they would likely eventually have to leave undiverted the same water claimed by the tribe in order to fulfill a biological opinion requiring instream flows for endangered species in the Snake River.

IX. What Happens Now?

The governor's office and the Tribe need to clarify what happens now that the Compact has been rejected. According to the CKST, for example, if the Compact is rejected "[a] legal battle will ensue, where the Tribes will seek higher in-stream flows based on their senior water rights [and] water users will have to defend their claims at their own cost."[8] The parties need to clarify what this means and whether the tribes now intend to file suit to enforce their water rights.

Conclusion

CWA's comments regarding the Compact illustrate the need for an expansive approach to the concept of the "right to water." This approach may be implemented through satisfying the water needs of native tribes and tribal communities which are often quantified not simply by daily potable-hygiene requirements, but by ecosystem-based allocations and environmental justice principles sufficient to support subsistence and commercial resource economies. Further, agencies should recognize the ability of using treaty water rights to not only satisfy tribal and non-Indian water right disputes, but to address the public interest in the protection of fish and wildlife habitat and the human right to water.

Members of Montanan Native communities and other stake holders have a primary interest in the maintenance, restoration, and protection of the water that flows into and through their traditional territories, as the quality and quantity of these waters determines the physical, spiritual, cultural and economic well being of the Village and ensures a viable habitat for the life-forms on which the Village depends. CWA believes that federal agencies should step outside the dominant paradigm of natural resource management based on bureaucratic inertia and apply the principles that humans should live within the rhythms of nature, respect for the interdependent web of all existence of which we are a part and a deep commitment to the quest for justice and the human right to water.

Please contact me if you have any questions regarding these comments. Thank you.

Respectfully,

s/Harold Shepherd
Harold Shepherd, Director
Center for Water Advocacy

cc: Carol Dubay
Nikos Pastos

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[8] CSKT, About the Flathead Water Compact, p. 2 (March 27, 2013).

Arne Wick, RWRCC
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RECEIVED
JUN 26 2013
D.N.R.C.

June 22, 2013

Subject: Proposed CSKT Water Compact

Dear Mr. Wick,

This letter is in response to Chris Tweeten's solicitation for feedback concerning the proposed CSKT – Montana Water Compact **February 13, 2013.** My name is Richard Coleman and I live in Hamilton, Montana.

85-2-701. Legislative Intent and Mandate: Conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. Conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state.

The RWRCC has failed:

-to conduct unified proceedings under the Montana Water Use Act.

-to conclude an equitable division and apportionment of waters between the state and its people (the citizens and water users of Western Montana) and CSKT.

-to provide any analysis of impacts.

-to provide a quantification of federal reserved water right for tribal lands on the Flathead Reservation.

There are several flawed assumptions in the proposed CSKT Compact that invalidate the entire Compact including the assertion of off-reservation aboriginal rights to instream flow, the allocation of reserved water rights, ownership of water, administration of water, and contribution to settlement.

<u>Off-Reservation Water Rights</u>

1) Hellgate Treaty of 1855 as interpreted by the RWRCC for suppositions stated in CSKT compact are incorrect.

Article I-The tribes cede, relinquish, and convey to the United States (Montana) all their right, title, and interest in the country occupied or claimed by them.

Article II-Establishes the Flathead reservation and boundaries.

Article III-The right of taking fish at all usual and accustomed places, in common with the citizens of the territory.

<u>FACT:</u>

- Water or water rights are not included or mentioned in this document.
- "The right to take fish" is incorrectly interpreted and asserted by RWRCC in the CSKT compact to allow off-reservation water claims unrelated to the Federal reserved water rights for the Flathead Indian Reservation.
- All right, title, and interest in aboriginal lands were ceded and relinquished to the United States in Article I.

2) The RWRCC has claimed that treaty language "the right of taking fish" is unique to Montana.

FACT:

-"The right of taking fish" is not unique. The **Territory of Washington** from March 2, 1853, until November 11, 1889, when the Hellgate Treaty was enacted under Governor Stevens, included lands of Washington, Idaho, Montana and Wyoming. Ten Steven's Treaties contain the same language "the right of taking fish" including: Nisqually, Quinault, Makah, Walla Walla, Cayuse, Middle Oregon, Flathead Tribes. Only the CSKT has claimed off-reservation water rights.

Allocation of Reserved Water Rights

-Reserved Water Rights were not recognized and mandated until the federal reserved water rights doctrine was established by the U.S. Supreme Court in 1908 in Winters *v.* United States.

-The decision was to provide quantified water for irrigable agricultural lands on the reservation.

-The reserved water right is attached to the lands occupied by the tribe, not to the tribal members.

-Reserved water rights claims are required to be submitted to the Montana State adjudication process and must meet the "primary purpose" and "minimal needs" requirements.

FACT:

-The CSKT compact takes all the water without limiting "primary purpose" and "minimal needs" as required.

-The CSKT compact has not quantified the water required to irrigate the agricultural lands owned by tribal members holding land on the reservation (7,042 acres).

-The compacts with other Montana State reservations provides between 0.09 to 1.13 acre feet of water per tribal owned acre whereas, the CSKT compact provides 67.53 acre feet per tribal owned acre. This fact alone should raise red flags and shows that the RWRCC did not provide for the equitable division and apportionment of waters in the CSKT compact.

-The CSKT ignores the history of the reservation, including the issuance of patents to fee land with appurtenant water rights, townships, rights of way, and the thousands of water rights filings contained in the court house as well as DNRC files (Flathead Indian Reservation Allotment Act of 1904).

-The proposed CSKT compact allocates more water than is available from the water resources.

- Forest and Wetlands are incorrectly included in providing quantified water to irrigate tribal owned agricultural lands on reservations.

Ownership of Water

The CSKT compact assumes that the United States and the Tribes own all of the surface and ground water within the exterior boundaries of the Flathead Indian Reservation.

-The assumption is flawed because it ignores the history of the reservation, including the issuance of patents to fee land with appurtenant water rights, townships, rights of way, and the thousands of water rights filings contained in the court house as well as DNRC files.

-The proposed FIP agreement 'returns' to the irrigators approximately 11% of the water initially used for irrigation purposes for over 100 years (see compact appendices 5 and 11).

Control of Water Resources

Based on the assumption of ownership of all surface and ground water resources on the reservation, the CSKT/United States asserted its right to control and administer all water resources by developing a new water administration rule called the Unitary Management Ordinance or "law of administration"

-This removes Montana State authority to administer water use on the reservation for state based water users.

-This new water administration system removes state-based water users from under the constitutionally-mandated protection of the State...a decision that neither a RWRCC nor the state Legislature has the authority to make.

-The new water administration program will affect 23,000 non-members on the Flathead Indian Reservation and extends Tribal jurisdiction over water uses and water use priorities that is unheard of anywhere in the United States.

Contributions to Settlement

The Parties agree that the State contribution to settlement shall be $55 million. The Parties agree that the Federal contribution to settlement shall be negotiated by the Tribes, the State, and the United States as part of the negotiations on the Federal legislation to ratify and effectuate the Compact.

-What parties agree, certainly not Montana citizens.

-What exactly will the contributions be used for?

-Who will receive the contributions?

In closing, statements apply to all sections of the CSKT compact. There are numerous legal and ethical aspects to the proposed CSKT compact that also need to be resolved. The Compact will have significant negative impacts on Montanans in both eastern and western sides of the state. No amount of tweaking will make this Compact legal, constitutional, or able to pass the test of being a 'fair and equitable settlement' of water rights. Montana Fish Wildlife & Parks under Montana's water law currently provides several mechanisms to directly protect or enhance instream flows or water levels to protect fisheries. Montana Government needs to protect and maintain control of the valuable water resource per the state Constitution and not give control and ownership to the federal Government.

Thank you for your time and attention.

Sincerely,

Richard L. Coleman

June 30, 2013

Reserved Water Rights Compact Commission
Attn: Chris Tweeten / Arne Wick
P.O. Box 201601
Helena, MT 59620-1601

Dear Mr. Tweeten,

Thank you for your invitation to provide additional comments on the proposed Compact with the Confederated Salish and Kootenai Tribes (CSKT). These comments are submitted in the context of having reviewed the many public comments and Commission presentations in the last year, and in the 2013 legislative session where the Compact and compact-related bills were addressed.

We are disappointed to report that the Compact Commission under your leadership failed to absorb the depth of public and legislative concern over the Compact in the last year of proceedings held by the Commission, dismissing any suggestions with condescending answers, criticism, and derision. Our analysis reveals that public and legislative support for this proposed Compact will continue to wane unless substantial revisions are made to the Compact's basic assumptions and associated components.

The starting point for this review begins with the legislative directive to the Compact Commission in Montana Code, where the Compact Commission is directed to develop "fair and equitable settlements between the Citizens of the state and Tribes claiming reserved water rights in Montana". However, the proposed CSKT Compact is not fair as basic State interests were not well-represented in the negotiations or hearings. For example, the Compact requires the State to give up its constitutional duty and statutory authority to administer the waters of the State and water rights of its citizens (Article IV) and presides over the unconstitutional taking of property rights (Article III C (1) (a). This is in addition to a $55 million State contribution to the Tribes. We do not believe this represents a 'fair' settlement.

In the context of the substantive issues raised in the last year and the Compact Commission's failure to address them when it had the chance, we have provided our comments in the form of two substantive papers. The first is entitled *A Critical Review of the CSKT Compact* and focuses on the underlying flawed assumptions that we believe resulted in the failure of the Compact both in the House Judiciary Committee and the Floor.

To support our analysis that State interests were not represented in the negotiation and that other options were available, we have enclosed a second document entitled "Proposed Alternative CSKT Compact". The proposed alternative shows what a Compact would look like if

state interests were adequately represented, and although it is not intended as any sort of 'replacement compact', it does highlight the many missed opportunities to structure a fair settlement during more than a decade of negotiations.

We hope that you find these documents useful as you meet the Governor's directive to address the issues raised in the Compact.

Kind Regards,

Verdell Jackson
Senator, SD 5

Jerry O'Neil
Representative, HD 3

Keith Regier
Representative, HD 5

Terry Backs
Concerned Citizens of Western Montana

Rick Jore
Former State Representative, Ronan

Catherine Vandemoer, Ph.D.
Consultant, Water Rights Associates

Enclosures: A Critical Review of CSKT Compact
Proposed Alternative CSKT Compact

cc: Governor Steve Bullock
Attorney General Tim Fox
Honorable Joe Durglo, Chairman, Confederated Salish and Kootenai Tribes
Senator Chas Vincent, Chairman, Montana Water Policy Interim Committee

Introduction

A close analysis of the public comments, public testimony, video reports, legislator comments, and written information submitted as a part of the public review of the CSKT Compact reveals that public support of this CSKT Compact is dependent on the substantial revision of several key items of the current compact. This document outlines those key sections of the Compact that the public, legislators, well-informed citizens, and professionals found objectionable. In a few days a second document will be produced that proposes an alternative compact that would be more likely to secure broad support.[1]

The concerns that have been raised are objectionable for good reason. Components of the proposed CSKT Compact involve the unconstitutional taking of property rights (water); require the State to relinquish its constitutional duty and statutory authority to manage state water rights and resources, and place state citizens under the jurisdiction of a government within which they have no vote or representation.

Moreover, the CSKT Compact is unlike any of the other Tribal Compacts negotiated by the Compact Commission as illustrated in Table 1. Because of the stark differences, concerns have been raised over other components of the Compact that have serious implications for public policy, the economy, infrastructure, and growth of western Montana. Until these issues are addressed, public opposition to the existing CSKT Compact is likely to increase. It will also be increasingly more difficult for legislators on both sides of the aisle to pass the existing Compact.

The major concerns with the existing CSKT Compact fall into several categories:

- Definition of Proceedings and Reservation Land
- Quantification, Water Claims & Priority Dates
- Water Administration
- Off-reservation aboriginal claims

Information will be presented in these pages that prove the CSKT have not moved off two significant tenets of their original position articulated by Tribal leaders in 2001. Refusal to negotiate on these two points extended the negotiations at least 11 years and in the end, the State capitulated to the Tribes' position. In consideration of this fact, if revisions are presented that make the Compact acceptable to Montanans but are rejected by the Tribes, a return to the proceedings of the on-going adjudication where all water rights are protected equally is the only viable option. Montana's preference may be to negotiate but circumstances may require adjudication.

Definition of Proceedings and Reservation Land

(a) Proceedings

The troublesome definition of the legal proceedings underway and the Flathead Indian Reservation lands begins with the Recitals section of the proposed Compact wherein the Tribes claim that they, not the United States, reserved the lands known as the Flathead Indian Reservation.

> *WHEREAS, pursuant to the Hellgate Treaty of 1855, 12 Stat. 975, the Confederated Salish and Kootenai Tribes reserved the Flathead Indian Reservation;*

While this may be the Tribes' view of their own history, the fact remains that the *United States* was the principle agent setting aside, or reserving, lands for the use and benefit of Indian Tribes. The *very existence of federal reserved water rights* is derived from the *federal* withdrawal of lands from the public domain for the use of the Indian Tribes and the implied reservation of enough water to fulfill the purposes of the reserved land. The United States then holds these water rights in trust for the Tribe. However, by claiming that the Tribes reserved the land, instead of the United States, the Compact does not then represent a 'federal reserved water rights' proceeding.

Despite this fundamental error in who reserved the land for the Tribes, the Compact then goes on to admit that the McCarran Amendment, which authorized State courts to hear claims of *federal reserved water rights* on Indian or non-Indian land, is the context under which this Compact has been negotiated:

> *WHEREAS, as a result of Congressional action and subsequent judicial interpretation, state courts have been found to possess, under certain circumstances, adjudicatory jurisdiction over federal reserved water rights held in trust by the United States for the benefit of Indians; see, McCarran Amendment 43 U.S.C. 666; Colorado River Conservation District v. United States, 424U.S. 800 (1976); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983);*

But if the federal government did not reserve the land for the CSKT, then there are no federal reserved water rights and the Compact could be considered of no consequence and irrelevant to resolving the CSKT federal reserved water rights.

The use of these recitals lays the foundation for the Tribes' claiming ownership of all land and water on the Flathead Indian Reservation, and to justify the Compact as a legitimate McCarran Amendment proceeding.

(b) Reservation Lands

The Flathead Indian Reservation is unlike other reservations in Montana in that it was actually opened by Congress to settlement in 1904.[2] However, the Compact defines the Flathead Indian Reservation without reference to this and other history that has resulted in valid non-Indian ownership of fee patent lands (private property) within the reservation boundary. The definition of the Flathead Indian Reservation used in the proposed CSKT Compact is:

> *"All land within the exterior boundaries of the Indian Reservation established under the July 16, 1855 Treaty of Hellgate (12 Stat. 975), notwithstanding the issuance of any patent, and including rights-of-way running through the Reservation."*[3]

The significance of this definition is that it implies that <u>all</u> the land within the Flathead Indian Reservation *is still in 'reservation status'* and held in trust by the United States for the benefit of the CSKT, *ignoring* the existence of private property on the reservation.

However, the definition is contrary to reality where more than 40% of the lands on the reservation are in private ownership by non-Tribal individuals, businesses, and the State. In fact, throughout history, various acts of Congress have diminished the amount of federal or Indian held trust land on the Flathead Reservation. Section VI of the Treaty of Hellgate references Section VI of the Omaha Treaty as to what was to be done with land 'excess' to the Tribes' needs:

> **Hellgate Treaty of 1855: Art. VI (in part)** "The President may...cause the whole, or said portion of such reservation, to be surveyed into lots, and assign the same as such individuals of families of the said confederated tribes as are willing to avail themselves of the privilege,...on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omaha's..." as follows: **Art. VI of the Omaha Treaty 1854 (in part)** "And the residue of the land hereby reserved... after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States."

Lands not needed by the Tribes were authorized to be sold for their benefit as part of the Treaty of Hellgate. Additional acts of Congress made further allotments of lands to Indians on reservations in severally, in other words, they could be sold by the Indians in 25 year as follows:

> **Dawes Act or "General Allotment Act" 1887** "An act to provide for the allotment of lands in severally to Indians on the various reservations,"...

The Homestead Acts of Congress were a series of acts offering surplus public land for settlement affecting the Flathead Reservation up until about 1917. The Flathead Allotment Act directly opened the reservation to settlement:

> **Flathead Indian Reservation Allotment Act of 1904** "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment."

The Flathead Irrigation Project was authorized in 1908 and constructed to meet Indian and non-Indian irrigation needs. Today 90% of the 130,000 acres of land under irrigation by this project is owned by non-Indians who purchased the land directly from the government or Indian allottee.

After decades of allotting Indian lands Congress passed the Indian Reorganization Act of 1934 which stopped allotment and provided for the consolidation of remaining Indian land. It also provided the following:

> **Indian Reorganization Act of 1934.** "BE IT ENACTED..., that hereafter no land of any Indian reservation...shall be allotted in severalty to any Indian."Section 3. The Secretary of the Interior...is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened ...Provided, however, *that valid rights or claims of any persons to any lands so withdrawn...shall not be affected by this Act*. **Section 5.** Authorizes the acquisition of lands, water rights, surface rights, and interests by the U.S. government for Indians and declares that purchased lands shall be tax exempt (*emphasis* added).

The language in this Act is significant because the valid land and water rights claims established by non-Indians prior to 1934 were deemed unaffected by the Indian Reorganization Act. In other words, the previous established claims for land and water on the reservation, including in the Flathead Irrigation Project, remained valid and were 'grandfathered-in' to the land ownership pattern, carrying forth to the present day. The 'remaining Indian lands', or whatever remained of the former Flathead Indian Reservation, were consolidated into 'reservation status', or held in trust for the CSKT by the United States.

The land use pattern on the 1.2 million acre Flathead Indian Reservation is the result of land use over the last century and the valid claims of any persons to the land and water on the reservation. By law,

these rights must be recognized.[4] The Tribes claim they have approximately 600,000 acres in tribal or individual trust.[5] Many of those acres are comprised of mountainous terrain so are not irrigable.

The CSKT's definition of the reservation assumes that the land within the exterior boundaries remains in reservation status and has significant tax implications for Montana's four counties that overlap the reservation boundary. Article I of Montana's Constitution states, in part,

> "...all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress..."

If the proposed definition of the Flathead Indian Reservation in the Compact remains, are the Counties and State illegally taxing their citizens on the reservation?

The definition of the reservation and the scope of this compact must be narrowed to even win a threshold of support from landowners on the Flathead Indian Reservation. The Recitals must be modified to reflect the reality of a federal reserved water rights proceeding under the authority of the McCarran Amendment in order for the Montana legislature to even consider the Compact.

Quantification, Water Claims, and Priority Dates

The quantification of a federal reserved water right of an Indian reservation involves the determination of the purpose of the reservation and the amount of water needed to fulfill that purpose. The CSKT Compact is noticeably silent on both—the purpose of the reservation and the amount of water needed to fulfill that or those purposes. Instead, based on the expansive definition of the Flathead Indian Reservation, the *CSKT assert on-reservation ownership of all the surface and ground water that flows through or underneath the Reservation.*[6] Within this broad claim of land ownership, the 'quantification' of the CSKT federal reserved water right becomes then the claim to all the water on the reservation. The CSKT claim is markedly different than all of the other Tribal Compacts in Montana, where the Tribal claim encompassed only that amount of water necessary to fulfill the purposes of their reservations. The CSKT Compact does not quantify the federal reserved water right of the CSKT; it just claims all the water on the reservation as if the year is 1855.

Article III of the Compact and multiple appendices list the water rights claims of the CSKT.[7] These claims include water belonging to others. This is another serious drawback to the Compact: to fulfill Tribal water rights, it requires the relinquishment to the CSKT of water rights from private water users in the irrigation community. This is a clear violation of the U.S. and Montana's constitution. The CSKT Compact will not be successful unless this provision is dropped entirely from the Compact.

Article III of the Compact sets forth the following *on-reservation* water claims of the CSKT:[8]

1. All water used by the FIP Irrigation Project (1.2 million acre feet)[9]. The use of the irrigation water right is immediately changed from agriculture to instream flow in the Compact without conducting any review of the impacts to surface and ground water. A portion is given back to irrigators in a water allocation, the FIP water use agreement.
2. Right to divert an additional 229,000 AF from the Flathead River of which 90,000 AF comes from Hungry Horse Reservoir. The Tribes and the United States used a computer model to determine that the irrigation project needed only 1.4 acre feet per acre for productive agriculture. After taking the original irrigation water use of 1.2 million acre feet, this water is in effect given back to irrigators for 130,000 acres. This amount of water is what is delivered to agricultural users.

3. All of Flathead lake (on/off reservation) up to elevation 2883 ft (16.5 million acre feet)
4. All wetlands, lakes, and reservoirs on reservation (amount of water unspecified)

The first water claim is based on the theory that the Flathead Indian Reservation still retains its reservation status and claims ownership of all the water in the Flathead Irrigation Project, or 1.2 million acre feet of water. This water, however, is already allocated to water users to irrigate 130,000 acres within the federal irrigation project. Hundreds of state-based and federally-filed water rights are filed in the County Courthouse and are also held by the DNRC awaiting processing in the general stream adjudication.[10]

Another factor that weighs against the CSKT owning all the water in the irrigation project is the construction and licensing of Kerr Dam. Kerr Dam was constructed to generate power and serve the irrigation project, with the upper 9 feet of the reservoir allocated to the Flathead Irrigation project. A portion of the power revenues from Kerr Dam have been used since 1939 to finish construction of the Flathead Irrigation Project (FIP). These funds are currently used for operation and maintenance of the irrigation project, but ceased to be used for irrigation project rehabilitation in 2005[11].

That Kerr Dam was constructed after the 1934 Indian Reorganization Act, which preserved all existing rights that had been acquired by non-Tribal members on the Flathead Indian Reservation, and was dedicated to generate power and to serve the existing irrigation project, only confirms that the right to use this water also belongs to hundreds of non-Indian irrigators within the Flathead Irrigation Project. [12]

The Role of the Flathead Irrigation Project Water Use Agreement. Because the CSKT claimed all the water in the irrigation project, the CSKT and United States, with the encouragement of the state, were prompted to reach an agreement with the Flathead Joint Board of Control (FJBC) about how much water to allocate back to the irrigators from the original 1.2 million acre feet. This is where the 'protection of irrigators' comes into play in that after the CSKT and United States claimed the irrigators water, they attempted to 'give back' an amount of water per acre that was deemed to 'protect irrigation' (claim 2 above). Unfortunately for irrigators, their 'water right' was to be replaced with a 'right to receive water' out of the irrigation water now claimed by the CSKT as its own. The struggle over the volume of water per acre to be allocated to irrigators was a diversion designed to draw attention away from the Tribes' claim of ownership of all the irrigation water.

The FIP Water Use Agreement would have allocated 180,000 acre feet to the irrigators (approximately 1.4 acre feet per acre) with an 1855 priority date[13] and taken the rest of the irrigation water (1.2 million acre feet) and turned it into instream flow with an aboriginal priority date. The Compact then gave the authority to the Tribes to lease the water formerly belonging to the irrigators. There were no environmental or economic studies to evaluate the effects this transfer of water use, change of use, and change of priority date.[14]

Thus it can be seen that there is *no actual need for a FIP Water Use Agreement on these terms* in the Compact: the irrigators have valid water rights and hold private property; the Tribes do not own or have the right to use the irrigator's water; and the federal water rights quantification is about determining the CSKT federal reserved water right, not relocating the irrigators' water rights.

The rest of the CSKT claims also presume ownership of all water resources on the reservation. The claim for all of Flathead Lake was presented as the water necessary to maintain an elevation of 2,883 ft —

which is all of the water in the original Flathead Lake without Kerr Dam, or about 16.5 million acre feet. To then claim ownership of all the irrigation water as well—which comes from the top 9 feet of Flathead Lake—means that the entire lake—18 million acre feet-- is claimed by the Tribes with a priority date of time immemorial. Only the southern one third of the lake is on reservation land.[15]

Note on Tribal "Ownership" of Water[16]. The Tribes have had this position on water ownership since at least 2001 when Tribal leaders articulated their viewpoint in the local press and in meetings. In 2002, tribal leader Clayton Matt stated the CSKT position that has now persisted for years:

> "We are saying that we own the water and that is what the law says," Matt said. "What we are saying is that if the state will recognize that this is a tribal resource, then we will recognize that there are legitimate uses."[17]

The "law" does not support the theory that the Tribes own all the water; but the law through the Winters Doctrine does say the CSKT have a reserved water right sufficient to fulfill the purposes of the reservation. In early 2002 and through 2003, the State told the Tribes that this proposal would not be a basis of negotiation.

In 2003, a newsletter of the Flathead Joint Board of Control cited the 2001 CSKT statement of ownership of the water as a pre-condition to any agreement with the state of Montana. At that point the CSKT leadership also stated that as 'owners of the water, we have a right to administer all water uses'. In 2002 the state and irrigators were unanimous in their willingness to negotiate, but that the ownership of the water by the CSKT was a 'non-starter":

> Jon Metropolis, a Helena attorney who represents irrigators through the Flathead Joint Board of Control, said irrigators support a compact settlement, but cannot and will not support any agreement that concedes that the tribes own the reservation's waters. "Our contention, which I believe is supported by the law, is that the state of Montana owns the water," Metropolis said. "The claim that they own the water conflicts with water law and we expect that it will be resolved in the state's favor. Since they don't own it, they don't hold the right to manage it."[18]

Without the legal, historical, or Constitutional consensus backing up this claim, the CSKT have nevertheless held this ownership claim since at least 2001. The surprise is that since 2005, both the Compact Commission and the attorney for the Flathead Joint Board of control now accept this premise, and are working diligently to convince their clients and to justify their position. With the recent change in the leadership of the Flathead Joint Board of Control, its attorney is now back in line with his 2002 position.

Water Administration

Again, based on the definition of the reservation and the claim of ownership of all the water on the reservation, the CSKT proposed that they have full administrative authority over all water uses on the Flathead Indian Reservation. The State of Montana has consistently refused to accept this premise. In 2008, the then-director of the Division of Water Resources within the Department of Natural Resources, John Tubbs, provided guidance for the Compact Commission which stated unequivocally that the dual state/tribal administration system used in all other compacts should also prevail with the CSKT Compact.[19] The Commission refused to follow this guidance and departed from three decades of a consistent position on water administration and precedent set in previous Compacts, and endorsed the CSKT administration plan.

However, under the proposed Compact, the State of Montana is forever barred from administering the water resources of the State and rights of its citizens on the Flathead Indian Reservation. Montana's system and authority is replaced by the CSKT Unitary Management Ordinance in which a politically-appointed board and a Tribal Water Engineer manage all water uses, water use disputes, and future water development on the reservation. The CSKT take over the data collection and centralization function belonging to the State. The overall make-up of the board and the decision-making structure proposed in the UMO guarantee Tribal control. [20] Since the management function will require financial support, allowing the Tribes to administer state water rights and resources could provide the Tribes with taxing authority that is now only held by the state and federal governments.

The curious change here was wrought by the Montana Reserved Rights Compact Commission. In the mid 1990's, the CSKT successfully sued to enjoin the state from issuing any water permits until the Tribes' federal reserved water rights were quantified. In 2005, the Compact Commission chose to permanently 'extend' this ruling beyond the quantification of the Tribes' reserved water rights and delegate the State's water administration authority to the Tribes. [21] A key problem with the Compact Commission's action is that there is no law supporting the Tribes' jurisdiction over 23,000 non-Indians or private property even within a reservation.

By law and under the Montana Constitution, neither the Compact Commission nor the state legislature has the authority to remove a class of citizens from its protection just because of where they live in the state. The state cannot delegate its constitutional authority for its citizens to a Tribe. The administration of all water on the Flathead Indian Reservation by the CSKT is unauthorized; however, the Tribes' authority to manage its *own* resources is well established especially in Montana Compacts with Tribes. Since the Compact Commission conceded to give all the water to the Tribes, the CSKT then took over the management function entirely.

Off-Reservation Aboriginal Rights

Article III of the Treaty of Hellgate secured to the CSKT the 'right to take fish, hunt, and gather at usual and accustomed places in their aboriginal territory in common with the citizens of the territory'. The CSKT has interpreted this language to mean that a water right was also implied to support the fishery, and further, that this off-reservation water is equivalent to a federal reserved water right:

> *WHEREAS, the Confederated Salish & Kootenai Tribes claim aboriginal water rights and pursuant to said Treaty, reserved water rights to fulfill the purposes of the Treaty and the Reservation;*

Clearly a federal reserved water right only applies to the land that was reserved, not to off-reservation lands. And there are important distinctions here that relate to whether a 'water right' off-reservation was implied in securing a right to take fish in common with the citizens of the territory. <u>On the reservation</u>, the exclusive right to take fish was associated with water sufficient to support the habitat needs of the fish in one legal decision.[22]

<u>Off the reservation</u>, the guidance on water rights is found in the legal cases surrounding the other tribes whose treaties were signed by Governor Isaac Stevens which had identical language in their treaty on 'taking fish in their usual and accustomed places off reservation in common with the citizens of the territory.' [23] These so-called 'Stevens Treaty Tribes' spent years defining and determining this right in

court. The right to take fish was eventually legally ruled to mean a *right to harvest a certain percentage of fish in usual and accustomed areas.*[24]

Where a water right has been claimed to support habitat off reservation, it first has never been part of a reserved rights proceeding. The range of legal opinion varies considerably on whether a water right is necessary to "the right to take fish". In a few cases, the Tribes' fishery right and thus water claim was ruled to have been diminished, and in other cases the water right is subordinated to existing uses. Such water claims have also been rejected by the Courts. Where courts have ruled in favor of some off-reservation water, or a negotiation has enabled them, the water is usually managed by the State.[25] Many of the off-reservation Stevens Treaty rights have been ruled 'diminished' as a result of settlement in aboriginal areas ceded to the United States.

Despite this uncertainty off the reservation, the CSKT have asserted claims to approximately 22.4 million acre feet of instream flows affecting eleven counties and eight major river systems in western Montana, and 8.8 million acre-feet of Flathead Lake off-reservation.[26] Although the use of water for instream flow is non-consumptive, the existence of a year-round instream flow in these streams actually deprives other water users from developing the water used for instream flow. What is more troubling for Montana's future is that the volume of water claimed by the Tribes approaches the limits of 'available water' in the river course. This impinges on future growth and development in these watersheds.

There are a few threshold issues. First, whether the 'right to take fish' off the reservation automatically implies a water right: case law on the subject is unclear and more often than not denies that there is any water right off reservation to support the right to take fish. Moreover, since that right to take fish is held in common with all citizens of the territory, does this give any one citizen a superior right to *water* than another? The second threshold issue is who should be in charge of managing the fisheries, rivers, streams and other habitat to support fisheries, especially in light of the fact that all citizens share in the right to take fish off reservation in Montana?

The Tribes claim 'co-ownership' with Fish Wildlife and Parks of any instream flow off the reservation and attach a 'time immemorial' priority date to certain waters in the Kootenai drainage but maintain the FWP priority date for others. Moreover, the CSKT claim they can 'call' the river against agriculture any time the river falls below the recommended instream flow level over a certain time period. On both counts there is no law allowing or precedent for Tribes co-owning a water right off-reservation and no law that gives the Tribes a right to 'call' for water off the reservation.

The final threshold issue is whether off-reservation treaty rights can be handled at all in a McCarren Amendment[27] proceeding. The Montana General Stream Adjudication is a McCarren Amendment proceeding in that it is authorized to hear federal reserved water rights. The adjudication proceedings were stayed for Tribes and the federal government while reserved rights were negotiated with the Compact Commission. In addition, both the U.S. Supreme Court and the Montana Supreme Court have stated that state courts are sufficient on their face to hear proceedings involving federal reserved water rights. No such 'sufficiency' exists for determining aboriginal treaty rights especially those that do not directly imply a water right in the Montana state courts.

The legislature's charge to the Compact Commission's was to negotiate a fair and equitable settlement of the federal reserved water rights of the Tribes and United States. Federal reserved water rights are derived from the Winters Doctrine. The Compact Commission's charge does not include the resolution

of off-reservation Treaty Rights. The CSKT rights to take fish are federally-derived treaty rights, but are not federal reserved water rights.

Summary

For the reasons outlined above, the CSKT Compact failed to win public and legislative approval during the 2012-2013 period when it was rolled out to the public and submitted before the legislature. The Compact Commission asked the state legislature to approve a 'forever document'—as it could not be revised after its approval—without answers to the fundamental questions discussed in this document. By the time the Compact bill was introduced to the legislature, there was less than one month left in the session with hundreds of other bills already in discussion.

Even with more time for legislative review, however the Compact had failed to gather support because of the issues discussed in this paper, namely:

- Definition of Proceedings and Reservation Land
- Quantification, Water Claims & Priority Dates
- Water Administration
- Off-reservation aboriginal claims

Substantive, fundamental change is needed in each of these areas to achieve both a fair and equitable settlement and a viable Compact that can pass legislative muster. Somehow the CSKT Compact negotiations veered away from generating such an agreement. If the goal of all of the parties is to continue negotiations in good faith going forward, then they will focus on:[28]

> "...specific, practical solutions to the share and administer water resources... If a tribe's or a state's goal is to establish a new legal principle relating to the Winters Doctrine, litigation is the process that should be used because it is capable of providing a binding legal precedent."[29]

ENDNOTES

[1] It is recognized that any revision to the existing Compact must be approved by the State, the Tribes and the United States. We welcome that review.
[2] Flathead Allotment Act of 1904, 24 Stat 388: "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and *the sale and disposal of all surplus lands after allotment.*" (*emphasis* added)
[3] This is a definition used of a reservation by some federal agencies when discussing water quality regulation and renewable energy facility citing. The definition is used in the Compact to extend "reservation status" to mean ownership of all surface and ground waters of as well as the lands of the reservation, and to extend Tribal jurisdiction over non-Tribal private property.
[4] 1934 Indian Reorganization Act, 48 Stat 984; Montana Constitution IX Section 3 (1) re: pre-1973 water rights
[5] This is an estimate only and federal and county land title records do not reflect these totals
[6] The effect of these claims is to constitute a direct taking of water and land, resulting in the diminishment of property values throughout four counties. It also violates Articles II and IX of the Montana Constitution and the Fifth Amendment of US Constitution on taking without compensation.
[7]The CSKT Compact as presented to the public ranged from 1,200- to 1,400 pages long. The length is due to the appendices detailing the multiple claims that were submitted
[8] Because this was a negotiated settlement, the Federal Government contributed water from an off-reservation federal facility. We believe the Federal government should provide most of the water to fulfill the CSKT water need from federal reservoirs. The use of 100,000 Hungry Horse water for the State of Montana is enabled by S.B. 376 , sponsored by Senator Verdell Jackson in 2007
[9] The Flathead Reservoir (1.2 million acre feet) water is earmarked for the FIP irrigation project and represents the upper 9 feet of the reservoir.
[10] During a FOIA investigation regarding the Compact Commission's files, photographs were taken of file cabinets full of water rights filings and permits both of the FJBC and by the United States filing on behalf of individual water users to whom it had sold water and land.
[11] There are on-going concerns about whether the BIA has properly expended existing funds on maintenance and rehabilitation of the FIP. Latest estimates suggest the FIP has an outstanding $80 million in deferred maintenance needs.
[12] The CSKT will become the owners of Kerr Dam in 2015, operating the facility according to the FERC license. This will have effects on local power rates and the county tax base.
[13] Most water users in the irrigation project already have an 1855 priority date as their lands were purchased from Indian allottees. These are known as 'Walton Rights'
[14] The potential environmental impacts are significant, including dewatering of shallow ground water aquifers, erosion, and water systems dependent upon irrigation return flow including wetlands. The economic impacts of removing water from agricultural lands were not investigated although significant irrigation and property value reductions are possible.
[15] Title to the banks and beds of the southern portion of Flathead Lake belong to the United States and the Tribes have the right to regulate the land use of riparian owners therein. 655 F. 2d 951 Namen case.
[16] It is abundantly clear that this premise can be challenged successfully by Montana in Court.
[17] 2002, "Liquid Assets: The Question of Who Owns the Water Continues", Missoulian 11/10/02
[18] Ibid note 16
[19] Tubbs Memo to Susan Cottingham and Jay Weiner, Compact Commission, 'Decision Points for CSKT Compact', June 2008.

[20] The Reservation Water Management Board consists of 5 members: 2 appointed by the Governor, 2 appointed by the Tribe, 1 appointed by the Tribe and Governor's selected members or a Federal judge, and a federal ex officio non-voting member. Of the five positions together, Criteria for membership include a business owner on the reservation, having a seasonal home on the reservation, and having some water related experience. Contractors, consultants, or employees of the Tribal, federal, and state governments are not excluded from membership. Based on the membership criteria, the CSKT could control at least 3 of 5 seats on the Water Management Board. Any business owner on the reservation could easily be impacted by his/her decisions.

[21] Chris Tweeten explained this in a meeting on August 2, 2012 where he stated that by the legislature approving this Compact, it would be exercising its constitutional authority over water by delegating it to the Tribes in this compact.

[22] State ex Rel Greely v. Conf. Salish &Kootenai December 1985

[23] There are 9 tribes who signed treaties with Gov. Stevens in Washington and Oregon. The territory of the Flathead was once part of Washington State.

[24] Boldt Decision and its progeny, 384 F. Supp. 312 http://www.ccrh.org/comm/river/legal/boldt.htm

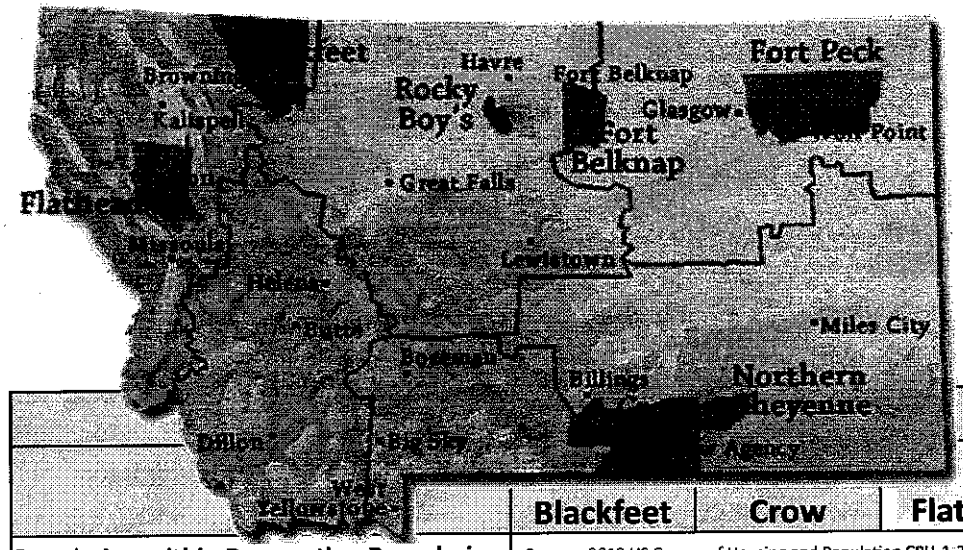
[25] Bilideau, 2012, *The Elusive Implied Instream Flow Right: Do Off-Reservation Instream Flow Rights Exist to Support Indian Treaty Fishing Rights?* 48 Idaho L. Review 515 (2012)

[26] The volume and location of these water rights were listed in hundreds of pages in the appendices to the Compact. It appears that multiple listing of the same instream flow for a single river system led to the claim for an enormous amount of water that the Commission would never admit publically. Values quoted here are taken exactly from appendices as compiled.

[27] The McCarren Amendment (43 USC 666) allowed the limited waiver of the sovereign immunity of the United States for the purpose of quantifying federal reserved water rights in state general stream adjudications where all users were involved.

[28] The Governor and legislature could still extend the Compact Commission; the question is the Tribes' willingness to negotiate.

[29] Folk-Williams, John A., *"The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Water Rights"*, Natural Resources Journal Vol. 28, Winter 1988



COMPARISON OF MONTANA INDIAN RESERVATION RESERVED WATER RIGHTS COMPACTS

	RESERVATION						
	Blackfeet	Crow	Flathead	Fort Belknap	Fort Peck	Northern Cheyenne	Rocky Boy
Population within Reservation Boundaries	Source: 2010 US Census of Housing and Population CPH-1-28						
Tribal	8,944	5,322	7,042	2,704	6,714	4,406	3,221
Non-Tribal	1,461	1,541	21,317	147	3,294	383	102
Total Population	**10,405**	**6,863**	**28,359**	**2,851**	**10,008**	**4,789**	**3,323**
Land w/in Reservation Boundaries (Acres)	Source: Indian Education for All—MT Office of Public Instruction 2009						
Tribal Trust	311,175	404,172	653,214	210,954	413,020	326,547	122,259
Tribal Allotments	701,816	1,166,406	58,729	406,533	516,092	113,277	0
Other (State/Federal/Private)	512,721	894,336	531,057	28,089	1,164,012	4,951	0
Total Land	**1,525,712**	**2,464,914**	**1,243,000**	**645,576**	**2,093,124**	**444,775**	**122,259**
Reserved Water Right Award (Acre Feet)							
On Reservation	86,880	800,000	16,300,951	500,000	1,052,472	89,530	20,000
Off Reservation	0	0	31,774,647	0	0	0	0
Total (Data Source: See Items 1 or 2 below)	(1) **86,880**	(1) **800,000**	(2) **48,075,598**	(1) **500,000**	(1) **1,052,472**	(1) **89,530**	(1) **20,000**
Compact Details							
On Reservation Water Rights Administration	U.S./MT/Tribe	U.S./MT/Tribe	Tribe/UMO	U.S./MT/Tribe	U.S./MT/Tribe	U.S./MT/Tribe	U.S./MT/Tribe
Off Reservation Aboriginal Treaty Rights	No	No	Yes	No	No	No	No
Relinquish Irrigation Water Rights to Tribe	No	No	Yes	No	No	No	No
Ratified Montana Legislature / U.S. Senate	2009 / No	1999 / 2010	No / No	2001 / No	1985 / 1994	1991 / 1992	1997 / 1999
Statistics:							
Acre Feet / Tribally Owned Acre	0.09	0.51	67.53	0.81	1.13	0.20	0.16
Acre Feet / Tribal Member	9.71	150.32	6,826.98	184.91	156.76	20.32	6.21

(1) Negotiating Tribal Water Rights: Fulfilling Promises In The Arid West, By Bonnie G. Colby, John E. Thorson, Sarah Britton

(2) Flathead Reservation based upon Concerned Citizens of Western Montana analysis of the 02/13/13 compact documents on the DNRC website. Note: the commission has not provided quantification numbers for this compact and recently revised the compact documents in Appendix 12, increasing the volume of water in the compact to nearly 52 million acre feet .

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DRAFT--Proposed Alternative CSKT Compact

Introduction

The paper, *'A Critical Review of the CSKT Compact'* (*Critical Review*), presented information that helps to understand why the Compact failed to secure both public and legislative approval during the 2013 legislative session. The lack of advocacy for the State of Montana within the Compact Commission resulted in a Compact in which fundamental problems exist. They include:

- Definition of Proceedings and Reservation Land
- Quantification, Water Claims & Priority Dates
- Water Administration
- Off-reservation aboriginal claims

This report presents an alternative Compact to the current CSKT Compact that directly addresses these issues. The intent of this exercise is to offer a comparison Compact that shows what an 'acceptable' compact would look like to the citizens of western Montana. If there is a chance for a CSKT Compact to be passed before or in 2015, it will result from changes to the original compact proposed for legislative consideration. [1]

Proposed Changes to the CSKT Compact

Amendments to or changes of the Compact must define a complete solution to the problems of the existing Compact in that the individual parts work together as a unit to structure a new Compact.

Definition of the Proceedings and the Reservation

The correct framework for the Compact proceedings would result in changes to the wording of the first set of Recitals in the Compact as demonstrated below:

- WHEREAS, pursuant to the Hellgate Treaty of 1855, 12 Stat. 975, the United States reserved the Flathead Indian Reservation for the Confederated Salish and Kootenai Tribes;
- WHEREAS, the Confederated Salish & Kootenai Tribes claim federal reserved water rights to fulfill the purposes of the Reservation;

The Flathead Indian Reservation must be defined to reflect the reality of land ownership and use within the exterior boundaries of the reservation set aside in 1855. That must include a clear description of the Indian Reorganization Act's land consolidation in 1934.

- Flathead Indian Reservation is all land within the exterior boundaries of the Indian reservation established by the Hellgate Treaty of 1855 which is held in "trust status" for the CSKT and does not include privately owned property that is in "non-trust" or "fee status" and subject to taxation by the State of Montana.
- Indian Land. Includes any tribal land or interest therein which is held by an individual CSKT member or the CSKT Tribe and can only be *alienated* [*sold*] or *encumbered* [*restricted or burdened by legal claim*] by the owner with the approval of the Secretary and/or is subject to a restriction against alienation under the laws of the United States.

Quantification of the CSKT Federal Reserved Water Right:

Quantification of a federal reserved water right involves the determination of the purpose of the reservation and the amount of water necessary to fulfill that purpose of that reservation. From the Treaty of Hellgate the purposes include (a) agriculture and the (b) *on-reservation exclusive right to hunt and fish*. A federal reserved water right to fulfill these purposes would include the volume of water necessary to irrigate the reservation's practicably irrigable acreage, water for instream flow to support the fishery purpose of the reservation, and water for future uses. The proposed quantification of the CSKT federal water right is shown in the table below:

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Component	Description	Source	Water Use	Total Annual Volume (Acre Feet)	Priority Date
Current Irrigable Acreage(1)	60,000 acres	Flathead River & Tributaries; 12,000 acres served by Flathead Irrigation Project	1.4 acre feet per acre(2)	84,000	1855/1934*
Future Irrigable Acreage(3)	30,000 acres	Hungry Horse Reservoir(4)/Flathead River	1.4 acre feet per acre	42,000	1855/1934*
Wetlands	11,500 acres	Flathead River & Tributaries, ground water, irrigation return flow	2.5 feet per year evaporation rate	28, 750	Variable
On-reservation instream flow	Miles of stream	Flathead River and tributaries	cfs	Existing flows	Time immemorial
Existing Uses	Irrigation, domestic, industrial, commercial	Surface water, shallow ground water	Acre feet/yr	6,000	
Future Uses &Development	2,000 AF	Deep Ground water(5))Hungry Horse Reservoir(6)	Acre feet/yr	2,000 50,000	Compact Water
TOTAL				**212,750**	

Current estimate is based on Tribal Attorney John Carter estimates, review of Compact Commission files; (2) an acre foot of water is enough water to cover one acre of land with 1 foot of water, or 325,875 gallons. (3)Generous 'guesstimate' (4) Hungry Horse Reservoir water is known as 'Compact Water" (5) any newly developed deep ground water > 35 gpm is also Compact Water. The amount suggested here is a minimum. (6)The amount of Hungry Horse water would diminish as irrigation rehabilitation efforts make more water available. *Due to lands acquired under1855 Treaty or 1934 Ind. Reorg. Act.

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The CSKT federal reserved water right claim is 212,750 acre feet with priority dates of time immemorial, 1855 and 1934. The water right is derived from the Flathead River, its tributaries, and Flathead Lake. The Tribes have right to share in the use of 50,000 acre feet of water from Hungry Horse Reservoir and a right to deep ground water development of at least 2,000 acre feet.

Some definitions would need to be developed so as to accurately describe the CSKT federal reserved water right as well as the other rights that will have to be adjudicated at the same time, such as those associated with the federal irrigation project and those state-based water rights on the reservation.

Tribal water right. Any portion of the federal reserved water right quantified in Article III holding an 1855, time immemorial, or 1934 priority date that is used to fulfill the purposes of the reservation, including water rights appurtenant with Indian land on the reservation. The Tribal water right may be used for any purpose deemed advisable by the Tribe or allottee and pursuant to procedures outlined in the Tribal Water Management Ordinance.

Project Water Right. Any portion of the water right associated with the BIA Flathead irrigation project that serves (a) individual Indian allotments or tribal trust land within the Flathead Irrigation Project with reserved water rights of priority dates of 1855, (b) Walton rights[2] holders with 1855 federal reserved water rights, (c) project water users with state-based or federally registered priority dates ranging from 1904 to 1973, and (d) Secretarial water rights holders, those holding water rights granted directly by the Secretary of the Interior[3]

Compact Water Right. Any portion of (a) Hungry Horse reservoir used to fulfill CSKT present or future water development needs or state development needs; and (b) deep ground water development undertaken by the state and the Tribes/US in fulfillment of the Compact.

State Water Right. A water right held by an individual registered with the State and subject to state rules and regulations.

Water Administration

The new Compact water administration system begins with the complete opposite assumptions of the original CSKT Compact, going back to the initial State position in 2003.

- The Tribes *do not* own all the water within the reservation; State has verified interest in and ownership of many state-based water rights
- State *does* have jurisdiction to administer water resources on the reservation. State has Constitutional duty and statutory authority to protect, manage and administer state-based water users

The new system is the same dual water management system that has prevailed in all previous Compacts. A Compact Board is also formed but with the additional joint office (state/tribal) to staff a Compact Board with Special Master[4] and perhaps federal representation, for resolving disputes before litigation.[5] It is based in Lake County. The water administration context consists of the following:

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- UMO becomes *Tribal* Unitary Water Management Ordinance (TUMO), applies only to Tribal water rights and resources, and is staffed by the Tribal Natural Resources Department
- BIA/CME/FJBC management , maintenance and rehab of FIP: quasi state-federal entity subject to BIA (federal) contracts with irrigators, *subject to obligations in this Compact* (e.g., administrative, data sharing/reporting)
- State water management statutes apply to private land, Walton Rights held by successors to Indian allottees, and other state-based water users.
- Compact Board composed of Tribal and State water resource chiefs or designees, special master from MT water court, and tribal/state staff, work to field verify and record all state and tribal water rights in state data base; conduct comprehensive reviews; establishment of technical criteria for water use and influences, oversight and assistance, and public education.

There are accompanying changes and additions to definitions:

Tribal Unitary Water Management Ordinance. The management plan, administration program, and technical support for the use, management, and protection of the Tribal Water Right.

Tribal Water Administrator. The chief water resource administrator who implements the Tribal Water Management Ordinance and coordinates with the Compact Board on behalf of the CSKT.

Tribal Water Engineer. The chief water engineer responsible for the scientific, technical, field verification, surveying, and sampling components of the Tribal Water Management Ordinance.

Compact Board. A board consisting of the Tribal Water Engineer and Administrator, their state counterparts, and a Special Master appointed by or a member of the Montana Water Court

Off-Reservation Treaty Rights

The alternative Compact recognizes aboriginal treaty rights secured to the CSKT to 'take fish in usual and accustomed places in common with the citizens of the territory', but does not acknowledge a water right was implied, is attached, or is reserved. Instead, the State recognizes its environmental responsibility to protect habitat so as to support fish populations in the CSKT aboriginal territory not only for the CSKT but also for Montana citizens.

As a threshold issue, aboriginal treaty rights do not automatically lead to a water right as evidenced by significant case law involving the 'Stevens Treaty' tribes, of which the CSKT is because of its common language with 8 other tribes in Washington and Oregon. Thus, the CSKT claim of off-reservation extensive treaty rights could be legitimately challenged in court and the outcome necessarily support an instream flow right with the Treaty right to fish. There is a fundamental question of whether these rights should be even considered in a Compact whose legislative purpose is to resolve *federal reserved water rights* which are by definition confined to the land that was withdrawn as a federal reservation. To include off-reservation rights of any kind would also depart from all other Compacts completed during the Compact Commission's tenure.

In the CSKT Compact negotiations, these off reservation rights were offered in June 2011, fairly late in the process and certainly not subject to enough technical, environmental, or economic scrutiny. It is also clear that the Compact Commission staff plainly ignored DNRC guidance for the CSKT Compact to keep the settlement to the reservation lands and waters. Finally, the CSKT are not the only Tribes who have access to the lands ceded in the Treaty of Hellgate.

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The Alternative Compact will not include any provision for the aboriginal rights. Instead the State will offer language recognizing that the aboriginal treaty rights exist and reaffirming its existing implementation of its environmental responsibility to protect instream flows through Murphy Rights and other fish and wildlife enhancement programs.

Financial Contributions

The basis for a monetary settlement most directly involves the United States' responsibility to the particular tribe involved. In this case, the CSKT major damage claim against the United States is that it ruined the reservation ecology and fisheries when it built the irrigation project. The Tribes will also claim that the United States 'gave away' its water rights and demand compensation for the loss of the water. The validity and amount of any settlement will be weighed against payments already made to the CSKT by the United States for 'natural resource damages'. By typically paying large sums to Tribes in water settlements, the United States accepts responsibility for its violation of any treaties, failure to protect the Tribes' natural resources, or other matters specific to the Tribe. While it is not required, it has been the policy of the federal government since 1985 to require some kind of state financial contribution to the settlement.

Existing CSKT Compact

The existing CSKT Compact proposes a $55 million contribution from the State, which is allocated as follows:[6]

- $30 million for pumping costs
- $12 million for irrigation rehab in Flathead Irrigation Project
- $ 8 million for fish and wildlife habitat enhancement
- $ 5 million for measuring devices in Flathead Irrigation Project

The unverified but mentioned federal contribution to the CSKT Compact ranges from $700 million to over $1.4 billion, and is to finally settle claims with the CSKT on the irrigation project, habitat restoration, and water resources.

In any new Compact these cost categories would be revisited, as several of the cost categories are associated with a federal irrigation project, which are a federal responsibility.[7]

Alternative CSKT Compact

A new approach would consider payment for benefits accrued to the State instead of the Tribes, including:[8]

- Continuing payments to Lake County from Kerr Dam estimated at $1.2 million per year
- 50,000 acre feet of Hungry Horse Reservoir with right to use for any purpose
- Irrigation district secure low cost block of power from Kerr Dam
- Subordination of the power right to irrigation in drought years
- Cooperation in all water management issues and final adjudication of all water rights on the reservation and within the Flathead River Basin.
- Agreement not to seek aboriginal water rights by piecemeal challenges to individual off reservation water rights filings[9]

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There are other non-monetary 'concessions' that would be useful, for example, the suspension of land purchases until all water rights adjudicated, for which the State could cooperate by expediting claims processing.

The cost of these items for the benefit of Montana in a new Compact could be far less than the $55 million of the existing Compact.

Structural Components of the Alternative CSKT Compact

The substance of a negotiated settlement relies on the contributions of the federal, state, and Tribal governments' appropriate response to securing a federal reserved water right and integrating that within the framework of State water management. The Alternative CSKT Compact draws from the kinds of issues addressed during the negotiations as presented in the current CSKT Compact and constructs a different Compact that includes state-based objectives as outlined here.

The proposed *federal contribution* that would benefit the State and Tribes would include the following:

- **Water—Hungry Horse Reservoir Contribution:** 100,000 split 50-50 with State of Montana/Tribes; both get to use the water for any purpose. This is 10,000 more acre feet than the existing Compact and splits the allocation between the Tribes and the State.
- **Irrigation System** --Complete irrigation rehabilitation over 5 year period, 50% funds to be repaid by Kerr Dam power revenues.[10] This is acknowledgment that the federal government was also responsible for opening the reservation for settlement and built an irrigation system to in part support that settlement policy. The BIA estimates that there is $80 million in deferred maintenance which if not addressed will *waste* the federal investment in irrigated agriculture on the Flathead Indian Reservation. In return, all water savings resulting from such rehabilitation will benefit the Tribes.

The proposed *state contribution* that helps all the parties includes:

- Environmental and Economic Assessment of Alternative Compact and report on any mitigation needs or private property impacts before submittal to legislature.
- Financial contributions as described above
- Staff and resource contribution to Compact Board

The proposed *Tribal contribution* to the new Compact includes:

1. Kerr Dam low cost block of power remains in place for 25 years with revenues from power purchase used to pay back federal government for FIP rehab. In a Compact agreement: any savings of water for irrigation rehab go to CSKT if paid for by fed government. A complete study of irrigation rehabilitation evaluates its impacts on shallow ground water and wetlands
2. Kerr Dam payment to Lake County remains in place or be replaced by an annual payment from the Tribes to the County in lieu of taxes for the services provided by the county within the reservation.
3. Cooperate in water management including data sharing
4. Waiver of all claims on reservation against federal and state governments
5. Commitment not to use Kerr Dam/Flathead Lake to contest new and existing water rights upstream
6. Hungry Horse water to be used on-reservation
7. Commitment to the use of deep ground water for future water development

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Summary

The alternative CSKT Compact presented in these pages produces a new Compact that is similar to the other Compacts completed in Montana with the six other Tribes. The major components of the alternative Compact include:

- A quantified CSKT federal reserved water right
- A dual State-Tribal administration system with a Compact Board
- A provision for the joint State-Tribal use of Hungry Horse Reservoir
- Complete rehabilitation of the federal irrigation project and dedication of water savings to the Tribes
- An agreement on Kerr Dam power and revenue

The benefits to all the parties could be significant.

This agreement has its focus on the solution to the quantification of the CSKT water rights within the context of the reservation, federal and state law, and available resources. This was the charge given the Compact Commission, to solve this problem within this context. We have demonstrated that alternatives do exist to what was produced by the Compact Commission.

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ENDNOTES

[1] How could these changes occur to the current Compact? First, all three parties must agree to any changes proposed so would have to agree somehow either before the sunset of the Compact Commission on June 30, 2013 or in some period shortly thereafter. If the Tribes demonstrate interest in negotiation, alternatively the Compact Commission could be extended by the Governor and Legislature with a new set of assumptions, sideboards, milestones, and timelines.

[2] Water rights of the non-Indian successor to an Indian allottee which bear the same priority date as the establishment of the reservation, in this case 1855.

[3]Secretarial water rights are those granted by the Secretary of Interior directly to water users for the irrigation of their lands from the federal irrigation project facilities and assessment of charges. See http://www.gpo.gov/fdsys/pkg/CFR-1999-title25-vol1/pdf/CFR-1999-title25-vol1-sec171-18.pdf

[4]A Special Master could be a member of or be appointed by the Montana Water Court.

[5]This eliminates a political board, keeps the resolution local, and provides an unbiased and water law-based guidance by the Special Master.

[6]These costs appear to be heavily biased toward providing the Tribe compensation and not getting much in return for the state.

[7] Funds for fish and wildlife habitat enhancement seem to 'buy into' the theory of the irrigation system's 'damage' to the environment. From the local citizen's perspective, irrigation on the Flathead Indian Reservation turned a dry landscape into productive farmland that provides significant economic benefit to the reservation economy.

[8]The State would be expected to pay its share of administrative and technical costs of a Compact Board and state staff.

[9] Such a "payment" for example, could include the establishment of State Murphy Rights and other protections on tributaries in western Montana Rivers and streams also corresponding to CSKT aboriginal homelands.

[10] A comprehensive engineering assessment and survey of the rehabilitation needs of the project and the development of a plan for rehabilitation that includes consideration of shallow ground water resources, wetlands, and instream flow implications of rehabilitation. This would prevent the piecemeal rehabilitation and be completed in a way that allows maximum water savings to accrue to the Tribes.

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Wick, Arne

From: J Dillon [jfdillon4@gmail.com]
Sent: Monday, July 01, 2013 3:52 PM
To: Wick, Arne
Subject: Comments on Proposed CSKT Water Rights Compact

Dear Reserved Water Rights Compact Commission,

As a citizen of the United States, and of Montana, and as a Ph.D. focused on policy dynamics of Indian water rights, Western water policy, and Native nation-building, I urge the Commission and the State of Montana to finalize the proposed water rights compact negotiated with the Confederated Salish and Kootenai Tribes (CSKT) as agreed to when first brought to the State Legislature HB 629 in early 2013.

In the Hellgate Treaty signed between the United States and CSKT, the Tribes explicitly reserved their rights to sustain themselves by the fish and waters of the greater Clark Fork watershed on and off the Flathead Indian Reservation. This treaty was and still is the law of the land as vested in the United States Constitution. Recently, the Tribes have consciously relinquished some of these on and off-reservation reserved rights and not pursued others so as to reach agreement with non-Indian water interests in the presently proposed compact. Given the historic tensions between Indian tribal and non-Indian private uses of natural resources, it comes as no surprise that some white people jealously oppose the Tribes' realization of their rights to water. Such opposition should be considered in light of this history, and existing state and federal laws to address resource conflicts and racial oppression. The recent Oregon State Adjudication (in the Upper Klamath Basin) exemplifies the reality that Tribal fishing rights can legitimately include a wide breadth of tribal water rights, no matter the assumptions of non-Indian junior water rights holders.

Thank you for your work and for considering my general thoughts. I hope that you continue to work to recognize and implement solutions to conflicting water rights questions that respect history, tribal self-determination, and indigenous human rights.

Sincerely,

John Dillon

June 24, 2013

Arne Wick, RWRCC
P.O. Box 201601
Helena, Mt. 59620-1601

RECEIVED
JUN 27 2013
D.N.R.C.

Dear Sir:

I have seen the pros and cons at several meetings. I believe the compact with the CSKT would be a good thing for the Flathead Irrigation Project and the state of Montana. Therefore, I am in favor of the Compact.

Gordon R. Doney

July 1, 2013

Arne Wick,
RWRCC
PO Box 201601
Helena, MT 59620-1601

Dear Arne:

This letter is in response to Chris Tweeten's of June 4, 2013 requesting questions and concerns about the Water Use Agreement (WUA). As a Commissioner from the Jocko District on the FJBC, I have made an effort to share your letter and information on the WUA with Jocko irrigators. My views of the key issues are summarized in a letter that is going out to all irrigators in this district (copy enclosed). I have also urged irrigators to write to you directly. I have talked with many irrigators, feel that the majority favor the agreement, but many, including several of the larger landowners, are reluctant to express their views openly. Your letter provides them with a further opportunity to comment on the WUA and I hope that many will do that.

Here are some specific questions and concerns regarding the agreement:

1. ***Can WUA still be included in the compact?*** Some people feel that the tabling of HR 629 effectively kills the agreement since the RWRCC is scheduled to complete its work prior to the 2015 legislative session. I hope that this is not correct and interpret your letter as evidence that this process is still alive.
2. ***How does the withdrawal of the Jocko and Mission Districts from the FJBC affect the approval process?*** The majority of commissioners from those two districts support the WUA,
3. ***How is support and opposition to the WUA by irrigators measured in this process?*** I understand that irrigators have been participating in the discussions on the agreement as a courtesy rather than as a legal requirement. In our elections, the votes of irrigators are weighted by the number irrigated acres, but I am unclear if and how differences in acreage are factored into voting on the WUA, if indeed any such vote is required or envisaged.
4. ***If the agreement is approved, will the support from the State and the Tribes be forthcoming as specified in the WUA?*** Have some of these funds been effectively lost already?

My primary concern as an irrigator is that a WUA is essential for the survival of farming in the Jocko. All irrigators agree that we must make significant investments to improve our irrigation system to survive. I see the WUA as a win win proposition for irrigators and fish and urge you to include our WUA in the RWRCC's final report.

Yours sincerely,

Kerry Donney, Chair
Jocko District Irrigation Committee
31607 Agency Rd
Arlee, MT 59821
Tel 406-370-7168
irrigators@blackfoot.net

Kerry Donney

DRAFT July 1, 2013

Dear Jocko District Irrigators,

As your representatives, we would like to clarify some issues related to the Water Use Agreement (WUA) that was approved by the majority of the Flathead Joint Board of Control (FJBC) Commissioners and submitted to the Montana Reserve Water Rights Compact Commission (RWRCC) in April 2013. We recognize these issues are complex historical, legal and scientific matters that have been distorted through misinformation, false information and omissions of critical facts related to the contents of the WUA and Montana and United States laws.

The RWRCC has requested input from the public, and particularly irrigators, on the WUA < http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/>. This is an opportunity for all Jocko irrigators and the general public to ask questions, express their views and inform themselves about the WUA in the process.

1. ***Is the WUA the best deal that Jocko Irrigators can hope to obtain?*** Yes. We acknowledge that there are significant differences of opinion among the parties affected by the WUA. As your representatives we were directly involved in the discussions with the CSKT and argued strongly for water allocations that we felt are needed for viable agriculture in our area. Did we get all that we wanted? No. We appreciate that instream flows necessary for healthy fish populations must be maintained, as guided by scientific studies and required by existing legislation, notably the Endangered Species Act (ESA). The FJBC was invited to participate in the WUA discussions as a courtesy, not as a legal requirement. Our participation resulted in concessions from the three negotiating parties in the form of support for water efficiency measures, including essential maintenance on the existing canals and improvements in the systems of individual irrigators. There was agreement on an extended transitional period.

   - ***WE DO NOT BELIEVE THAT THE PARTIES INVOLVED WILL AGREE ON HIGHER ALLOCATIONS FOR IRRIGATION THAT WILL COMPROMISE HEALTHY FISH POPULATIONS.***
   - ***WE STRONGLY BELIEVE THAT IMPROVING THE EFFICIENCY OF IRRIGATION IS ESSENTIAL FOR THE FUTURE OF AGRICULTURE IN THE JOCKO AND VIEW THE SUPPORT PROVIDED THROUGH THE WUA AS CRITICAL IN MAKING THE NECESSARY INVESTMENTS.***

2. ***Can irrigators obtain a better deal through litigation and who will pay for that?*** If there is no agreement one or more parties may seek to have the issues formally adjudicated through the courts - a long, expensive and piece-meal process. Most legal experts familiar with water rights law predict that irrigators are unlikely to secure more rights and water than is specified in the current WUA. The seniority of the tribes' claims on water on the reservations has been confirmed by several legal decisions over the years. Litigaton, rather than a

negotiated compact will result in the application of the strict provisions of the ESA that would require increased stream flows for bull trout and reduce water available for irrigation. The compact provides more water to irrigators than would be likely through litigation and a path forward outside the courts. In the event of litigation, ***each irrigator will be responsible for their legal fees*** in this instance. The process could take decades and cost millions. For the State of Montana to assist in legal costs, a specific allocation for this purpose would have to be approved by the state legislature. This has never happened.

3. ***How does the agreement affect existing water rights?*** The Department of Natural Resources for the State of Montana has the following definition of water rights on an Indian Reservation: "A federal reserved water right is a right to water that is created when Congress or the President reserves land out of the public domain. These rights must be resolved as part of Montana's statewide adjudication" (DNR website < http://www.dnrc.mt.gov/rwrcc/>). The WUA and the compact settle water rights for all users on the reservation avoids further adjudication. The agreement confirms the seniority of the Tribes claim to surface water. The Tribes relinquish their claims to most off reservation water rights. Further, the Tribes give up the right to call any household, municipal, commercial, industrial or any other non-irrigation rights.
4. ***How does the agreement affect electricy costs?*** Mission Valley Power contract with Bonneville Power Administration (BPA) ends in 2015. Currently we have low cost electricity to pump water from the Flathead River to the irrigators in the Flathead District. It is most likely that this low cost electricity could double or triple after BPA and Mission Valley Power renegotiate the kilowatt price. In addition to increased pumping costs, increased electric rates could adversely affect other regional economic development. The compact guarantees the continued low cost of electricity that we are currently paying.
5. ***How does the agreement affect property values and investment?*** Undefined water rights and the prospect of lenthy and expensive litigation will adversely impact on property values in the Jocko Valley. Further farmers will be less likely to make investments that are essential to ensure to viability of agriculture.

In conclusion, we feel the WUA achieves the following:

- balances the preservation of natural resources (notably fish habitat) and agricultural requirements;
- avoids the expense and uncertainty of litigation by settling issues that have been polarizing our community; and
- helps ensure that the people who live and work in the Jocko will prosper and live together in harmony.

Kerry Doney, Chairman
Roger Christopher, Member
Jocko District Irrigation Committee
P.O. Box 446, Arlee, MT 59821
E mail: irrigators@blackfoot.net
Website: irrigators.com

RECEIVED
JUN 12 2013
D.N.R.C.

To Arne

The Compact for the State, Tribe Federal Government water use is fair with every one.
Please pass the agreement.

Thank You
Maxine Doney.

This was mailed in Maxine Doney name.
Well he passed on Sept 2005, I was his wife of 56 years and has stay living on our ranch and am a irrigator

Maxine

Wick, Arne

From: Elsa Duford [elsad@centurytel.net]
Sent: Monday, July 01, 2013 4:50 PM
To: Wick, Arne
Cc: elsad@centurytel.net; sen.jfielder@legmt.gov
Subject: RWRCC Chris Tweeten, Chair

July 1, 2013

To Chairman Chris Tweeten and the public
(Your letter of June 4th arrived in my mail box on June 13th)

What else can be said after all the years of meetings and the public's many comments?

Concerning the conflicting info stated, and published about the July 1, 1855 Hell Gate Treaty, Article #3. I suggest you send Mr. Duane Mecham a copy of the power point presentation Jay Weiner presented at the Polson Meeting in the fall of 2012, and the authentic, official copy of that Treaty. The version he presented at the June 19, 2013 FJBC meeting in St. Ignatius is inconsistent with the Treaty, which is said to be the official one. He is described in the article as the senior attorney with the DOI in Portland, Ore. Office. Attorney Jennifer Frozema from his office and Travis Teegarden a BIA attorney accompanied him. The Valley Journal reported the meeting, by Berl Tiskus – vjberl@valleyjournal.net. I suppose you could request an email copy.

Mecham said, "--------federal courts have ruled that the Confederated Salish and Kootenai Tribes, by reserving in the 1855 Hellgate Treaty the exclusive right to hunt and fish on the reservation, are entitled to on-reservation reserved water right for instream flows. At issue is how much water, so the quantity will have to be resolved." He mentions other issues on bull trout and grizzly bears.

What is missing from his comments are "In common with the citizens of the territory" on fishing, and "PRIVILEGE TO HUNT" seems to apply to both parties. I've said this before about this Treaty, so to repeat that when Jay did the power point in Polson, one man said "the State is trying to cheat us again"! I don't how this can be resolved unless all parties have identical copies of this Treaty, so all are on the same page. When words are taken out of context it misrepresents the document.

Article #3 of the Compact needs explaining also on Religious, Traditional and Cultural uses of water. I didn't think the explanation given before was clear enough. Is this a special privilege due to religious beliefs? It seems Duane Mecham of DOI, and the BIA could use your assistance. I would appreciate your reply. Thanks.

Sincerely

Elsa Duford
406-883-2849
905 15th Ave. E
Polson, MT. 59860

Wick, Arne

From: lakecasa in MT. [lakecasa@montanasky.net]
Sent: Saturday, June 08, 2013 4:37 PM
To: Wick, Arne
Subject: Pls. RE: Report on the Proposed CSKT - Montana compact dated 6-4-13

Mr.'s Wick, and Tweeten,

We are in receipt today of this letter asking for our opinion, and thanks for the opportunity to voice.

We, my wife June & I have been to a number of the water meetings held in Polson and Ronan, and after listening, have come to the conclusion that the tribe (CSKT) should NEVER be given control over the waters they are seeking to get, and government seems to think they should have, and be granted in getting!

This may sound biased, but I want you to know that I happen to have lived in the course of my life on or adjacent to the Chippewa and Sioux, most of the tribes in Arizona, and now the CSKT here in Montana. I have yet to find more than a few of their personage that are exemplary, fine dependable examples, or good managers of any kind either. Furthermore, and even though the tribesmen of today's ancestors did roam over these parts prior – SO WHAT – and to tie that to 'the fishing clause'? that's not only a stretch, it's Inane! And why should that (their ancestors) have anything to do with the notion that they should be in charge of any aspect of management of ANY OF THE WATERS today? The whole idea that they should be given this control is beyond Ludicrous!
Thanks,
W. P. Will Elliott
Polson, Mt.

July 1, 2013

To: RWRCC

From: Richard Erb
46451 Schoolhouse Ln
Moiese, MT 59824
richarderb@montana.com

Subject: Questions and Concerns about Compact

I appreciate the opportunity to comment on the Compact but this is the time of year when I make hay, so to speak. My comments below focus on the WUA. Forgive any errors

I support the Compact even though I have had reservations about some specific provisions in the Compact agreement and the associated Water Use Agreement (WUA). My main concern now is that the Compact will not be approved because of a very active opposition.

Many supporters are less than enthusiastic and many sit on the fence. But I believe there is more support among irrigators for the WUA than recognized and that it is possible to broaden and strengthen the support. To that end I suggest consideration of an alternative approach.

Alternative approach to WUA

As an alternative to relying on the FJBC and risking an impasse, the Compact Commission should ask the three official parties to the Compact negotiation to take responsibility for the WUA and clarify and address sections that remain controversial. Water right issues for farmers and ranchers could then be settled by the open Compact negotiating process that was established by the Montana legislature and not by FJBC politics. It also would avoid future legal battles over whether the FJBC has the legal basis for entering into an agreement that affects water rights.

WUA Issues to Clarify

1. There is still quite a bit of confusion regarding the relative standing of the MEFs, FTAs, TIFs and MWUAs. It's confusing because there are many provisions with cross references among sections in the body of the text and between the body of the text and Appendix B. Also, Appendix B is very difficult to interpret. Key questions include:
   a. Which will come first, achievement of the MEFs or the FTAs as a result of Operational Improvements and R&B projects?
      - Section 22 gives the MEFs priority over FTAs.
   b. What delivery status will the Measured Water Use Allowances have:
      - Relative to the FTAs? Will it be necessary to achieve FTAs before implementation of MEFs?
      - Relative to the TIF flows? The MWUA at any instream flow location must be met before "full attainment of the TIF flows", but what will be the relative status of MWUAs before that limit is achieved?
2. Opponents argue that the WUA contract would not stand up in the courts over time and the Tribe's water right claim would enable it to trump legal commitments to provide water under the WUA. Thus it would be helpful to have an in depth presentation on the provisions in the Compact and

WUA that are intended to provide individual property owners confidence that the courts would in fact defend their legal right to water deliveries in accordance with the FTAs and MWUA provisions..

WUA Issues to complete

The MWUA provides a framework for dealing with the fact that irrigation requirements differ across the project depending on a number of factors including soil water holding capacity and effective precipitation. But the details of the framework need to be developed to address a number of issues including for example:

1. The relevant criteria that will be used when conducting on farm efficiency audits
2. The relative importance to be attached to the net irrigation requirements of different crops
3. The ability of an individual farm to seek modifications in its MWUA depending on the kind of crops raised
4. The conditions under which the Project Operator may modify the MWUA

At the January meeting between the FJBC and CSKT Seth Makepeace said that the MWUA could be completed in a relatively short period of time (3 months?). The Commission should ask Seth to take the lead and coordinate the technical work. It also would help if he and his team talked to individual irrigators and also to the FJBC consultant Bill Slack. But again, his modifications to the MWUA should be presented to the three main Compact parties.

General Comments

- Opposition is financed, organized and emotionally charged
    - Ran a negative campaign with little response from public officials
    - Many opponents were informed of legislative hearings and had time to protest at hearings
- Supporters not organized and emotionally reserved in support
    - Many of us had farm and other responsibilities;
    - lacked info on legislative hearings
    - Many supporters afraid to speak out; fear of lost business and personal attack
- FJBC major mistakes
    - Super-secret negotiations
    - contentious responses to initial irrigator reactions to May WUA
    - many irrigators unhappy they were not fully informed when FJBC approved CME
- Public meetings not very helpful
    - Well attended by opposition- often with disruptive tactics
    - Official responses too often didactic and condescending- not enough effort to explain the thinking that went into decisions
- Amendments to Water Use Agreement (WUA) positive and substantive, but too late

Wick, Arne

From: Julia Fehrs [juliafehrs@yahoo.com]
Sent: Sunday, June 30, 2013 8:23 AM
To: Wick, Arne
Subject: Comments

Dear Commissioner

My husband and I own 5 acres in Bigfork, Montana and I am very interested in what will happen to us and our property rights when this goes into effect.

There are question I have and all I get is the run around. To be informed about the Water Rights, I have Studies the Treaties that Chris Tweeten.. and Jay Wiener talk about, but I don't come up with the same Conclusion. What happened to all the Treaties that come after the Hellgate Treaty? Winters Act, the Supreme Court decision 1908, Federal Reserved Water Rights are defined as the amount of water necessary to fulfill the purpose which a federal reservation of land was created. MCCarran Amendment 1952, Congress opened the door for reserved water rights to be adjudicated in state court proceedings. The Supreme Court has affirmed this, and many more. Are they null and void? The court ordered quantification of the water needed on the Reservation. This doesn't mean all the Water?

Where does it states that the CSKT Indians in any of these treaties that the water is owned by the Tribes? I understand that they can fish, hunt in all their usual places, but nothing about owning all the water in North Western Montana, off or on the Reservation? They have Federal Water Rights.

Walton rights say that the Land and the Water go together and cannot be separated!

Montana Constitution Article IX "Environment and Natural Resources" Section 3 Water Rights Subparagraph (3) "All surface, underground, flood, and atmospheric water within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law". Did you forget this part of the Constitution or on purpose throw it out of the equation? Who decision to tell the CSKT Indians they owned all the Water Rights of all the 11 Counties in NW. How can you give all the water to the Indians when you have no authority to give it? The Montana Constitution says it belongs to the citizens.

You say this is a fair and equable Compact, Why weren't all the parties at the table, or did our side turn against us, the citizens of Montana. I went to several of the 11 counties, dog and pony show that they went through. Chris Tweenten always said if we didn't like this to get a lawyer and spend thousands of dollars to litigate our water rights as a threat. Is this the way you want the chairman of the Commissioner to act if we don't agree with them? They try to scare us if we don't agree with them. They are supposed to be working for the Government and are we not the Government?

You say we don't need a EIS or EPA report, do you know what future holds for the state of Montana,

When this Compact goes in effect forever? What will happen to our beautiful Land if you lease our Water? Will it look like California, Lakes dried up, and the value of our property be worth nothing? Will there be crop in our Valley, for food and livestock?

Will this ruin the economy of Montana? Will we lost jobs over this? You say that none of this will happen, but how can we believe you, with all the controversy that is going on in our Government?

I thought that the DNRC was legislated to be the controlling factor for Montana's citizens Water Rights, but somehow you took the authority from the legislator and decided to make a new organization CME to control by the CSKT not the state run DNRC. Does the CSKT Indians have jurisdiction over the non – Indians if this goes through?

Art. II Section 29 Eminent Domain Private Property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

Treaty of Hellgate Art.VII

The aforesaid confederated tribes of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

Depredation = a laying waste or plundering. Is this what you plan for Montana?

Is this what will happen to Montana land owners, when you give our property rights to the CSKT Indians?

Yes we need to get a Federal water right for the state of Montana and the CSKT, but we need a fair and equable agreement for all the citizens even the Irrigators, which with what I've read they are not. One size fit all doesn't fit here, there are all kinds of land here and that what makes Montana a very unique state.

In one meeting, it was asked to Seth the Highdroligist. What models did you use to come up with the 1.4 acres feet of water for all the Irrigators? He said he used International models. Montana is not like Europe or any other international Country, it is unique with all its lakes, mountains. This is wrong!! The

Winter Act describes the models they use back when, did something change?

Yours Truly

Julia Fehrs

Metropoulos Law Firm, PLLC
Jon Metropoulos, Attorney
50 South Last Chance Gulch, Suite 4
Guardian Building
Helena, Montana 59601
Phone: 406-442-0285
Mobile: 406-461-4296
Email: jon@metropouloslaw.com

1 July 2013

VIA ELECTRONIC MAIL
Chris Tweeten, Chair
Reserved Water Rights
Compact Commission

Re: Proposed Flathead Compact: Comments of FJBC

Dear Mr. Tweeten:

On behalf of the Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts, I respectfully submit this letter in response to the Compact Commission's June 4 letter asking for comments regarding the proposed Flathead compact dated February 13, 2013. The FJBC appreciates the Governor's direction in his letter vetoing SB 265 (Sen. Jackson), in which he called for "the Commission, working with the DNRC, the CSKT, the Flathead Joint Board of Control, the United States, and other interested parties to prepare a comprehensive report addressing the questions raised about the compact during the 2013 legislative session."

As I mentioned on behalf of the FJBC at the June 18 Water Policy Interim Committee meeting in public comment regarding your presentation on this matter, the FJBC is in the middle of a four-phase process brought about by the decision of the 2013 Legislature to gather more information about the proposed compact and its effects before further considering its enactment and the recent election of a new chairman of the FJBC and a majority with a new perspective on the compact, specifically Appendix 3, which is the Flathead Indian Irrigation Project Water Use Agreement.

The first phase, seating the new commissioners and officers and consolidating their authority over FJBC operations is completed. There have been complications in that two of the Districts, Mission and Jocko Valley, recently voted by 2-1 to withdraw from the FJBC in 90 days, on or about September 16. Until that date, the FJBC is in full operation and represents all three Districts. It is the intention of the majority of the FJBC to move forward with the next three

phases of this process, the outcome of which may lead these commissioners to revisit their recent decision.

Phase two is an effort to "regularize" the FJBC's operating procedures, which encompasses revising bylaws and policies, implementing greater use of its website, appointing appropriate subcommittees, etc. This process is ongoing and, while the necessary work for it has been at time delayed by other matters, it will not itself delay accomplishing the next two phases, which are the most vital.

Phase three is an internal review process to ensure all commissioners fully understand the WUA, including its factual and legal basis, and, crucially, based on this understanding, to develop a list of "concerns" with the WUA. This list is intended to be both comprehensive and as concise as possible, so that the FJBC can make an objective, fact-based assessment about whether to support the WUA as it is or to propose consideration of ways to address, as the Governor proposed, the concerns it has. That process has proceeded smoothly, and it is hoped the FJBC will have this phase completed by July 22.

The fourth phase involves asking the appropriate U. S. and tribal representatives to meet and discuss the FJBC's concerns and ways to address them. Whether to accept this invitation is, of course, up to the Tribes and the United States. Our negotiations have been respectful and in good faith at all times and by all parties, and as such we are hopeful they will agree to discuss our reasonable concerns. This phase we hope to conclude by the end of August.

As an experienced and skilled negotiator, I am sure you understand that for the FJBC to submit comments in the midst of this process would be premature and could be unhelpful in the extreme. We are working, as noted, to address only the vital concerns with the Tribes and the United States, not to engage in fly-specking of the compact or speculating about what might have been or what might be. We do not want to make either this process or our possible discussions with the Tribes and United States any more complicated, and therefore will not be submitting substantive comments at this time. The FJBC appreciates your statement that July 1 is not the end of this opportunity but on the contrary the beginning of it.

Consequently, when the FJBC has completed its internal process and to the extent it is appropriate we will relay substantive comments to both the Compact Commission and the WPIC.

Again, the FJBC extends its appreciation to the Governor and the WPIC for this opportunity.

Sincerely,

Jon Metropoulos

cc: Governor Bullock (via electronic mail)
Andy Huff (via electronic mail)
Ranald MacDonald (via electronic mail)
Duane Mecham (via electronic mail)

The Francis Ranch
747 Hi Francis Road
Arlee, Montana 59821
June 27, 2013

RECEIVED
JUL - 1 2013
D.N.R.C.

Mr. Arne Wick, RWRCC
P.O. Box 201601
Helena, MT 59620-1601

Dear Mr. Wick,

First let me say that we need a compact and I favor a compact—just not this one. Specifically, it appears that these negotiations were skewed from the start when the State had to admit that all the water rights belonged to the Tribes, re: Articles III and IV. The negotiations were about how much water the Tribes would give back to the irrigators.

Also, to the States disadvantage was to hire for the RWRCC a brilliant staff attorney who was an advocate for Indian affairs from the Rossette law firm from Sacramento. The perception of conflict of interest loomed large there.

In the case of our family farm, let me say that we have a strong case to claim the water rights on 150 acres under the FIIP including 43 acres of Secretarial water rights all duly filed with the State. This is based on U.S. vs. Winters, U.S vs. Powers, and Colville Confederated Tribes vs. Walton. I hope that everyone who sits on the RWRCC is familiar with these court cases.

I acknowledge that the CSKT with their time immemorial right have a strong claim for increased in stream flows and these flows need to be balanced with the irrigators needs. But it is important to me to be able to keep my ranch's historical water rights. If real estate loses its water right to the Tribes, its value would be reduced, even with the promise by the Tribes to give some water back.

The RWRCC and the CSKT constantly make us aware of the power of the Hellgate Treaty of 1855. Let me say that the existence of the Francis ranch is based on the **Rule of Law,** namely the Dawes Act, The Flathead Indian Allotment Act and other Federal laws that apply. These were well intentioned, at the time, but with 20-20 hindsight were clearly detrimental to the Tribes and they may deserve compensation from the Federal government for their losses, but not by giving up our private water rights. When the Indian allotee acquired the Tribal water right the land value was increased. The non-Indian buyer compensated the allotee for his "Winters" rights so this was not a taking without compensation. Possibly this is not the case for homesteaded lands. The Compact treats homestead lands and former allotted lands the same—they are not.[1]

Our farm/ranch is uniquely suited for flood irrigation and uniquely unsuited for sprinkler irrigation. It is sloping with irregular shaped fields and meadows with obstructions within. Changing from our historical flood irrigation would be impractical, especially on the 1.4 acre-ft. per year as in the proposed WUA.

Let me close by saying that the Francis family has been favored to live and farm in the Jocko valley for 98 years and there is nothing racial to influence my views. To me dealing with the Tribes is like dealing with a large corporation—they have their bottom line and I have mine.

Respectfully Submitted,

Perry Francis

[1] Coleville Confederated Tribes vs. Walton (9th Cir.1981)

Wick, Arne

From: Jon Gravning [jvgravning@hotmail.com]
Sent: Wednesday, June 12, 2013 9:43 AM
To: Wick, Arne
Subject: Concerns about CSKT Water Rights Compact

1. THE MONTANA RESERVED RIGHTS COMPACT COMMISSION EXCEEDED ITS AUTHORITY.
a. The Commission added off- reservation "Stevens Treaty" aboriginal water rights to a federal reserved water rights determination. This is outside the scope of the Reserved Water Rights Commission's mission and charge, which is to negotiate the federal reserved water rights associated with Indian and other federal land in Montana (MCA 2-15-212; 85-2-701). The McCarran Amendment allows the Montana state court to adjudicate and the Compact Commission to negotiate only federal reserved water rights, not off-reservation treaty or aboriginal rights.
i. On-reservation federal reserved water rights originate from the 1908 U.S. Supreme Court decision in the Winters case (207 US 564), and are those waters the United States impliedly reserved when it set aside the reservation. These are Federal reserved water rights. The water right is for use on the reservation and is that amount of water necessary to fulfill the purpose of the reservation. The Commission was established to resolve the federal reserved water rights of Indian and non-Indian federal reservations in Montana.
ii. Off-reservation water claims, or "Stevens Treaty rights" are aboriginal claims associated with that portion of the Hellgate Treaty that incorporated the Stevens Treaty language, which "secured the right of taking fish at usual and accustomed places together with the privilege of hunting, gathering, and pasturing in common with the citizens of the territory" (Article 3, Treaty of 1855). However, they are not 'federal reserved water rights' because they do not derive from the Winters Doctrine 3, and are outside the scope of the Compact Commission without legislative consent (MCA 85-2-701).
b. The FIP Agreement: the Commission Abandoned the State's Statutory Responsibility and Constitutional Duty to Protect State Water Users.
(Montana Constitution, Article IX, Section 3) The Commission acted in a way that waived the water rights of citizens, changed state water law, and waived the state's statutory duty to protect water rights. In this manner, the Commission exceeded its authority by proceeding as if it were legislating, not negotiating.
I. By incorporating into the Compact a Private Agreement (the FIP
Agreement) in which it failed to participate (Compact Article II paragraph 30 and Article III C(1) (a), (b), (c), and (d)), the Commission neglected the State's constitutional duty and statutory responsibility to protect the water rights of all the citizens of Montana (Article IX Section 3).4 II. The Commission allowed the transfer of on-reservation fee land- state-based water rights to the 'block' of water known as the CSKT/U.S.
Federal Reserved water rights, eliminating established priority dates and appurtenance to irrigated lands (Compact Article Iii C(1)(a)) III. By allowing the FIP agreement to sever irrigation water rights from the land, it allowed state water rights to be allocated to an entity -the CSKT/U.S.-- instead of the land. 5,6 c. The Commission created a new water administration system or new "rule" (the Unitary Management Ordinance, or UMO) that enables Tribal jurisdiction over non-members. The Commission erroneously claims that there is jurisdictional vacuum on the reservation and claims it had to create the UMO. However, as decided by the MT Supreme Court, the DNRC cannot issue permits on the reservation until the Tribes' water rights have been quantified. The DNRC is not barred from non-Tribal fee lands within the reservation.7 The UMO establishes a "parallel" politically appointed and tribally-controlled board that has the exclusive power to control the use and award of water rights on some lands within the reservation boundaries, including non-Indian fee land, despite significant precedent and case law that establishes that Indians do not have civil or criminal jurisdiction over non-Indians on the reservation.

d. The Commission fails to acknowledge the open status of the Flathead Indian Reservation and subsequent actions of Congress and federal law opening the reservation to settlement and establishment of considerable amounts of private fee patent land. The Commission erred by accepting a definition of reservation lands as undiminished (Compact Article I 31)9 and then relinquished state water rights attached to legally-established private fee patent land and townships within the reservation to the CSKT/Federal government (Compact Article III C (1) (c)) Ignoring these established state water rights, acts of Congress, and the existence of private patented fee lands ,the Commission agreed to set up a water administration system that is based on the CSKT/U.S. control over the use of surface and ground water on the reservation as if no private land or established state water uses existed (Unitary Management Ordinance, Part I, 1-1-101 (4)).

2. THE PROPOSED COMPACT VIOLATES THE MONTANA CONSTITUTION AND LAWS OF THE STATE OF MONTANA.
a. Commission 'negotiates' provisions of the Montana Constitution. The Water Rights provisions of the Montana Constitution establish that the legislature provides for the administration, control, and regulation of water rights (Article IX Section 3(4)). The Compact instead establishes a new system of water rights administration (UMO) that relinquishes the State's constitutional duty to, and responsibility for the administration, control, and regulation of water rights.
b. The Compact facilitates the taking of property rights by allowing the FIP Agreement to take appurtenant water from farmland which consequently reduces property values and results in a taking through inverse condemnation (Article II Section 29).
i. The Compact Commission failed to consider the consequences of this strategy as directed by the Montana Attorney General in the Private Property Assessment Act (Mont. Code Ann. § 2-10-105 Chapter 462, Laws of Montana (1995)). The law requires state agencies to identify and evaluate proposed agency actions that may result in the taking or damaging of private property.11 Removing any amount of water from irrigated private fee land may result in considerable economic damage.
c. The Compact failed to recognize and confirm existing uses of water as provided in Article IX, Section 3 (1)). Instead the existing uses of water are allocated to the Tribes which eliminate their recognition by Montana's Constitution. The Compact replaces historically recognized 'water rights' with a 'right to receive water' from the Tribes' allocation.

3. REQUIRED FEDERAL AND STATE ENVIRONMENTAL AND ECONOMIC IMPACT ANALYSES HAVE NOT BEEN COMPLETED, AND WILL BE REQUIRED BEFORE AN INFORMED DECISION CAN BE MADE BY THE LEGISLATURE a. The scope of the Compact and magnitude of water involved guarantees widespread economic and environmental effects for which state and federal environmental impact studies are required. The Compact's Water Abstracts show that the amount of on-reservation water claimed by the CSKT/U.S. is over 20 million acre feet, and off-reservation the claim exceeds 30 million acre feet. The scope of the Compact covers all of Northwestern Montana and potentially impacts more than 350,000 people.
As discussed with the FIP agreement, the Compact has the potential to reduce the amount of water applied to farmlands, affecting farmland production, tax revenue, land value and ultimately, the stability of the family farm and agricultural land base. Off reservation, the chance that basins may need to be closed poses even more potential impacts across a larger region. The impacts of the UMO, as a new administrative 'rule'
for water, must be analyzed. Before an informed decision can be made by the Legislature to pass a Compact of this scope and magnitude, both environmental and economic impact studies should be completed.
i. The National Environmental Policy Act (NEPA) requires an Environmental Impact Statement for any major federal action (42 USC § 4331). Because of the federal government's role as trustee for the CSKT, agreement with the proposed Compact qualifies the proposed Compact is a 'major federal action' thus requiring an environmental impact statement.
An economic effects analysis on the federal side is triggered through aspects of the environmental analysis. One of the significant environmental impacts that will need to be examined is the effect of removing water from farmlands on the hydrology of the reservation, including springs, recharge rates, and ground water discharge to streams.

ii. The Montana Environmental Policy Act (MEPA) requires that environmental impact statements be completed for any major state agency action (MCA 75-1-101). The Compact Commission is housed within and relies upon the technical expertise of the Montana Department of Natural Resources (DNRC), which is subject to the Montana Environmental Policy Act. DNRC may be required to conduct an environmental evaluation of the Compact before the legislature can make a decision on the Compact.
b. Economic Impact Analysis of the Compact 's Provisions are Required due to Private Property Concerns and the Creation of a New "Rule" for Water Administration. Section 5 of the Private Property Assessment Act (MCA 2-10-15) requires an agency to prepare an economic impact if a proposed agency action has private property taking or damaging implications. An Economic Impact Statement on the UMO—as a new rule affecting State citizens- is required also by MCA 2-4-405.

4. FEDERAL RESERVED WATER RIGHTS HAVE NOT BEEN QUANTIFIED AND THE COMPACT DOCUMENTS ARE NOT READY FOR LEGISLATIVE REVIEW a. The federal reserved water rights of the CSKT have not been quantified. The Compact does not specify the quantity of water that is being claimed as a 'federal reserved water right'. First, the only partial quantification was applied to the water rights of the non-Indians on private fee land in the irrigation project (the FIP Agreement). The CSKT then simply took the rest of the water left over with the primary purpose of supporting instream flows for fish. Second, the water abstracts fail to identify specific volumes of water for wetlands, ground water, lakes, and some surface water claims. The Commission has never publically confirmed the volume of water claimed.
b. The Commission has rushed a set of incomplete documents as a 'final compact' to the Montana Legislature for approval. The documents comprising the proposed Compact are incomplete and/or not yet finalized, and legal, technical (see top 5 scientific reasons for rejecting), and constitutional inconsistencies between documents indicate that the proposed Compact concepts have not been well thought out.
i. The FIP Agreement has been put on hold due to litigation over its violations of state law that occurred during the negotiation between the Flathead Joint Board of Control—representing irrigation districts—and the United States (MCA 85-7-1957, 1956; 85-6-1710; 18-11-101).Although renegotiation of the terms of this agreement are possible, any such agreement must be voted on by all the irrigators in the project and then submitted to the District Court for evaluation and approval. The Commission cannot incorporate such agreement into the compact when it violates provisions of Montana statutory law as described above.
ii. The Unitary Management Ordinance is built upon the assumptions of the Commission regarding the legal status of the water rights of fee-patented land; the relinquishment of the State's constitutional and statutory duty to manage state water rights and the Montana Water Court's authority to adjudicate water rights; and the improper grant of jurisdiction to the Tribes over the non-member residents of the reservation.

5. THE COMPACT FAILS TO CONSIDER FUTURE GROWTH AND UNDERMINES THE FAMILY FARM.
a. Future Growth and Basin Closures. The volume of aboriginal water rights claimed off-reservation across the watersheds of northwestern Montana may in fact result in basin closures in the not too-distant future. The federal reserved water right claimed on-reservation just for Flathead Lake -17 million acre feet- may affect the DNRC's issuance of ground water permits in the upper Flathead Basin. Basin closures will thus impact future growth possibilities in communities on and off the reservation. These factors have not been considered by the Commission yet are fundamental to ensuring a 'fair and equitable division of waters between the Citizens of Montana and the CSKT' (MCA-2-15-212).
b. Hurting the Family Farm. Agricultural lands within the reservation on fee patent land, receiving water secured legally from the federal irrigation project, are family farms at the center of the agricultural economy of the reservation and of Lake and Sanders County. The targeted reduction of water to the family farm as allowed in the FIP agreement has a clear potential to degrade farmland and hurt local farm production in terms of crop types and the quality of existing products, which in turn affects the local economy, including food prices. Farmers forced to sell their lands without a secure water right will receive an amount of money nowhere near their investment and improvements.

Wick, Arne

From: Linda Helding [helding64@gmail.com]
Sent: Monday, June 10, 2013 8:08 AM
To: Melissa Hornbein; Dick Barrett; Wick, Arne
Subject: Flathead Water Compact Public Comments

Good Morning -

My name is Linda Helding and I am working with a group of people in the Jocko Valley irrigation district who want to study the effects of the water compact on our district. We only recently organized and had a informational meeting with Dick Barrett which alerted us to the questionnaire which asks for public comments by July 1, 2013.

We only just organized a few weeks ago and as you may know it is difficult to gather people together who are 1: confused about the rhetoric surrounding the compact and 2: are valley farmers who are in fast working mode for the summer season.

I am writing to request an extension of this public comment period. We need at least the summer to organize around whether or not the Jocko District will be willing to sign off on the compact. The opposition to the compact is well organized and they feel they have control of the Joint Board of Control and the CME (operations and maintenance). At this point we are considering moving away from the Joint Board and/or focusing on the upcoming elections in our area. There is precious little time to get public comments that are thoughtful and well written if the deadline remains at July 1st.

Please consider this request as soon as possible as it will help with our organizing tactics.

Sincerely,

Linda Helding
Jocko District
P.O. Box 812, Arlee, MT 59821
helding 64@gmail.com
406 241 4261

RECEIVED
JUN 24 2013
D.N.R.C.

Comments from Stranahan and Helding

Arne Wick, RWRCC
P.O. Box 201601
Helena, MT 59620-1601
Email: AWick@mt.gov

June 19, 2013

Mr. Wick and members of the RWCC:

We are writing to endorse the efforts of the State of Montana, the Federal Government and the Confederated Salish and Kootenay tribes in their efforts to negotiate reasonable water rights compact. One of the main reasons we approve of the Water Compact and the Water Use Agreement is that the United States Government needs to honor the treaties they negotiate with a sovereign nation. We honor the CSKT tribes as a sovereign nation within the Federal Government.

We understand that the Governor of Montana in 2013, with his veto of SB265, extended the suspension of water rights adjudication and required an interim study of the compact. Does this suspension as mentioned in the previous sentence extend to the current efforts of the Flathead Joint Board of Control (FJBC) to litigate over the Water Use Agreement with the CSKT tribes?

In a letter of May 22, 2013 from the NW BIA office in Portland, OR:
"As a result of extensive litigation in the 1980s, federal courts confirmed that the CSKT tribes, by reserving in the 1855 Hell Gate Treaty the exclusive right to hunt and fish on-reservation, were entitled to an on-reservation reserved water right for in-stream flows. The courts found that this in-stream flow reserved water right has a priority date of time immemorial and is senior to the irrigation water rights for the Flathead Indian Irrigation Project (FIIP). The Ninth Circuit Court of Appeals also determined that, even though the Montana general stream adjudication had been commenced in the Montana State courts by the 1980s, the federal courts had jurisdiction to determine the Tribes' legal right to reserve in-stream flow water rights pending the completion of the adjudication." Given the tribes senior rights and reading the water use agreement, 1.4 acre feet of water is guaranteed to each irrigator. There is a rumor floated about by the WMWUA that there are loopholes in the agreement that the tribes could arbitrarily decrease an irrigator's acre feet that is guaranteed. We understand the concepts of soil type, FTAs, global warming (a wet year, a dry year, a normal year) and the senior water rights of the tribes. We ask for understanding of said loopholes if they exist.

The WMWUA and consequently the new FJBC are taking advantage of confusing "water rights" language beginning in 1912, ignoring the above remarks made the regional BIA office letter that the tribes have senior water rights. For instance, some irrigators feel that they have a state water right. We have been told that only adjudicated water rights are water rights, all the rest are water claims. Are there any adjudicated water rights concerning irrigation water out of the Jocko River?

Also, WMWUA claims that the State of Montana will have to defend non-native water users if there is litigation. Is this wishful thinking on their part or true?

We understand that without a ratification of the water compact our right to use irrigation water is undefined and may be undefined for many years into the future. Do you have any comments on our "rights to use irrigation water" without a ratification of the water compact? In a letter of February 19, 2013 from Duane Mecham, Attorney for the regional BIA office, he states:
"From the federal perspective, a failure or significant extension of the negotiations would leave unresolved several critical water resource needs and conflicts on the Reservation that, with or without settlement, will have to be addressed in the near future (hence our comments in the previous paragraph). ...the need to implement efficiencies and other measures within the federal FIIP to conserve

water and improve operations." Will the CME (operations and maintenance for the FIIP) continue without a settlement into the future and what fiduciary responsibilities will the individual irrigators carry to support the CME without settlement money?

We support greater efficiency and conservation with or without a ratification and strongly support the biological compliance for in-stream flows and fisheries work on waters associated with the CSKT tribes. Is there any way that the state and/or federal government can initiate legal efficiency and conservation methods of using irrigation water?

Finally, in the Water Use Agreement between the FJBC and CSKT tribes and the United States Government it is said that the FJBC will conduct a referendum among irrigators regarding the proposed Agreement. The Jocko and Mission Districts have given 90 day notices to remove their commissioners from the FJBC. Will each district, on its own, be allowed to have a referendum among Jocko and Mission irrigators regarding the proposed Water Use Agreement?

We want to thank you for this opportunity to comment.

With Respect,

Mary Stranahan
Common Ground Farm, Arlee, MT 59821
stranie@blackfoot.net

Linda Helding
73124 Graywolf, P.O. Box 812, Arlee, MT 59821
Helding64@gmail.com

Wick, Arne

From: Bev Horner [jhorner@ronan.net]
Sent: Friday, June 28, 2013 9:08 AM
To: Wick, Arne
Subject: Water Rights Compact

Dear sir:

I am a 68 year old Farmer/Rancher who has ranched on the same family farm on the Flathead Indian Reservation my entire life.

I am dependent on approximately 1200 acres of irrigated land. My family and myself are dependent solely on this land to maintain a modest living. Many families on this project are in the same situation as I am.

Sadly there is a well organized group of people who are very actively opposed to this compact. Many of them are transplants to the reservation with small acreages and sources of income other than agriculture.

This group has used half truth's and misinformation to spread their agenda. Many are anti-Tribal and would like to rewrite history. Ignorance is rampant and many refuse to listen to and kind of reason. It is important that off reservation legislators be educated as to the true impacts of the compact. They are being fed many untrue statements concerning the results of the compact.

This compact is the result of years of hard serious work by many concerned deep thinking people.

Thank you for your time.

James R. Horner (Jack)
44325 Cornelius Rd.
Ronan, Montana 59864
406-676-2105

Rick Jore, Montana Citizen
30488 Mount Harding Lane
Ronan, MT 59864

Re: CSKT Water Compact/Solicitation of Public Comment

To: Montana Reserved Water Rights Compact Commission
Chris Tweeten, Chairman
C/O Arne Wick, RWRCC

Cc: Governor Bullock
Attorney General Fox
Interim Water Policy Committee Members, Sen. Chas Vincent Chairman
Sen. Janna Taylor
Rep. Greg Hertz

Dear Mr.Tweeten and Commission Members,

Thank you for your letter dated June 4th notifying me of the RWRCC seeking public comment regarding questions and concerns about the proposed water compact with the federal government and the Confederated Salish and Kootenai Tribes. I appreciate the opportunity to comment, as I do have concerns about and objections to the compact as currently composed.

As the Tribes have indicated that they "want the negotiating parties to follow the tenets of the Hellgate Treaty" (Tribal Chairman Joe Durglo in the Char Koosta, March 15, 2012), it seems to me that the commission should be well versed in the Treaty.

I perceive that much of what I disagree with in the compact stems from the commission embracing entirely different assumptions than those of myself regarding the actual intent and language of the Hellgate Treaty and of Congressional acts subsequent to the Treaty.

The first "recital" in Art. I of the compact states **"WHEREAS, pursuant to the Hellgate Treaty of 1855, 12 Stat. 975, the Confederated Salish and Kootenai Tribes reserved the Flathead Indian Reservation;"**

I submit that this statement is not a correct understanding of the Treaty and that, in fact, the United States **"reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead Nation,..."** (Please see Art. I & Art. II of the Hellgate Treaty.)

If the CSK Tribes "reserved the Flathead Indian Reservation," it is not logical that the United States would have authority to place other tribes or bands of Indians upon it.

Other Treaty language also makes the premise of this recital illogical. Art. VI, for example, says **"The President may from time to time, at his discretion, cause the whole, or said portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes,..."** If the tribes reserved the reservation, how could the treaty grant such authority to the President?

Also, Art. VI of the Treaty states that it is **"on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas,..."** which establishes that **"the residue of the land hereby reserved,...after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States."** Again, this Treaty language simply is not consistent with the premise of the first sentence in Art. I of the Compact.

If the Treaty was an expression of the tribes reserving land for themselves, why does the language of the Treaty express such authority, as is mentioned above, as belonging to the President and the Congress? Why does the federal government hold tribally "owned" land "in trust" if the tribes did indeed "reserve" it for themselves? Moreover, why would the Treaty include such language as is stated in Art. VIII: **"The aforesaid confederated tribes of Indians acknowledge their dependence upon the Government of the United States,..."**

Additionally, the Enabling Act of Feb. 22, 1889 (referenced by and incorporated into Art. I of the MT Constitution) articulated clearly that the United States exercised "absolute" jurisdiction over the "reserved" land. Both documents state that **"...all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States,..."**

The erroneous premise expressed in Art. I clause 1 of the compact...and ignoring or neglecting actual Treaty language and Congressional Acts subsequent to the Treaty...appears to be the basis for the definition of "Reservation" in the compact. Art. II Sec. 30 states: **"Flathead Indian Reservation" or "Reservation" means all land within the exterior boundaries of the Indian Reservation established under the July 16, 1855 Treaty of Hellgate (12 Stat. 975), notwithstanding the issuance of any patent, and including rights-of-way running through the Reservation."**

To embrace this definition denies the reality of current land ownership within the boundaries of the reservation arising from the consequence of Congressional acts and the fact that many Indian "allottees" eventually sold their land to non-Indians.

I would also submit to you that for the State of Montana to agree to such a definition places the State in violation of the above mentioned Enabling Act and Art. I of the MT Constitution because the State is, in fact, exercising authority over supposed "reservation land" by application of its taxes and laws to lands within the exterior boundaries of the reservation. Would the commission actually argue that it is appropriate for the State of Montana to define "Flathead

Indian Reservation" in one fashion for the purposes of levying taxes on fee property and non-Indians and in an entirely different fashion for the purposes of denying those non-Indian citizens "equal protection" in regards to the administration of their water rights?

In short, this definition disregards the fact that the reservation has been diminished; and the State of Montana has attested to the fact of this diminishment by exercising taxing and regulatory authority within the boundaries of the reservation.

Did the commission consider the **Flathead Indian Reservation Allotment Act of 1904,** presumably based on Art. VI of the Treaty? The title of this act states: **"An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment."**

Did the commission give any consideration to the language of the Indian Reorganization Act of 1934? While this act stopped the practice of allotment "in severalty to any Indian" and made a significant change in federal Indian policy, it clearly **did not "restore" "any lands so withdrawn" from reservation status back to tribal ownership.** Section 3 of the act states: **"The Secretary of the Interior...is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened ...Provided, however,** ***That valid rights or claims of any persons to any lands so withdrawn...shall not be affected by this Act:..."***

Since the Flathead Indian Reservation Allotment Act of 1904 opened for sale and settlement the entirety of the "surplus lands" after allotment, the "reservation" established under the Hellgate Treaty actually no longer existed until 1934, when "remaining surplus land" was "restored" to "tribal ownership" by the Indian Reorganization Act. It could rightly be said then, that the Reservation that exists today is not the reservation established by the Hellgate Treaty but rather the reservation which was "restored to tribal ownership" in 1934.

Wrong assumptions lead to wrong conclusions and I have to believe that the commission, by agreeing to the definition of "Reservation" contained in the compact, believes that its endorsement of a "Unitary Management Ordinance" and the creation of a "Flathead Reservation Water Management Board" are justified. I strongly disagree.

The UMO is, in my opinion, the most objectionable aspect of the compact. As Chris Tweeten has publicly, and correctly, stated, the UMO "**removes non-Indian rights on the reservation from the jurisdiction and control of the state..."**

Placing non-Indian, tax paying, state citizens under the authority of this Board, which **"shall be the exclusive regulatory body of the Reservation for the issuance of Appropriation Rights and...for the administration and enforcement of all Appropriation Rights and Existing Use"** is a clear violation of the "equal protection" clause in Art. II Sec. 4 of the Montana Constitution.

This Board is 2/5 appointed by the Tribal Council and 2/5 appointed by the Governor, with those four choosing the fifth member. Non-Indian state citizens within the boundaries of the reservation have one vote--their vote for Governor--with which to influence the makeup of this Board. State citizens who are also tribal members have two votes--one for Tribal Council and one for Governor--with which to influence the makeup of the Board. In short, those with a tribal interest have influence over the appointment of all five members of the Board while those with non-tribal interests have influence, at best, over three of the five. It is possible, of course, for the entirety of the Board to be determined by individuals favorable to tribal interests.

It is beyond my understanding how anyone could argue that this is not a clear diminishment of representation, and therefore, **less "protection of the laws,"** (Art. II Sec. 4 Montana Constitution) **for non-Indian Montana citizens who reside within the boundaries of the reservation as opposed to those non-Indian Montana citizens who reside without the boundaries of the reservation.**

These non-Indian Montana citizens are subject to all applicable state laws and taxes in a fashion no different from all other non-Indian Montana citizens. In light of that fact, the legislature has no authority or right to place these citizens, simply by reason of where they reside and own property within the state, under the authority and jurisdiction of an autonomous board that is, at minimum, 2/5 determined by another (sovereign?) government, to administer something that its own Constitution specifically and explicitly establishes as a legislative duty to all citizens. (Art. IX Sec. 3)

Regarding this legislative duty, I am compelled to remind the commission of the actual language in Art. IX Sec. 3 of the Montana Constitution: **"The legislature shall provide for the administration, CONTROL, and regulation of water rights..."** As pointed out above, Mr. Tweeten has publicly stated that the compact **"removes non-Indian rights...from the jurisdiction and CONTROL of the state."**

In light of this clear language in the Montana Constitution pertaining to "control" of water administration, any argument that the UMO and the creation of a "Flathead Reservation Water Management Board" fits within the context of Art. IX "as long as the legislature agrees to it," borders on the absurd.

By endorsing the current compact and asking the legislature to ratify it, the commission expects legislators to disregard Art. I, Art. II Sec. 4 and Art. IX Sec. 3 of the Montana Constitution and to violate their oath of office. This is an unreasonable and, I would say, inexcusable, expectation of legislators.

In conclusion, I understand that some contend, including the Tribes, that Congressional Acts allotting and selling original reservation land was not within the context of the Treaty but rather a violation of it. That appears to be the assumption underlying the compact because, as I mentioned, these Acts are disregarded and ignored.

If the Tribes were, in fact, defrauded, it should also be acknowledged that non-Indians who

purchased land and settled within the boundaries of the reservation were also defrauded by the federal government as they were invited here under false pretenses. It should also be understood that the United States federal government is responsible for the fraud, not the non-Indians who happen to live and own property within the boundaries of the reservation. These non-Indian Montana citizens should not be punished by a diminishment of their citizenship rights for actions entirely attributable to the federal government.

Sincerely,

Rick Jore

Wick, Arne

From: Steve Killorn [skillorn@montrailbison.com]
Sent: Wednesday, June 12, 2013
To: Wick, Arne
Subject: Compact

Many comments and questions were submitted in 2012 and 2013 and never addressed. I feel they were never even heard because an agenda was being followed ,theirs. At this point it is a start over process with all parties involved to reach an agreement. The questions and the specifics of them have been in the Commissions hands all along.

Wick, Arne

From: Lake Farms (Susan Lake) [jlake@ronan.net]
Sent: Wednesday, June 24, 2013
To: Wick, Arne
Subject: Compact

We farm over 1000 acres in mission valley. If this compact fails we will not have the water to continue farming in a way that will keep us financial viable. The compact and WUA provide us with certainty that we will have the water we need. The compact also provides for a locally controlled management board that will control water development on the reservation. This provides stability as water resources are developed for both tribal and noon-tribal residents. Without this compact our future is uncertain.

Wick, Arne

From: Charla Lake [charlalake@hotmail.com]
Sent: Wednesday, June 26, 2013 10:37 AM
To: Wick, Arne
Subject: Water compact

To Whom it May Concern:

My family farms in the Mission Valley. I teach fifth grade. I am concerned about what happens to our community if the compact does not pass. I definitely support the compact. It protects our family farm and harmony in our community.

Charla Lake
Ronan fifth grade teacher

Wick, Arne

From: jack lake [lakefarms@ronan.net]
Sent: Wednesday, June 26, 2013 10:34 AM
To: Wick, Arne
Subject: Water Compact

To whom it may concern:

My family has farmed and ranched here since 1934. What water will be left for irrigation if the compact does not pass?

At this point we cannot even plan next years crops.

Jack Lake

Wick, Arne

From: jamie lake [jamielake06@gmail.com]
Sent: Wednesday, June 26, 2013 10:46 AM
To: Wick, Arne
Subject: CSKT Water Compact

My husband and I are just beginning to farm. We are worried our future will be drastically changed with no water compact.

What will it cost us as individuals in the adjudication process against the tribes claims? What does that process look like.

That is our concern. With the compact we know we have a future. Without it we don't know what we have.

Jamie Lake
Ronan, Montana

June 27, 2013
Montana
76-7783

RECEIVED
JUL - 1 2013
D.N.R.C.

Arne Wick, RWRCC
P.O Box 201601
Helena, Mt. 59601

Dear Arne Wick,

This letter is concerning the Water Use Agreement between the Tribe and the J.B.C. Due to the action of the Western Mont. Water Users Assn. and their disapproval of the agreement, and their majority on the J.B.C. Board, it has left irrigators with a lot of uncertainty.

In my opinion, without a water use agreement the O. & M. charges are going to increase significantly, and if they choose the litigation route it will be in courts for many years.

I believe, if a pole were taken with the facts presented the majority of the irrigators would be in favor of the water use agreement, negociated by the Compact Commission.

Sincerely,

Roy Lake

A life long resident and Irrigator of the Mission Valley.

Wick, Arne

From: Jerry McGahan [arleeart@blackfoot.net]
Sent: Sunday, June 30, 2013 2:54 PM
To: Wick, Arne
Subject: the reservation water compact

Dear Arne Wick:

My wife and I have lived on the reservation for the last forty years. We live on the Jocko River and share a boundary with the Arlee Pow Wow grounds. We pay an irrigation tax.

We are grateful to live on the reservation and have gained much from being here. Some two or three decades ago, we were members of the Flathead Resource Organization and worked with many tribal people on opposing projects we deemed threatened the natural world here. The first of these projects was in fighting the proposed Knowles Creek Dam. In one of our projects, we set out to study the watershed here, only to discover the tribe had already gathered all the data we thought was important. The state people who came to advise were as amazed and impressed as we were.

We support the proposed compact as is. We trust the tribe. We feel the ongoing litigation gains nothing but bad feeling, costs an incredible amount of money, puts the whole economic system here in limbo, and in the end would be futile.

Thank you for considering our feelings on this.

Sincerely,

Jerry and Janet McGahan
Box 71
Arlee, Montana 59821
(406) 726-3480
arleeart@blackfoot.net
JerryMcGahan.com

RECEIVED
JUN 27 2013
D.N.R.C.

June 24, 2013

Chris Tweeten, Chairman
Montana Reserved Water Rights Compact Commission
State of Montana
PO Box 201601
Helena, MT 59620-1601

Arne Wick, RWRCC
PO Box 201601
Helena, MT 59620-1601

Mr. Chris Tweeten, Mr. Arne Wick, and Reserved Water Rights Compact Commission:

Thank you for the opportunity to voice our concerns with the proposed CSKT Water Compact. We are irrigators who live within the boundaries of the CSKT Reservation. This proposed compact, as written, will affect our livelihood (ranching) and will take the future away from our children and grandchildren. We have trusted our elected government officials represent all of Montana citizens and will not violate their oath to uphold the Constitution and the laws of the State of Montana. We are hoping you will view and consider our concerns with an open mind.

Some of our concerns:

1) Montana cannot bargain away its statutory and constitutional obligations to administer water rights within the State of Montana. Article IX, Section 3 of the Montana Constitution confirms Montana owns all surface, underground, flood, and atmospheric waters within the boundaries of the state and are the property of the state for the use of its people and charges the State with administration, control, regulation of water rights and a system of centralized records. We do not want to be under Tribal jurisdiction to have them administer a "right to water delivery". (Article X, paragraph 25 (h) This is not the same as a water right. We do not support any transfer of administration of the federal irrigation project to the tribe for the simple fact that we are not tribal members and would not have any say in issues that would arise, basically "taxation without representation."

2) The water rights we now have are appurtenant to the land upon which they are beneficially used. Our water rights must stay (appurtenant) with our land...not Running With the Land. (Article VII, paragraph 16) The tribes do not own all the water on the reservation...in fact they do not own all the land within their reservation boundaries. Without water rights, the lands of irrigators would be worth a fraction of their current values.

3) We would like to know what the "instream flow" was before the irrigation project was put in? Without the irrigation project many of these wetlands and creeks would soon dry up. How much water do the fish need? We are not against maintaining water for the fish, but are against the fact that excess water (conserved efforts by the irrigators) does not go back to benefit the irrigators, but goes to the tribe (Article XVI) so they can than send it downstream in Instream Flows or Lease or Sell it? We wonder if this is even legal?

4) The proposed 1 acre foot of water (1.4 max) is not sufficient for raising a grain or hay crop, or for that matter even irrigating pasture land. By the time an audit process for up to 2 acre feet would be completed, our crops would be dried up. As water users we need certainty and know that our irrigating water will be there, and not worrying that in a dry year (or any year) a Call will be made and we lose. And...if there is enough water for all 130,000 acres under irrigation to have 2 or 3 acre feet it should be there now, without an audit process. How much water is there to deal with? We need to know this before a fair quantification of water can be made. We have checked with other irrigation districts and are told they are receiving a quota of 4 feet for the same amount of money??

5) We do not need another water management ordinance. The Unitary Water Management Ordinance is very unfair. Instead, the water rights on the Flathead Indian Reservation must be administered by Montana. And...instead of water measurement devices the money should be used for equipment and materials to improve the canals and ditches under the federal irrigation project on the Flathead Indian Reservation.

6) We would like to add that this is not a racial issue. We have tribal members in our family. This is an issue of our future and the future of our children and grandchildren that wish to remain ranching.

The current compact is very lengthy and complicated. Everything should be spelled out in a contract, there should not be any phrases "To Be Developed". And...most of all, a new negotiated compact <u>must</u> follow the Montana Constitution. Thank you for reading and considering our concerns.

Sincerely,

Kurt McPherson
Elaine McPherson

pc: Governor Steve Bullock
Attorney General Tim Fox

DONEY | CROWLEY | PAYNE | BLOOMQUIST P.C.

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July 1, 2013

Mr. Arne Wick
Montana Reserved Water Rights Compact Commission
PO Box 201601
Helena, MT 59620-1301

Re: *Comments to Proposed Montana/CSKT Water Rights Compact*

Dear Mr. Wick:

My office represents Monroe Property Company, LLC ("Monroe"). Monroe owns real property and water rights from the Blackfoot River and tributaries within Water Basin 76F. Monroe's water rights support the irrigation of approximately 2,000 acres in the Blackfoot River basin. On behalf of Monroe, we appreciate the opportunity to comment on the proposed CSKT/Montana Water Rights Compact ("Compact") and in particular the report the Compact Commission is preparing pursuant to the Governor's veto letter for SB 265.

Monroe's main concern with the proposed Compact concerns Art. III. D.5, and the proposal to transfer and use Water Right No. 76M 94404-00 as an instream fishery right. This right is the former "Milltown Dam" water right historically used for hydropower production.

Monroe's concern with the proposal for the former Milltown Dam right is two-fold. First, the Compact expressly sets forth specific call provisions for the right against junior users which has historically not occurred. Prior to this Compact, Monroe is unaware that 76M 94404-00 was at any time used to assert an upstream call on junior water rights. As such, while the priority date claimed is December 11, 1904, and the flow rate claimed is 2,000 cfs, actual use of the right has never asserted priority over other rights on the Blackfoot River or any tributaries of the river upstream. As such, Monroe questions whether this right may lawfully be exercised in priority over upstream rights when actual historic use has been exercised in a contrary manner.

Second, the actual historic beneficial use of the right for hydropower production is unclear. While the "paper right" is for 2,000 cfs, Monroe believes the Compact Commission should assess and analyze actual historic use. In other words, what quantities of water were actually used for hydropower production, and during what period of the year? Because the production of hydropower at the site was historically not a "run of the river" operation, the quantification of the

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406-443-2211 Fax 406-449-8443

right should be accurately assessed prior to authorizing use of the right as an enforceable instream flow right.

While the Compact purposes to both adjudicate and legislatively authorize a change in the purpose of the former Milltown Dam right, Monroe believes information or analysis of the underlying right should be provided to the public and demonstrated. In effect, the Compact will legislatively confirm the elements of the underlying paper right and authorize a change of purpose outside of the normal adjudication or DNRC processes. At a minimum, the actual enforceable elements of the right should be reviewed and demonstrated to those who will be affected.

Finally, Monroe would suggest the Compact Commission consider additional modifications to the call provisions under the Milltown Dam right. Because the right has never been used to curtail upstream junior uses, allowing the right the "spring" into effect will adversely affect upstem juniors. Monroe would suggest the Commission consider additional provisions which would lessen adverse impacts of a call. One provision could consider limiting any call to the mainstream of the Clark Fork River rather than at separate points above on the Blackfoot River and the Clark Fork River. The approach may reduce potential adverse effects up either source, and if coupled with a proper understanding of historic use, may lessen impacts to upstream water users.

Again, on behalf of Monroe, I appreciate the opportunity to provide comments. Monroe would request the Compact Commission consider additional provisions for Art. III.D.5 to lessen the impacts to water users upstream of the former Milltown Dam hydropower site. If you, or the Commission, have any questions concerning these comments please feel free to contact my office.

Sincerely,

John E. Bloomquist

cc: Kirby Christian, Esq.
Tracy Turek

1940.001 – PL 143811

PO Box 7186 Missoula, MT 59807 (406) 543-0054

27 June 2013

Arne Wick
Reserved Water Rights Compact Commission
P.O. Box 201601
Helena, MT 59620-1601

Comments on proposed CSKT water compact

Dear Mr. Wick:

Montana Trout Unlimited appreciates the opportunity to comment at Chairman Tweeten's invitation on the proposed water compact between the State of Montana and the Confederated Salish and Kootenai Tribes. We are extremely disappointed the 2013 Montana Legislature failed to ratify this reasonable accord. Though the invitation from Chairman Tweeten primarily solicits questions, we thought it appropriate to share observations we have of the compact, the process that produced it and the unfortunate atmosphere surrounding discussion of the proposal.

General comments

Though we are disappointed several elements originally proposed by the State or the tribes were eventually dropped, Montana TU strongly supports the Compact that was reached between the State and Tribes. The accord resulted from a rigorous, good faith effort among the three sovereigns. We attended numerous public meetings and negotiation sessions. We communicated on a number of occasions with compact commission members, commission staff and the tribes. We found the negotiations to be transparent and provided for ample public involvement during all steps of the discussion. The product is balanced, and, importantly, it succeeds in achieving the common objective of reaching an agreement while protecting the legitimate rights of all existing water users. Critically, as devised, the Compact, if ratified and implemented would resolve the high degree of uncertainty currently surrounding water development on the Flathead Indian Reservation. In addition, it would reduce the complexity and expense of adjudication of water rights in Montana. Further, it would have resolved forever, the significant claims the tribes have to water off reservation as a result of the Stevens Treaty.

Having witnessed and/or spent much time engaging in development of previous compacts – including the Crow Tribal Water Compact and the compact resolving the reserved water rights of the U.S. Forest Service – we can attest that the resources, time, energy and attention to the public dedicated to development of the CSKT Compact were much more exhaustive. All three teams did a very good job representing their individual interests. It is important to note that the CSKT conceded far more than they probably could have, given what could reasonably have been their legitimate claims to water in Montana not only west of the Continental Divide, but also in the upper Missouri River basin.

The Compact

We support the proposal for on-reservation water rights. The proposals for establishing instream flow rights for the tribes on waters managed by the Flathead Indian Irrigation Project, non-project waters on reservation and headwater streams were eminently reasonable. They protected existing uses, protected headwater areas from future development – thereby benefitting existing users, and, predicated perfection of water rights on investment in conservation (FFIP waters) and statewide adjudication (non-FFIP reservation waters). Further, the proposal resolved the enormous uncertainty – and economic complications – of existing and future groundwater water rights. The proposal for the governing body for unitary management of on-reservation rights was adequately balanced and reasonable.

We are baffled why this proposal attracted so much derision and violent opposition. We are not unsympathetic to the legitimate concerns of existing water users. However, based on testimony we witnessed, media reports and alerts and website information from opponents, it appears some irrigators were worried they would not get water they currently use that they don't necessarily have a water right for, or that they bowed to fear mongering, or, at worse, that they are flat out prejudiced against the tribes. Certainly testimony and letters to the editors and news reporting indicate that some non-tribal irrigators and their supporters will never accept the legitimacy of the Hellgate Treaty, tribal sovereignty or case law related to tribal reserved water rights. But those are settled issues and not part of development of this compact. It is especially disappointing these issues found traction with some members of the Montana Legislature, a few who also seemed genuinely baffled by water law and the concept of tribal reserved water rights.

We are disappointed by the Compact's off-reservation proposals. But not disappointed for the same reasons some opponents cited, such as folks in the Bitterroot – including county commissioners – who cited unfounded concerns that the tribes would seize valid existing private water rights, or, as the deputy county attorney in Ravalli County stated publicly, that the Compact would somehow allow other Indian tribes to file claims for water rights in the valley, so watch out.

Our disappointment stems from:

1. Removal from the proposal of two basin closures in Lincoln County that would not have granted the tribes any water rights, but instead would have protected from future claims the interests of existing water right holders, including some folks who opposed the closures. We are curious why proposals that would actually benefit existing users in over-appropriated basins were dropped.

2. There was no explanation on why tribal claims for tributaries in the Kootenai and lower Clark Fork were also dropped – even though they would have been junior in priority to all existing water rights, and, much like the claim for the Kootenai and Clark Fork main stem, would have been subordinate to FERC licenses and operations at federal dams.

3. There was no explanation on why other proposals seemingly acceptable for all three parties, such as flow protections for tributaries in the Swan River drainage were dropped in the final compact. Again, these elements would have had no effect on existing users.

4. We proposed that the instream flow water right for the co-managed right at Milltown include an enforceable flow of 1,300 CFS. It was based on the fact that FWP's instream flow reservation claim for the Clark Fork at Bonner was 600 cfs, and, the Murphy Right for instream flows at Bonner to protect fisheries on the Blackfoot is 700 cfs. Basically, we proposed a flow that reflects what the professionals in FWP long ago deemed the minimum necessary to protect the fishery in the two rivers. However, the negotiated amount was only 1,200 cfs, with only 500 for the Clark Fork (with a very junior priority date of 1905). If a co-managed fishery right was the priority at Milltown, 1,300 cfs should have been the minimum agreed to by the parties in the Compact. But for some reason they settled on a lower, unscientific flow. Still, for the sake of consensus, we didn't oppose the proposed flow.

It appears most of these items, and others, were dropped simply at the insistence of legislators and others who didn't appear to use objective legal or technical reasoning, but instead they resorted to ideological or political rationales.

The Process

Given the complexity and scale of the proposed compact, public engagement required step-wise dialogue with the public. Unfortunately, the sincere efforts of the Compact Commission and the tribal and federal teams to accomplish this were constantly confounded by near mob rule and ideological posturing. Amplifying this point is the fact that at public meetings in the last two years, the same people would get up meeting after meeting and give speeches about the same points – many of them irrelevant or not founded in fact, including some posed by local legislators. It also appeared that many critics were not reading the documents. Yet the negotiating

team, and Compact Commission, patiently lent an ear no matter how off the wall the comments were.

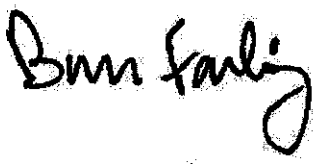
To be fair, the compact is complicated and at times staff and negotiating team members could have been more colloquial in their explanations and in the materials they presented. However, to many opponents, it wouldn't have mattered. No matter what was said or demonstrated, or how long the public review period was, to them the compact would still be the product of some sort of conspiracy. At times, the public exchange was painful to watch.

Montana TU greatly appreciates the effort and the patience demonstrated by the negotiating teams. It is a shame the Montana Legislature – led by many legislators in the western part of the state – don't understand, or care about, the implications of not ratifying this Compact. They certainly were afforded enough opportunity, if indeed they took the opportunity to listen objectively.

The result of their rejection is this: Though the Montana Legislature has delegated to the Montana Reserved Water Rights Compact Commission the authority to negotiate reserved water right compacts on behalf of the State, the 2013 Legislature still decided to nix the CSKT accord with little debate. The 2013 Legislature now has the distinction of being the first Legislature in the history of these types of negotiations in Montana to ever nix a water compact negotiated by the very people it assigned to the job, which happened to include members of its own body. The uncertainty and future expenses now facing the state, existing water right holders, the tribes and future water development in the Flathead because of the legislative rejection of the compact – developed over many years with plenty of opportunity for public review, especially if some legislators had been doing their job monitoring the process on behalf of their constituents -- is considerable and potentially very harmful. It is very disappointing.

Again, thanks for the opportunity to provide our thoughts.

Sincerely,



Bruce Farling
Executive Director

Gerald Mueller
440 Evans
Missoula, MT 59801
(406)543-0026

RECEIVED
JUN 20 2013
D.N.R.C.

June 17, 2013

Chris Tweeten
Chair
Reserved Water Rights Compact Commission
P.O. Box 201601
Helena, MT 59620-1601

Dear Chris:

In your letter of June 4, 2013, you noted that Governor Bullock has directed the Reserved Water Rights Compact Commission (RWRCC) to prepare a report addressing questions raised during the 2013 Legislative session about the Confederated Salish and Kootenai Tribes (CSKT) water rights compact. You asked for questions and issues regarding the compact. While I do not have questions about the compact per se, I do have a suggestion for the report directed by the Governor. The report should explain the status quo regarding water right administration in the absence of a compact for that portion of Montana in which the CSKT are likely to file claims.

My understanding is the status quo includes the following:

- Surface and ground water permitting, including water right changes, on the CSKT Reservation by DNRC will continue to be suspended pursuant to the Montana Supreme Court decision in 1996 prohibiting DNRC permitting until the Montana Water Court completes the adjudication of the CSKT water rights.
- The CSKT have no system in place for issuing water right permits, including changes, on the reservation.
- The lack of any permit system means that water cannot be legally developed on the Reservation.
- In the absence of a CSKT Compact, the Bureau of Indian Affairs may adjust water supplies and water duties, implement conservation measures and measurement requirements and address structural improvements to the Flathead Indian Irrigation Project to prevent entrainment of fish species pursuant to the Endangered Species Act.
- No water is reserved in the Clark Fork River basin for future water uses.
- Permitting by DNRC of new water uses and changes to existing uses off of the CSKT Reservation is subject to the adverse affects test for both CSKT water rights and lower Clark Fork Basin hydropower water rights.
- The State of Montana owns water rights formerly used for hydropower generation at the Milltown Dam. This state-owned instream water right at Milltown Dam creates uncertainty for water use in the upper Clark Fork as numerous upstream water rights junior to the Milltown Dam priority date, December 11, 1904, may be subject to a water right call by the state to protect its instream right.
- In the absence of a CSKT Compact, the venue for resolving the CSKT reserved water rights is the Montana Water Court water right adjudication.

- When the CSKT file claims in the adjudication, the claims will be afforded the same status of other claims, i.e., a claim constitutes prima facie proof of its content so that individual water right holders that may be adversely affected by the CSKT claims have the obligation to file and pursue objections to them before the Water Court.

My concern is that the implications of failing to reach a negotiated compact with the CSKT be clearly set forth in the RWRCC report on the compact.

Thank you.

Sincerely,

Gerald

Gerald Mueller

Northwest Montana Association of REALTORS®, Inc.

REALTOR®

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RECEIVED
JUL - 1 2013
D.N.R.C.

June 29, 2013

Mr. Arne Wick, RWRCC
PO Box 201601
Helena, MT 59620-1601

RE: Comments on the Reserved Water Rights Compact

Dear Mr. Wick;

Thank you for making the opportunity to comment on the RWRCC possible. I hope that you receive a good response to your request for input and that the Commission takes the comments into consideration with their future negotiations.

The Real Estate community knows that a Compact must be crafted and adopted on the Confederated Salish Kootenai Reservation. It has been difficult for Realtors to sell properties on the Reservation that have a question mark as to future water rights and dubious existing water rights. The adoption of a fair Compact would greatly benefit all parties in this predicament.

Interested Realtors and staff from the Northwest Montana Association office have been attending Compact meetings for many years and have provided some public comments and asked questions for clarification. In fact, there have been several presentations here at our Association office where members of the Compact Commission have come to speak, listen and answer questions. In the interest of fairness, there have been speakers from groups that oppose the Compact that have also visited to voice their concerns.

When negotiations came to a close and in the ensuing rush to get the document approved by the legislature, it became harder to give a blanket "seal of approval" as there were changes being made at the last minute and it was hard to track what we might be "approving". In light of this, our Government Affairs Committee voted to support Senator Verdell Jackson's bill to extend the Commission's authority for two additional years and to study the situation at a more reasonable pace. Additionally, we were hearing that the FIIP portion of the Agreement was not pulling together as planned and it became doubtful as to whether or not they would have the necessary votes needed in time for ratification by the legislature. Government Affairs Committee members could not in good faith recommend that our organization approve a "work-in-progress" document, or a document that was having difficulty in getting approval from its most affected water users; the FIIP.

I'm hopeful that with some additional time, a well-crafted Compact will be sent out to the public for their careful review and consideration. It is necessary to have the irrigators support, for without buy-in from this segment of the water user community, the document seems destined to fail once again. At this time, we do not have any specific questions as to the Compact itself, but offer a few comments as to what might improve chances for future ratification.

Some of our observations as to why the Compact had a difficult and tempestuous road through the process was that a better "PR" job needed to be done; that a clearer, more concise message needed to be put forth. For example, there were times that some of the most basic of questions were not addressed directly by those on the Compact Commission. Avoiding these basic questions such as "Where is the quantification of the water currently being used on the Reservation?" and direct queries as to the Constitutionality of the entire endeavor bred additional mistrust and feelings of being deliberately misled. Many times during the presentations/public meetings, the Commission members lapsed into "legal-ese" and it became difficult for the layman in the audience to follow.

The only measurement that the public had to judge this Compact, was by comparing it to other Compacts around the state that had been ratified, and those were so vastly different than the CSKT Compact in terms of water rights granted the tribes. There was never a clear explanation as to why the Compacts varied from reservation to reservation. This lead to suspicion and belief that the Commission was giving CSKT everything it wanted throughout the "negotiation" process. The fact that the "negotiations" were never in the public eye also fueled the fires of mistrust. Many of the posted agendas for meetings noted "negotiations", however, when the Commission and tribal teams came to the table, it was obvious that agreements had been come to previously and that all negotiating had been done beforehand. The audience never could get a sense of what had been on the table at the get-go, and what concessions by either party had been made. More transparency on this portion of the project could have dispelled quite a bit of hysteria and fear-mongering. The CSKT could have been a stronger voice in the campaign for approval. It was never heard how much the Tribe had given up in the negotiations, how much they could have taken and how the original Hellgate Treaty gave them additional rights over other treaties that had been made with tribes in the state.

Complicated presentations by engineers and hydrogeologists glazed people over by using mathematical formulas and statistical projections, but did not address issues in plain, clear language. Additionally, many times I heard Commission members say that passing the Compact through the legislature was going to be a "slam dunk" and "a sure thing". This type of attitude contributed to fanning the flames of government conspiracy theories that already abound in this area. And finally, although I understand the timeframe in which you were up against, but the last-minute race to the legislature without the irrigator support contributed to eating away any remaining support that we could rally.

A final suggestion may be to have an impartial professional facilitator assist in the presentations with the public. Having Mr. Tweeten be part of the negotiation team, and then run the public meetings, sometimes gave the appearance that he was orchestrating the flow of information.

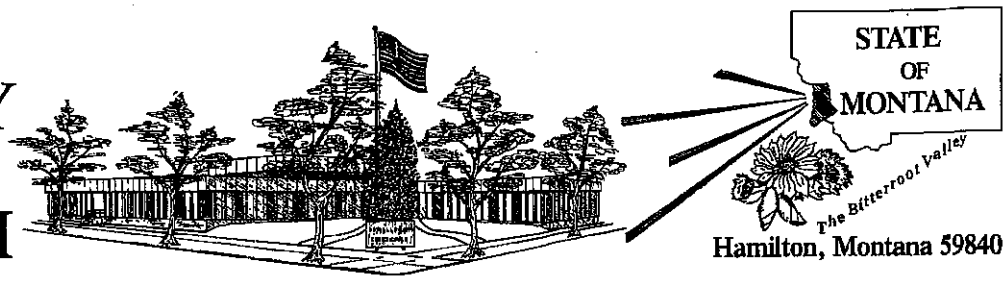
Thank you again for the opportunity to express our concerns. I hope that you take these comments in the spirit in which they were given; not to be obstructive, but constructive in hope that future Compact proposals will be better received and supported.

Sincerely,

Erica Wirtala

Erica Wirtala
Government Affairs Director,
Northwest Montana Association of Realtors

COUNTY OF RAVALLI



Hamilton, Montana 59840

Ravalli County Commissioners
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406-375-6500
commissioners@rc.mt.gov

RECEIVED
JUN 21 2013
L.N.R.C.

June 18, 2013

Arne Wick, RWRCC
PO Box 201601
Helena, MT. 59620-1601

Dear Mr. Wick;

The following are observations and concerns provided in response to Governor Bullock's request for comments concerning the water rights compact negotiated with the Confederated Salish and Kootenai Tribes (CSKT) by the Reserved Water Rights Compact Commission:
These comments focus on that aspect of the compact dealing with the Bitterroot River drainage. The compact purports to give the CSKT in-stream, non-consumptive rights in the Bitterroot River for the alleged purpose of maintaining sufficient flow rates in the late season to preserve the fishery, and for recreational use. Neither of these rights may be valid.

The rights purportedly granted by the proposed compact flow ostensibly from the Hellgate Treaty, which granted the CSKT: "The exclusive right of taking fish in all streams running through or bordering said reservation [and] the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory. . . ." This language has been recognized by courts to grant a water right to support fishing in waters running through the reservation, but this language has not been recognized as granting an in-stream water right to support fishing off-reservation. Because the Bitterroot River is not a tributary to any river running through or bordering the reservation, no in-stream right in the Bitterroot was created.

Indian tribes have, nonetheless, in other instances asserted two bases for claiming an off-reservation in-stream water right to support fishing. First, Indians have pointed to dams and other artificial obstructions that have impeded fish migrations (principally Salmon), thereby reducing the fish population along stretches of rivers where Indians fished before the dams, etc. were installed. Secondly, Indians have argued that a treaty with an Indian tribe should be interpreted from the perspective of the understanding and expectation of the Indians. But as applied to the Bitterroot River, neither of these arguments would support a claim for an in-stream water right.

Unlike the situation on certain rivers in Washington, Oregon and Idaho, the Bitterroot River is not dammed. No artificial obstruction impedes the migration of fish; further, the State provides fishing access to the public at many points along the entire length of the river. Thus, the CSKT cannot claim as a basis for an in-stream water right the need to remove obstructions to fish migrations or to obtain access to the river.

In the Bitterroot, the CSKT only has the right of fishing, in common with the citizens of the Territory. As no citizen of the Territory had the right to assert an in-stream, non-consumptive right to preserve a fishery, neither does the CSKT. Further, it would be difficult to argue that at the time of the Hellgate Treaty, the Indians expected that they would have the right to alter the late-season flow of the Bitterroot in order to improve fishing when the water level in the river drops. The means or technology to do so was not available to the Indians or settlers at the time. It is important to remember that, historically, the Bitterroot River ran nearly dry in the late season each year after the annual snowmelt. (With only about 13" of precipitation each year in the Bitterroot Valley, there is insufficient rain to recharge the river.) The only reason it doesn't now is because water stored in Como Lake and Painted Rocks Reservoir is released when flow rates drop below a certain level. Thus, the Bitterroot fishery has been significantly enhanced, particularly in the late season, by the water storage technology afforded by these reservoirs. Illogically, the compact purports to give the CSKT some sort of co-ownership of the water stored in these reservoirs to support a late-season flow that never existed at the time of the treaty, and for which the CSKT never paid to help develop.

No court has recognized an off-reservation in-stream water right to support fishing under these circumstances. In fact, the district court in our neighboring state of Idaho specifically rejected just this sort of water right claim by Indian tribes there even with more favorable facts than exist with respect to the Bitterroot. See, *In re Snake River Basin Adjudication (SRBA)*, No. 39576, Consolidated Subcase 03-10022, at 47 (Idaho 5th Jud. Dist. Ct., Twin Falls Cnty. Nov. 10, 1999).

As mentioned, the CSKT proposes to satisfy its water-right claims in the Bitterroot by agreeing to co-own in some manner water rights that the Department of Fish, Wildlife & Parks (FWP) already has in Como Lake (1 claim) and Painted Rocks Reservoir (2 claims). FWP acquired these claims by contributing to the development of increased water storage capacities in these reservoirs. The CSKT is not being asked to contribute to the cost of maintaining those reservoirs, however.

Of course the citizens of the Bitterroot Valley are concerned with preserving the fishery in the Bitterroot River and its tributaries, which is why the capacities of Como Lake and Painted Rocks Reservoir have been increased over the years at a considerable cost to irrigators and the State of Montana. Irrigators and FWP have a long history of cooperating to ensure that sufficient late-season water flows down the Bitterroot to preserve the fishery. How will the involvement of the CSKT help or make any difference at all, especially given the fact that under the proposed compact the CSKT has no financial obligation to preserve the resource?

FWP already asserts claims to Bitterroot water to preserve the fishery. The U.S. Forest Service is also filing claims for the same purpose on all tributaries to the Bitterroot. Why would a water

compact be negotiated to give the CSKT the right to do what both state and federal agencies are already doing? If these government agencies represent the interests of the citizens of Montana in preserving the fishery, why aren't the interests of the CSKT in the same fishery adequately protected now? When a governmental agency regulates and provides for the survival of fish, an Indian tribe has no in-stream water right to do the same. Further, the legal authority of FWP to assign an ownership interest in a water right it owns in trust for all the people of the state to a subpopulation of the state is questionable.

In conclusion, the asserted right of the CSKT to demand the maintenance of a certain level of in-stream water flow in the Bitterroot River is not well founded. But even if such a right were found to exist, rights also entail responsibilities. Yet the compact required nothing of the CSKT. If the CSKT is to be granted some sort of co-ownership of FWP's water rights in Como Lake and Painted Rocks Reservoir, it should also co-own the financial responsibility to maintain them. Finally, the water compact never discloses the extent of the compensation that the CSKT will receive from both the state and federal government. The citizens have a right to know this exactly and explicitly before being bound by a negotiated compact.

Sincerely,
BOARD OF RAVALLI COUNTY COMMISSIONERS

Jeff Burrows, Chairman

Suzy Foss, Member

Greg Chilcott, Member

J.R. Iman, Member

Ron Stoltz, Member

Wick, Arne

From: Curt Rosman [curt.rosman@yahoo.com]
Sent: Thursday, June 27, 2013 10:02 PM
To: Wick, Arne
Subject: Proposed CSKT - Montana Compact

Dear Mr. Wick,

My wife and I currently have about 100 acres with 75 +/- irrigated that is affected by the compact. I have attended several of the meetings, spent about 4 hours with Alan Mickelson as he explained the compact to my wife and me, and read all the letters in the local newspapers expressing various opinions about the proposed compact, although I have not read the complete compact.

I understand that there is a limited amount of water available, that the precipitation supply is not a constant, that climate change can affect the supply, that in stream flows are necessary, and that the irrigation system is in need of considerable maintenance. I believe the compact as developed was negotiated in good faith, those representing the irrigators were working in our best interest, and it is an acceptable and workable compromise and deserves to be signed by all parties. I give it my support.

Sincerely,

Curtis W Rosman
34365 Gunlock Road
Charlo, MT 59824

Wick, Arne

From: janette [janette@ronan.net]
Sent: Friday, June 28, 2013 2:23 PM
To: Wick, Arne
Subject: Reserved Water Rights Compact Commission

I have received the letter: Report on the Proposed CSKT-Montana Compact. My husband, Curt Rosman and I, Janette Rosman have 100+ acres in the Mission Valley. I have followed the Water Compact Issues and attended not all of the meetings but a fair amount of the meetings, I have also walked out of the third meeting I attended that the opposition was holding. They were not giving me direct questions and I felt inciting chaos. It is unfortunate that group was had the loudest voice and no-one stood up to them and their ways.

I feel we live here on the reservation and the Water compact that was presented to the legislature was not perfect but it was what I feel the best that could be presented. We live on the reservation, I am not a native American. I do have to trust them that they will not be cutting off our irrigation and water rights. That is really way out there and dysfunctional thinking. The individuals that spent years and years of gathering information and putting the compact together presented the best compact they could. When issues came up the Compact addressed those issues and negotiated with the tribe and resolved many of the concerns.

The Unitary Management Ordinance boils down to one issue. The whites don't want the tribe to control their irrigation water. Well we live on the reservation and having two appointed tribal members and two appointed members by the governor and those four elect a fifth party seems like a fair method to me. I have concerns that the same voices that have created chaos in the Mission Valley would somehow get control of the management like they took over the negotiating process of the Compact, we don't need that type of leadership. I want people who will listen and know the process. It's not just about who is going to control who and our water.

I am in favor of the Compact and would like to see the governor move forward and get the water rights in Lake County resolved. By not getting the water compact passed it will have an effect on the economic conditions in lake County and continue to create a division between the tribe and whites. That is something we do not need. We need to be working together and not against each other. Janette Rosman

Windermere Real Estate/Ronan, Inc.
Janette Rosman
PO Box 489
63506 Highway 93
Ronan, Mt. 59864
406-676-3443 Office 406-261-6792 Cell
Web sites:
WWW.ronanmtrealestate.com
WWW.jrosman.mywindermere.com

Wick, Arne

From: irrigators@blackfoot.net
Sent: Wednesday, June 26, 2013 3:37 PM
To: Wick, Arne; Hornbein, Melissa
Subject: [Fwd: Irrigators for the Compact]

---------- Original Message ----------
Subject: Irrigators for the Compact
From: "Karen Ryan" <kryan@montana.com>
Date: Wed, June 26, 2013 9:53 am
To: irrigators@blackfoot.net

To Whom It May Concern,
We would like to go on record as being for the water compact on the Flathead Indian Reservation. We irrigate 120 ac. in the Ronan area and have no problem with the compact.
Thank you.
Dan and Karen Ryan
44864 Kaiser Rd
Ronan MT 59864

Wick, Arne

From: David Salomon [2705753@gmail.com]
Sent: Tuesday, June 25, 2013 3:34 PM
To: Wick, Arne
Subject: Compact

Hello,

To whom it may concern,

My family has been in Lake county since coming over from Denmark.
We have been irragators for 3 generations.

I am in support of getting along with the tribe land have use of the water and approve the first proposal to agree with the tribe to resolve all issues rather then a long court battle

--
Sincerely,
David Salomon, Realtor
dave.salomon@century21bigsky.com
www.century21bigsky.com
119 Anchor Way
Polson,Mt.59860
(406)883-5387 office
(406)883-5389 fax
(406)270-5753 cell

Wick, Arne

From: Gary Saurey [nfflyfish@centurytel.net]
Sent: Friday, June 28, 2013 3:39 PM
To: Wick, Arne
Subject: CSKT Water Compact

To whom it may concern:

There are so many concerns that have arisen over this agreement that it is folly to believe that they can be adequately addressed in a comment period as short as this. Commentary should be taken for at least 90 days, if not more.

Secondly, the Governer should back off, since it is up to the legislature to approve any agreement. It appears that Jackson and Regier are working on this, and the citizens of Western Montana should be more comfortable with the legislative body to be taking this up.

No off-reservation water rights should be granted to the tribe, as in other compacts negotiated and accepted.

All water rights granted should be subject to Montana Water Law, just as every other citizen of the state.

The negotiations should be limited to the reserved water rights necessary to the reservation, not a dubious claim based on the right to hunt and fish throughout Western Montana.

The vast majority of the citizens of Western Montana should not be treated as second class citizens to the benefit of 5,000 members of the tribe.

The negotiations should be fair, not the State of Montana and its Citizens outnumbered two to one against both the Federal Government and the CSKT.

In my opinion, the process is so broken, that it should start over from square one.

Better to go to court than to accept this unfair transfer of my and fellow citizens water rights to the "sovereign nation" CSKT.

Gary Saurey
406-862-3849

240 Crystal Ct
Whitefish, MT 59937

RECEIVED
JUN 20 2013
D.N.R.C.

F.H. STOLTZE LAND & LUMBER COMPANY

Lumber Manufacturers
Box 1429 Columbia Falls, MT 59912
Phone (406) 892-7005 Fax (406) 892-1612
www.stoltzelumber.com

June 18, 2013

Arne Wick
Reserved Water Rights Compact Commission
PO Box 201601
Helena, MT 59620-1601

SUSTAINABLE FORESTRY INITIATIVE
Good for you. Good for our forests.
Member Company

RE: Report on the Proposed CSKT – Montana Compact

Dear Mr. Wick,

Please accept the following comments on behalf of F.H. Stoltze Land & Lumber Co. regarding the proposed CSKT – Montana Compact.

WOOD WATER CERTIFIED TREE FARM SUSTAINABLE FOREST
Member Since 1966

Stoltze owns and manages timber land in Lake, Lincoln and Flathead Counties as well as our manufacturing facility in Columbia Falls. We hold a number of water rights in a variety of locations, both ground and surface, for uses ranging from domestic to irrigation to stock water and industrial. Many of these water rights have priority dates of early 1900's. These water rights are essential to the operation of our business and to maintaining the value and use of our timberlands.

We are concerned the negotiated compact could adversely affect our existing water rights and therefore our ability to continue both industrial and timber management operations. We are confident that an equitable solution can be attained if care is taken to preserve the existing rights in addition of those of the CSKT while being cognizant of the future needs of our communities and landowners.

Please keep us informed of progress made on this issue and we look forward to future opportunities to provide input.

MONTANA Wood Products ASSOCIATION
Charter Member

Sincerely,

Paul R. McKenzie
Lands & Resource Manager

June 8, 2013

State of Montana

Christopher Sullivan

166 Montana Highway 212

Dixon, Montana 59831

Governor Steve Bullock

Senator Jon Tester

Reserved Water Rights Compact Commission

Dear Governor Bullock, Senator Tester, and Reserved Water Rights Compact Commission,

Today I received the letter from the State of Montana and the RWRCC, asking for any comments that I might have on the proposed "Water Rights Compact" negotiated with the Confederated Salish and Kootenai Tribes. As a non-tribal rancher and irrigator on the Flathead Reservation, I will do my best to address my concerns with the content of this letter. Please allow me to explain my position by reading the entire content of this document, as my livelihood and my assets will be directly affected by the outcome of any water compact.

During the last year I have attended many public meetings held in Montana by the RWRCC, CSKT, and the Joint Board of Control. At every meeting I attended I was very disappointed that the actual history of the water issue for Western Montana was not addressed. The historical details of settlement, homesteading, and the previous agreements concerning water rights do not seem to influence the RWRCC compact agreement or the ramifications of the proposed compact on so many Western Montana citizens. We can learn from history why so many people are against this proposed compact and are not willing to believe that the documents are the best that we can develop. I will rely on history to justify my sentiments that the present proposed water compact is not in the best interest of the majority of Montana citizens.

I live a couple of miles from the town of Dixon. As you may know, the town of Dixon was named after Joseph M. Dixon. Joseph M. Dixon was very influential in the development of Western Montana as a whole. Joseph Dixon served as an attorney in Missoula, then a representative to the Montana Legislature, and finally as Governor of the State of Montana. During his term as a state representative, it was Joseph Dixon that sponsored the bills to allow the Flathead Indian Reservation to be divided into allotments for the tribes, and later be divided into homesteads for non tribal residents. I would like to quote from the Northwest History Course.org website: **"While in Congress, Dixon worked to have the Flathead Reservation allotted and open to non-Indian settlement. He used a very liberal reading of Article VI of the Hellgate Treaty to support his desires. Dixon emphasized Article VI, which allowed for the allotment of and distribution of Indian lands to Indian families, over Article II, which called for reservation lands to be used exclusively by Indians, and the Flathead bill was**

passed in 1904. This bill and the allotment of Indian lands served Dixon's role as a real estate speculator and served to bring profits to himself and his friends in business".

Later, when Joseph Dixon became Governor, in 1920, he continued to affect major change in the politics of the State of Montana. Historian K. Ross Toole asserts, "*No Governor before nor since has shown such penetrating grasp of Montana's historical and economic problems. No one has so clearly and bluntly defied them.*" The influence of Joseph M. Dixon on the Flathead Reservation that affects us all today, Indian and non-Indian, cannot be denied. The State of Montana and also the Federal Government would like to choose to ignore this fact. But responsibility needs to be accounted for concerning the promises made to both the CSKT and the non-tribal residents of the Western Montana area. Hostility and division was created by Joseph Dixon's decisions to sponsor certain bills that were approved by the Montana Legislature and by President Taft and the United States Congress. Those hostilities and conflicts need to be addressed before any meaningful support of any water compact can move forward.

The RWRCC claims that all water rights in the areas in question are held by the CSKT. This "claimed right" is in direct conflict of previous agreements made on behalf of **non**-tribal residents on the Flathead Reservation. When settlers began to claim and purchase the lands of the Flathead Reservation, it was President Taft who promised, as quoted in the 1910 Lake Shore Sentinel, *"The administration is determined, so far as within its power, to assure sufficient funds to complete these projects (note: Flathead Irrigation Project), and you will have earnest and persistent support of the administration for that purpose... I am determined that these* ***settlers*** *that have gone upon these projects shall not wait any longer for their water than it is possible to get it there, if Congress will give me the money".* Thanks to President Taft's commitment to the settlers of the Flathead Reservation, the Flathead Irrigation Project is a beautiful work of modern engineering.

During the non-tribal settlement of the Flathead Reservation, the Lake Shore Sentinel would give the latest progress regarding the irrigation project being built for the new residents of the Reservation. In January of 1910 the Polson newspaper reported, "***Reservation Water Rights filed upon****: Water Rights for more than 50,000 acres were filed with the county clerk and recorder today by Engineer H. N. Savage, who is in charge of the Government reclamation work on the Reservation. The land to be covered consists of 7 different tracts and is to be watered from the Flathead River, from Mud Creek, and from one or two branches in the vicinity of those two streams, or tributary to them. According to the claims filed, it is the purpose of the Government to erect dams and, in the case of the Flathead River Project, to boar tunnels and to pump the water by turbines to the ditches and distributing pipe lines".* Interlake

Earlier, in 1909, the Lake Shore Sentinel boasted that "The *Sentinel is in receipt of the Reclamation Record, and it is shown the progress on different projects throughout the Northwest. Of the Flathead Project it says: The construction of canals has been continued on the first unit of the Jocko and Mission Divisions, including the building and placing of turnouts,*

bridges, and other structures. Surveys have been continued in connection with farm units and 16 square miles have been mapped; 80 miles of secondary levels have been run, and 3 farm unit plats have been completed".

The Hellgate Treaty of 1855 established the Flathead Reservation, but over half a million acres passed out of Tribal ownership during land allotment that began in 1904. The Flathead Irrigation Project sometimes played a direct part in some of the land passing from Tribal ownership to non-Indian ownership. Operation and Maintenance fees that were charged Tribal members to run the Flathead Irrigation Project were sometimes found delinquent. Many CSKT members were not farmers or ranchers and could not keep up with the charges. Tribal ground was lost as a result of the Flathead Project's "O and M" charges.

A Polson newspaper article in the Flathead Courier of 1910, describes that small acreage lots surrounding Flathead Lake were surveyed and sold to bring in revenue for the Reclamation Project. These substantial funds were to be used for further construction of the Flathead Irrigation Project. These were exciting days for new settlers on the Flathead Reservation as the Headlines read. ***"Lake Front Lands and Indian Allotments":*** *All interested in Polson and the Reservation have been keeping in touch with all the acts Congress relating to it. But nothing since the passage of the bill for the opening has created the interest like Senator Dixon's bill permitting the sale in two and five acre tracts of the lake front land and a portion of the Indian allotments. This not only means many new farms open for settlement but that the Lake front will blossom as the rose, as there is no finer fruit land in the State of Montana , than a Flathead Lake Front."*

Joseph M. Dixon believed and professed that the Native Indians of the Flathead Reservation would and should be assimilated into the dominant culture of society. Aside from his own business motives, his actions in politics displayed these beliefs. Of course, at the time of Joseph Dixon, native people were nearly powerless against such an onslaught of policy and the result of those policies. Joseph Dixon owned the Missoulian Newspaper, a ranch near Ronan, a business in Polson, and had multiple business associations in Western Montana. Farmers, CSKT, and Ranchers that had been anxious to acquire land in the region were, and to this day are, the recipients of the politics of the early 1904 to 1914 era.

The proposed Water Compact that the RWRCC has presented modern day settlers with is attempting with efforts thus far, to award privileges to the CSKT that were taken from them by the State and Federal Government many years ago. The Compact Commission has no authority to try to settle any conflicting promises that were made to both settlers and the CSKT. If the current proposals were to be approved, the lies that were told to both the CSKT and the settlers on the Reservation will be perpetuated. Unfortunately, it was politics in Government that set the stage for conflict; it is only a fair proposal by the Government that will allow the problems to be resolved. Fair treatment for all the parties promised "water rights" need to be addressed. If the RWRCC continues to try to push the existing compact there will be continued distress in our

communities and in our personal businesses on and off of the Reservation. This distress will also be prevalent in a wide area outside of the Reservation.

Revisions of the Water Compact that were released since November 2012 have not been substantial. At each and every public meeting that I attended, the same rhetoric and the same erroneous assumptions were touted by the RWRCC. It was consistently evident by the actions and words of the Commission that their agenda was set and there was little room for healthy discussion.

The CSKT was wronged by Representative Joseph Dixon's plans for the Flathead Reservation. The Montana State Government and the U.S. Federal Government were both wrong to encourage non-tribal people to come here to build communities and make their livings. The CSKT has been compensated by monetary settlements every decade since the 1960's, for land, unfair treatment, and abuse by government power. The settlers of the past and the present, non-tribal settlers of the Reservation, have received nothing in compensation for the mistakes made by the governments that have encouraged them to move here. We have lived in constant threat of our water rights being taken from us. We have paid our taxes, and made positive contributions to society with many agricultural products. Water is the only resource that makes our operations work. Our land, without a true water right attached to it, will be devalued immensely, and, sadly, this will be a place where our agricultural communities will slowly dissolve. President Taft signed the Homestead Bill for the Reservation with no uncertain terms. There was and is abundant water for agriculture and for fisheries. Distributing the water, with a water right appurtenant to the land is the only way that justice for all citizens will prevail.

I implore you as Government officials to take the proper action. Scrap the present compact and start over, taking into consideration all of the historical facts, not simply selective facts that favor a minority. The present compact will serve an injustice to hard working Americans that have trusted in our Governments to do the right actions. The present proposed compact is too lengthy, as well as too complicated. It creates more red tape combined with many convoluted loopholes to be interpreted in various different ways. Interpretation would depend on which party has the best attorney.

Thank you for the opportunity to express my opinion for my family, and for my hopes for my community, and future.

Chris Sullivan, Dixon, MT

P.O Box 386
St. Ignatius, MT 59
June 20,2013

RECEIVED
JUN 26 2013
D.N.R.C.

Dear Mr. Wick,

Subject: Response to proposed CSKT-Montana Compact

As non-tribal irrigators on the Flathead Reservation, we welcome the opportunity to voice our concerns and questions concerning the compact.

1. Where is it actually written that the tribe owns all the water on the reservation?
By law, Montana owns all the water within its boundaries. See Montana Constitution, Article IX,§3.

2. In Mont., when you buy property, you also buy the water rights attached with the property. Act of Congress May 29, 1908.

3. The tribe was ordered to quantify their water in 1908,1995, 2002, & 2004. The tribe did not quantify their water. Does this lack of compliance nullify the treaty?

4. When did instream fishing rights turn into water rights affecting irrigation? No right was given to increase minimum stream flows. This was for established flows on the reservation, not off the reservation. The off-reservation hunting & fishing rights do not transfer to irrigation rights.

5. Tribe water rights, as outlined in Hellgate treaties, do not include the right to sell or lease water downstream. Winters Doctrine: "The tribes Federal Reserve water right is only for the purpose outlined in treaties. No authority exists for the tribe to lease water." Water would be taken from irrigation & leased to Bonneville Power (for 99 years with another 99 year option). This would not benefit the reservation and all its people.

6. "Forever" means permanent, binding, everlasting. We feel that this compact should be revisited and examined every few years (possibly every 10 or 15 years). Times and conditions have a habit of changing. All three (3) parties have the same rules for changing, terminating, etc. Only Montana Water Court has jurisdiction and authority to adjudicate water rights.

The compact, as presently written is not acceptable. It is vague. The wording needs to be concise with no alternative interpretation.

On July 16, 2012, Attorney Brian Shuck sent a detailed list of findings (34 pages) about the compact to Mr. Bill Schultz. Please read all 55 items/concerns and address each item. Changes need to be made in the content of the compact to clarify each item.

As written, this present compact will "give away" valuable water rights. This compact needs to be written with precise language.

These are only a few concerns that we have. We feel that the proposed compact is a good place to start to draft a final and fair compact for all concerned. The next two (2) years (an extension) will help to address many of the concerns of the tribe and irrigators.

Thank you for your time and consideration,

Roy Vallejo Sheila M. C. Vallejo

Roy and Sheila Vallejo

Dear Chairman Tweeten:

Thank you for you and your commissions' solicitation of comments and questions regarding the CSKT Compact negotiations. As you know, I served as Chair of the Senate Natural Resource committee and am currently chairing the Water Policy Interim Committtee (WPIC), this interim. I would like to submit these comments and questions gleaned from before, during, and after the 2013 legislative session about the proposed Flathead Compact, dated February 13, 2013.

The Compact is a document that is complex and far reaching. With appendices, the Compact exceeds 900 pages. The implementing legislation, HB 629, was 132 pages. The Compact proposes to settle not only the water rights of the Confederated Salish and Kootenai Tribes, on and off reservation, to instream flows and consumptive uses now and for forever. It will affect the rights on reservation of approximately 2,000 farms and ranches that are delivered irrigation water by the Flathead Indian Irrigation Project. It would also affect the rights of perhaps 20,000 other Montanans living on the reservation, both tribal members and non-members.

In the absence of time for objective analysis and facts before it's submittal to the 63rd legislature, it was, and still is a natural assumption by many that by settling these rights the Compact poses in some cases immediate and in other cases, at the least, potential impacts to every other water rights claimant and water user in western Montana. While some hoped to enact the proposed compact in the 2013 session, I am sure many policy makers will agree that as they are elected to represent the interests of all of the people of Montana, the responsible decision in the face of not fully understanding the impact of the compact was to defer it until more information could be gathered. Governor Bullock's call for this report is helpful in this regard. But of assurances we have had plenty. What we need and have the time to acquire now is objective, verifiable facts as to the impact of the proposed compact on the State and on its people, both on and off reservation. Having gathered that information, it is hoped the compact will also gather a great deal of well-founded support for some alterations to address the legitimate concerns of Montanans.

In light of the importance of this issue, it clearly has been well worth the dedicated effort of the Compact Commission and the professionals that have staffed it to craft this complex proposal. Thank you for that work. Likewise, as a compact that could eventually be enacted through state and federal legislation and tribal approval providing a permanent resolution of these property rights it therefore warrants careful scrutiny by not only the Legislature, but the public before enactment. I appreciate your efforts to fully explain this compact, including analyses of legal positions and risks, and by providing verifiable facts.

Governor Bullock's veto letter of SB 265, through which the Legislature intended to offer the CSKT more time to file claims in the Montana Water Court in the event the compact was not adopted by the Legislature, called for a report "addressing the questions raised about the compact during the 2013 legislative session." I appreciate the Governor's effort to illuminate what needs to be addressed in the compact and offer these questions and comments to assist the creation of that report.

I understand this report will be presented to the WPIC at our September meeting. I look forward to receiving that hand off of this issue. It is my hope to have the report a week in advance so the WPIC can review it and prepare to ask questions of you at the next meeting. I also look forward to receiving the report for its undoubtedly useful information and will be critical to addressing the legitimate questions Montanans have raise regarding the proposed compact. To the extent you can provide me information in response to these questions prior to that, for example those requesting information contained in memoranda undoubtedly already prepared, I would appreciate it.

I trust the Compact Commission will respond to these questions fully, knowing they are asked both to gain a fuller, objective understanding of the proposed compact and to aid it in communicating to the public valuable information that in my discussions with many concerned citizens seems to be the most pressing to them. This, I hope, will provide the public more objective information and, perhaps, will help bring resolution and ratification of a negotiated compact the majority of stakeholders impacted by this settlement can support.

QUESTIONS AND COMMENTS

1. The inclusion of off-reservation water rights for the CSKT for in stream flows with a time immemorial priority date based on the Hellgate Treaty of 1855 is unique among Montana's compacts and engendered a great deal of interest by the public. Please explain the legal basis for the position that this is a reasonable compromise. Also, please explain the counter argument and its basis. As you know, some have questioned why it would be better to recognize a water right, rather than a right to fish. Please explain both sides of the argument.

2. Regarding number 1, in preparing to negotiate and conduct these negotiations, the Compact Commission must have developed memoranda analyzing the legal arguments regarding the existence and characteristics of the CSKT's extant rights under Article III of the Treaty. Please provide all such memoranda.

3. When the 1855 Treaty of Hellgate was signed, Montana did not exist. Since then, Congress has taken many actions that affect Treaty provisions, directly and indirectly, including allowing Montana to join the United States. What affect do these congressional actions have on the CSKT rights under the Treaty of Hellgate off-reservation? What affect do they have on-reservation? Please provide any memoranda you have analyzing this question.

4. What relevance to the issue of assessing the CSKT's remaining legal rights under the Treaty, on and off reservation, do the litigations they brought against the United States for its violations of the Treaty have? Please provide any memoranda you have analyzing this question.

5. Many members of the public asked what the effect would be on Montanans, on and off reservation, of the fact, under the proposed compact, that the CSKT would own in stream flow water rights. Would tribal sovereign power extend to nonmembers and their actions relating to and affecting water subject to the CSKT water rights proposed in the compact? In what way? Even assuming absolutely no impact on other water users arising from the volumes of water dedicated to the CSKT under the proposed compact, would not their ownership of these water rights result in

some impact? Please explain, both for on and off reservation. Please provide any memoranda you have analyzing this question.

6. Many water users, in particular irrigators, both on and off reservation questioned whether in fact the proposed compact would result in a reduction of water available for their uses. As you know, these questions have been expressed by Montanans from the Flathead Valley, the Bitterroot, the Blackfoot, the Clark Fork and on-reservation. Yet they have received many public assurances, by representatives of the Compact Commission, the United States, and the CSKT that no reduction in irrigation water would occur. Taking each area separately, please explain whether in fact this is correct and, if so, what information the public can consult to be assured of this. Please provide any memoranda you have analyzing this.

7. Many on-reservation residents questioned the legality of the proposed Unitary Management Board and the Law of Administration/Ordinance, Appendix 4. If I understand the objection it is that Montana's constitution requires the state to administer water rights within the state and this proposal unconstitutionally shares that duty with the CSKT. Similarly, the UMB is un-elected and the Law of Administration differs from legal provisions for administering water elsewhere in Montana. Please address these and the related questions regarding both the Board and the Law of Administration.

8. The threat of significant losses in litigation over these water rights figured very prominently in the testimony of advocates for the compact, including Compact Commission personnel, in many public meetings and hearings over the past year. Please provide any memoranda you have analyzing the likelihood of this, whether as to on or off reservation issues. Similarly, the cost of litigation figured prominently in advocates' statements. Please provide any memoranda you have analyzing the likely costs, in all respects.

9. The feared effects of the proposed compact, especially through Appendix 3 concerning the irrigation project water, raised almost as many concerns by citizens as off-reservation in stream flows. Notably, both tribal member irrigators and nonmember irrigators were publicly in opposition. Yet they have been assured the compact, through the project Water Use Agreement, would not reduce the amount of water historically made available to them for irrigation. Please help me understand the factual basis of that assurance. As noted in opening, the only responsible way for Legislators to vote for this proposal is for them to understand it. Assurances alone do not fulfill our responsibility, and we cannot waive away concerns merely because these irrigators live on the Reservation. They, both tribal members and nonmembers, are Montanans too, and we represent them just the same. Consequently, your assistance in helping me to understand the impact on them as well as other Montanans would be very much appreciated. Please provide any memoranda you have analyzing the facts of this situation.

10. Finally, allow me to emphasize that I am well aware of the superiority of a compact as a means of settling these difficult issues. I and many other legislators prefer that method of resolution by a far cry. But as I have stated here, to vote responsibly in support of a compact we need facts and full, candid answers to questions, as well as objective analyses of the case law driving much of the terms in the negotiation.

Thank you for the opportunity to provide comments and questions regarding the Flathead Compact, I look forward to your report.

Sincerely,

Sen. Chas Vincent

Wick, Arne

From: Paul Wadsworth [wads9954@gmail.com]
Sent: Sunday, June 30, 2013 8:23 PM
To: Wick, Arne
Subject: Fwd: water compact facts

Hi my name is Paul Wadsworth I farm and ranch in the Mission Irrigation District I am not a hobby farmer like what has taken over the Joint
Board of Control, Irrigation is vital for me. I irrigate 600 acres and run 200 head of momma cows. I have lived and ranched here for 43 years have watched lots of people come and go, out of staters come because they like what is here then soon they try to change the relationship with the tribe not knowing the legal history of tribal water rights and some or most are jealous of tribal rights but don't understand what the tribe is or how the treaty is constitutional between the tribe and the US. Lets not go to court against the tribe's lets use the compact to fulfill all the needs of everyone on the reservation. The suprem court just ruled a few months ago that no one is losing any water rights in this compact. Lets stay with the facts and forget the racists and those who have no stake in this fight which is most of the noise against the compact.
Thank you
Paul & Twila Wadsworth

This letter pretty well states why the compact is needed and I agree completely

---------- Forwarded message ----------
From: <irrigators@blackfoot.net>
Date: Sat, Jun 29, 2013 at 8:50 AM
Subject: water compact facts
To: irrigators@blackfoot.net

These facts were sent to us by an interested party. Please consider writing to the Reserved Water Rights Compact Commission if you have not already done so. The addresses are at the end. Thank you.

1. The proposed Compact is squarely within the authority of the Commission. Compact opponents argue that the Compact includes off-reservation rights that they say are not within the technical definition of a federal reserved right, and conclude from this false premise that the proposed Compact is beyond the Commission's authority. Montana law does not make the distinction these opponents rely on; in fact, the Montana Supreme Court has squarely held that all Indian water rights are within the Water Court's jurisdiction. Ask yourself: "Why would the Legislature include all Indian rights in the adjudication and exclude part of them from the negotiating authority of the Commission?" Doesn't make sense, does it?

2. The Compact absolutely prevents the Tribes from controlling water rights throughout western Montana. The Tribes relinquish their claims to off-reservation rights in all but a handful of streams outside the Reservation. The Tribes also give up their right to call any household, municipal, commercial, industrial, or any other non-irrigation

rights. The Tribes have approved an agreement with the leaders of the Flathead Indian Irrigation Project that provides adequate water to irrigators on the project to allow them to irrigate their crops. Irrigators on the Flathead River system could theoretically be called for water by the Tribes, but this has never happened in the 100-plus year history of the Flathead Indian Irrigation Project, because such a call cannot, as a practical matter, be effective in securing water for the Reservation.

3. There is no grand conspiracy embedded in the Compact. To tackle two of the prevalent theories: (1) The Tribes' rights are held in trust by the United States, but the same thing is true of all six compact that the Montana Legislature has already confirmed. Strict legal rules bind the United States in its management of tribal trust property, as the recent Cobell settlement dramatically demonstrated. The federal government cannot commandeer the Tribes' water to serve some other federal purpose by, for example, piping it to California. (2) The Tribes cannot lease their water downstream for the use of the Bonneville Power Administration. Under the Compact, the Tribes have agreed not to lease water outside the State of Montana.

4. The Compact negotiations were transparent. All negotiating sessions were held in public. Anyone who wanted could place their names on a mailing list and get actual notice of all negotiating sessions. After the Commission and the Tribes agreed on the framework of a Compact, more than 25 public meetings have been held throughout the area affected by the Compact, during which Commission members and staff explained the Compact and answered any and all questions members of the public posed.

5. The Compact will have significant impacts on western Montana water users, but not in the way that its detractors claim. It will protect all persons who have claims in the Water Court adjudication from years of expensive litigation, some of which will be paid for by Montanans' tax dollars and some of which will be paid for by the water users personally. It will remove a huge potential litigation load from the Water Court's docket, making it more feasible for the adjudication to complete its work within the time frames provided by the Legislature. It will provide a process for securing new water rights on the Flathead Reservation and adjudicating disputes over existing water rights that has been completely absent for the past fifteen years because of adverse court decisions. It will remove a massive cloud of uncertainty that surrounds water use on and around the Flathead Reservation. It will pave the way for the infusion of millions of dollars for the betterment of the Flathead Indian Irrigation Project, providing for upgrades that simply will not happen without the Compact. It will also enable improvements to fisheries on and off the reservation, all to the benefit of Montana's recreational and biological heritage.

This Compact is the product of years of careful work by dedicated public servants, both State and tribal. It deserves your approval. If you already written to the Reserved Water Rights Compact Commission,

Thank-you!
Please send your comments and/or a letter today.

Snail Mail: Arne Wick
P.O. Box 201601
Helena, MT 59620-1601
Email: Arne Wick
AWick@mt.gov

THANKS For All you Do!

LAW OFFICE OF BRIAN C. SHUCK, P.C.

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June 25, 2013

VIA E-MAIL ONLY
Mr. Chris Tweeten
Montana Reserved Water Rights Compact Commission
P.O. Box 201601
Helena, MT 59620
E-mail: AWick@mt.gov

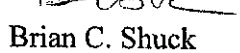
Dear Mr. Tweeten:

I received your letter dated June 4, 2013. As you know, this firm represents the Western Montana Water Users Association, LLC. As you are also aware, WMWUA has filed a number of comments with the Compact Commission and other settling parties throughout the course of the Compact negotiations. Rather than reiterating all of their concerns here, we simply incorporate by reference the comments filed in July, 2012, as well as those provided in the fall of 2012 and January of 2013. As you are also aware, I provided testimony during the Legislative Session, as did numerous members of the WMWUA. The testimony provided is incorporated by reference as well.

There are numerous complicated issues that need to be addressed. In your letter, you asked for specific references to specific portions of the Compact. This suggests that, once again, you are looking for simple solutions to fix a handful of problems. If that is the approach the Compact Commission chooses to take, then it is seriously underestimating the severity of the deficiencies in the proposed Compact. The WMWUA encourages serious settlement discussions. As I have stated before, it will take more than Band-aids to fix this Compact.

You should have copies of all WMWUA's comments as well as access to the audio and video recordings of the testimony. If you need anything further, please call me.

Truly Yours,
LAW OFFICE OF BRIAN C. SHUCK, P.C.



Brian C. Shuck

BCS/tl

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→ by Reference
see June 2013 email

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July 16, 2012

COMMENTS

NOTE: NOT ADMISSIBLE
CONFIDENTIAL SETTLEMENT COMMUNICATIONS

VIA E-MAIL ONLY
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Dear Sirs and Madam:

Thank you for the opportunity to submit comments related to:

1. The working draft of the *Water Rights Compact Entered Into by the Confederated Salish and Kootenai Tribes, the State of Montana, and United States of America,*

2. The public review draft dated 3-19-2012 of the *Unitary Administration and Management Ordinance,* and

3. The public review draft of the *Agreement Between the Confederated Salish and Kootenai Tribes of the Flathead Nation, the United States, Acting Through the Bureau of Indian Affairs of the United States Department of the Interior, and the Flathead Joint Board of Control, of the Flathead, Missions and Jocko Valley Irrigation Districts.*

Be advised that this firm, and local counsel Bob Fain of Billings, Montana, have been retained to protect the interests of a local water rights holder, Buffalo Wallow, LLC, and to assist it in providing comments and taking whatever other action is necessary to protect its water rights. The comments are as follows.

1. Jurisdiction. No tribal entity or entity purporting to jointly administer with the tribes has jurisdiction over non-Tribal members or their lands, Walton water right holders, or state-water right holders. My client is a non-tribal member owning land and water rights on the Flathead Indian Reservation. My colleagues and I have argued this issue in other cases and prevailed. I am well aware of the cases you would cite in support of tribal jurisdiction and have been successful in convincing the Court in another adjudication that the tribes have no jurisdiction over non-tribal water right holders. Such cases have been persuasive to the Montana Supreme Court in its recent 2007 decision related to water rights on the Flathead reservation.

Montana cannot bargain away its statutory and constitutional obligations to administer water rights within the State of Montana. Further, the legislation establishing the Reserved Water Right Compact Commission specifically states that nothing in that section is to be construed as the State relinquishing authority over the administration of water rights of non-tribal members on the reservation. Further, Article IX, Section 3 of the Montana Constitution confirms Montana "owns" the water and charges the State with administration, control, regulation of water rights and a system of centralized records.

2. **Walton Water Rights.** Many water users on the Reservation will have an Indian allottee as their predecessor in interest in their chain of title. Such water users are entitled to

receive a reserved water right with a priority date consistent with all other Indian reserved water rights, whether that is "time immemorial" or the date of the Hellgate Treaty. It is wholly unacceptable to subsume Walton rights within one large "tribal" water right and all Walton rights must be awarded to the former allottees' lands. In fact, all water rights adjudicated through a settlement process or by the Montana Water Court must be awarded to specific reservation lands. It is unacceptable to reward a "big bucket" of water rights to the tribes and leave Walton water right holders to merely trust that they will receive delivery of the full amount of their water rights. See discussion of appurtenance, *infra.*

3. **The Proposed Settlement is too Vague.** The proposed settlement is vague with respect to the definition of the "tribal water right." In the definition, it refers to Article 3 of the compact. However, Article 3 of the compact merely includes the phrase "To be developed." Local water users cannot provide meaningful comments or agree to any proposed compact unless and until the proposal is fully "developed" and the proposal quantifies the amount of **all** water rights. The proposed Compact, Agreement, and Unitary Administration and Management Ordinance appear to tackle some of the general issues, but leave out many other crucial details that are to be developed at a later date. It is absurd to think that anyone would agree to a compact that is, to date, undefined. As stated above, significant issues have been entirely omitted. While no one would discourage continued settlement discussions, the proposed documents can be viewed as nothing more than a good first try; however, much work remains to be done.

4. **The Flathead Reservation Joint Board Has Failed to Cooperate, and the Timing of Comment Deadline During Irrigation Season is Poor.** Area residents have requested information from the Flathead Irrigation Joint Board and it has failed to provide the information requested. Area residents have sought to obtain data related to the identities and

number of Walton water right holders and other non-tribal water right holders. The Joint Board's failure to provide this documentation has impeded the ability of affected parties to submit complete, fully-developed comments before the July 16, 2012 deadline. In light of the close ties between the Board, the U.S. federal agencies and the tribes, it appears the federal agencies may be attempting to thwart efforts to provide meaningful comments. Further, setting a deadline for irrigators to meet during the height of the irrigation season fails to acknowledge this is the busiest time of year for water right holders and this poor timing will inhibit local water users' ability to submit fully-developed comments. For these reasons, additional time should be provided for water right claimants -- both non-tribal water right holders and individual Indian water right holders -- to submit comments and meaningfully participate in the negotiation of the settlement.

5. **Water Rights are Appurtenant.** Water rights are appurtenant to the land upon which they are beneficially used. Further, federal law recognizes Indian and Walton reserved water rights are appurtenant to the lands upon which they are used. However, the proposed settlement purports to give the tribes, in essence, a "large bucket" of water that they can carry wherever they wish and fails to state that the water rights are appurtenant to the land upon which they are used. For this reason, the U.S. Supreme Court has been very careful to award reserved water rights to the "lands," not to the "tribes." Any proposed settlement that fails to award the water rights to the land rather than the tribes is unacceptable and provides no comfort to the individual Indian and non-Indian reserved water right users that they will continue to have the water for use on their lands in the future.

In one general stream adjudication, action was sought by tribal members against the tribes requesting that the Court declare reserved water rights were appurtenant and attached to their lands. After much litigation, the tribes and the federal government entered into a stipulation

on the eve of trial agreeing that reserved water rights are attached to the land upon which they are used. In light of the above, both tribal members and non-tribal members should be concerned that, if the water rights are not specifically decreed as being appurtenant or attached to their lands, then they have no certainty that they will continue to receive water in the future.

6. **The Parties Cannot Negotiate "Ownership" of the Water.** By law, Montana owns all the water within its boundaries. See Montana Constitution, Article IX, § 3. It does not have authority to transfer ownership of water by stipulation, legislation, or otherwise. All references in the proposed settlement to ownership and joint ownership of the water and water rights are in violation of the Montana Constitution. At best, the water rights are a usufructary right to use Montana's water , not a right to the ownership of water.

7. **Water Rights are Reserved Only for the Primary Purposes of the Hellgate Treaty, Not for Secondary Purposes.** The proposed Agreement seeks to award the tribes significantly more than is necessary for the primary purpose of the reservation. There is no legitimate claim to reserved water rights for secondary purposes. Therefore, it is unclear from the proposed settlement documents what has been determined as the primary purpose of the reservation -- only reserved water rights for the primary purpose may be awarded.

8. **Groundwater is Not a Primary Purpose and There Can Be No Reserved Water Right on the Flathead Reservation for Groundwater or other Non-Primary Purposes.** The Courts are split as to whether a reserved water right exists for groundwater. Further, the purpose of the Hellgate Treaty of 1855 did not contemplate groundwater uses in light of the ample surface water resources available on the reservation. Although 2 different Montana Supreme Court decisions discuss groundwater on the reservation, they stopped short of ruling that a reserved water right in groundwater exists. No proof has been provided to demonstrate that groundwater was intended to be used or necessary to satisfy the primary

purpose of the treaty. Further, no proof has been provided to demonstrate that fishing by tribal members could not be fulfilled from Flathead Lake and that instream flows in the rivers and streams is necessary to satisfy the primary purpose of the treaty.

9. **Only the Montana Water Court Has Jurisdiction and Authority to Adjudicate Water Rights.** Article IV of the proposed compact seeks to give authority to the tribes' natural resources department and the United States to adjudicate the water rights of any individual land owners after the compact is signed. However, the Montana Water Court has jurisdiction to adjudicate water rights under the McCarran Amendment. Further, the tribes have no jurisdiction over non-tribal members, their lands, or State water rights. Adjudicating water rights is a lengthy process involving a detailed quantification of each individuals' rights to use water. The settlement proposed seeks to gloss over the details and enter into a "big picture" agreement and unlawfully delegate the task of adjudicating the water rights to an entity that lacks the expertise, experience, authority, or jurisdiction to do so.

10. **Tribes Cannot Create New Water Rights.** In numerous places throughout the settlement documents, it is suggested that the tribes can issue water rights for new uses. Neither the tribes nor the federal government can create new water rights.

11. **All Tribes Signing the Treaty with the Blackfeet and Treaty with the Flatheads, Etc. Signed in 1855, Must Be a Party to Any Compact.** The two treaties of 1855 were signed with tribes other than the two tribes that are a party to the proposed compact and settlement Agreement. The State of Montana cannot and should not enter into any agreement that leaves it open for other tribes to later seek additional water rights under the compact. These other tribes must be joined in the process and as individual Indians from these tribes and their allottees may be equally entitled to receive reserved water rights, including Walton rights, awarded to their lands.

12. **<u>The Tribes Lack Authority to Lease Water Rights.</u>** The portion of the compact pertaining to leasing of the "tribal water rights" merely states: "This section to be developed." This is an extremely important issue and no party should agree to the terms of an agreement until all of the terms are made known. No authority exists for tribes to lease water rights. Even if such authority did exist to lease water rights, any change in the place of use of a reserved water right must be confined to reservation lands. Similarly, the proposed settlement with the tribes would grant the tribes or joint board exclusive jurisdiction to approve changes in use of the "tribal water rights." As stated above, water rights must be awarded to the lands, not to the tribes. Further, any change of use related to lands owned by a non-tribal member must be approved by Montana as Montana is the only entity with jurisdiction over these non-tribal members, not the tribes.

13. **<u>Future Uses of Tribal Water Right.</u>** The purpose of a general stream adjudication to adjudicate Indian reserved water rights is to quantify the amount of water rights necessary to give effect to the primary purpose of the treaty. Any future uses must be tied to "practicably irrigable acreage" within the reservation boundaries and must be attached to those specific lands upon which a future use might potentially be made. If the tribes wish to propose certain lands that they believe were susceptible to irrigation and that are economically feasible to bring under irrigation, then they may propose such uses and prove the practicability of irrigation for each acreage proposed. However, as the parties hopefully know, it is not a simple as just looking at an aerial photograph of irrigated reservation lands and merely awarding a right for future use on all unirrigated lands. Proof that they are practicably irrigable is required, which involves soil studies, the right slopes and topography, economical access to a water source, and elimination of all home sites, fence lines, irrigation ditches, wastewater ditches, roadways, and railways, to name a few, and other areas where irrigation is not feasible. It is a detailed and time-

consuming process. If such an undertaking has been made, we would like to see the data to support the award of future uses to specific lands. However, to give away a "big bucket" of water rights that can be carried around and used wherever a tribal bureaucracy wants or give to whomever they want is unsupported by law. See the proposed compact, Article III, B5.

14. <u>The Flathead Reservation Water Management Board is Unworkable.</u> The administrative scheme proposed in the draft of the compact in Article IV C is unworkable. The proposed settlement seeks to reinvent the administration of water rights and have those administrative powers and jurisdictions vested in a joint local, tribal, and federal political entity. The settlement proposal proposes that the board consist of people appointed by the Governor, the tribes, and the Secretary of the Interior. The last thing water users in and around the Flathead Indian Reservation need is a highly-charged political entity, administered by local politicians appointed by politicians, with no expertise or experience in water rights administration. Instead, the water rights on the Flathead Indian Reservation must be administered by Montana.

15. <u>The Parties Fail to Acknowledge that Water Rights Are a Real Property Right.</u> Property rights are best administered by the State agency that has administered these rights for more than 100 years. Water users need certainty and predictability. By giving a joint political entity the authority to administer and manage water rights will politicize those water rights and make them less certain and less predictable than if they continue to be administered by Montana.

Further, the procedure for the appointment of an individual selected by the gubernatorial and tribal appointees to the board is entirely unworkable and the tie-breaker process is entirely unworkable. The proposed compact states that the person or entity to choose the fifth member of the board in the event that the gubernatorial appointees and the tribal appointees cannot agree is "TBD," which we understand to mean that that person or entity is "to be determined" at a later

date. The balance of power lies in this provision. The parties simply cannot agree to, nor can anyone file meaningful comments pertaining to, a settlement draft that lacks the most crucial provisions.

The only entity that can properly administer water rights is Montana. On page ten (10) of the proposed compact, it includes a footnote that states: "4 We will need to grapple with how enforcement will work if the dispute is between an on-reservation and off-reservation water user." The only entity with jurisdiction to handle such issues would be the Montana DNRC. This was precisely the issue the Montana Supreme Court keyed in on in its 2007 ruling that the Montana DNRC has jurisdiction on the reservation. Further, State regulation of all headgates on the reservation has been successfully done in other States for some time and has been affirmed repeatedly. To the extent that federal agencies or others may argue that there is no precedent for State administration on the reservation, such a position is unfounded. Other general adjudications have already grappled with this issue and decreed that the only entity with jurisdiction and the experience to administer water rights upstream from the reservation, on the reservation, and downstream from the reservation is the State Engineer's Office. Under no circumstances could a tribal entity, a federal entity, or a joint entity have any jurisdiction over a water right off the reservation. Montana must vigorously defend its authority and jurisdiction to administer water rights both on and off-reservation. Any attempt by Montana's officials to do so would violate their oath to uphold the Constitution and the laws of the State of Montana. Further, it is unthinkable that Montana would waive its sovereign immunity in this regard. See proposed compact, Article IV, paragraph C.

16. **<u>Times of Water Shortage.</u>** It appears that, under the proposed settlement, the new procedures only apply when there is enough water for everyone. Specifically, paragraph D states: "**Distribution of water in times of shortage**. *This section to be developed,*" which water

users must assume means the rules will change at the time the prior appropriation system and State administration is needed the most. Article IV D at the bottom of page twelve (12) of the proposed compact underscores the fact that, even though there appear to be similarities between the State process and the new proposed process, it will produce different results because the proposed rules are vastly different when there is a shortage of water. In a successful water administration system, the rules have to be the same when water is plentiful and when water is scarce. If the water rights are not to be administered pursuant to a prior appropriation system, then there is no reason to award reservation lands with a priority date with the date of the Hellgate Treaty. In other words, paragraph D fails to follow the holding in the *Winters* decision awarding water rights with a priority date equal to the treaty date. The parties have no authority to disregard the U.S. Supreme Court's *Winters* decision.

17. **The Contributions of All Parties to the Settlement Agreement Must Be Established and Disclosed to the Public for Comment Prior to the State's Approval of the Compact.** For example, in Article VI, the state and federal monetary contributions to the settlement are not defined. It is unacceptable to not disclose the federal government's proposed monetary contribution to the settlement prior to Montana's approval. At a time when the federal budget deficit is at a record high, the people of Montana are entitled to know whether there is a large federal bailout the tribes will be receiving at the federal level before it agrees to anything that at the State level.

18. **Termination of the Compact.** Article VII of the proposed compact contains a double-standard. It allows the tribes to terminate the compact for any or no reason. In contrast, the State can only terminate the compact for specified reasons. The State of Montana's willingness to agree to such a lopsided compact causes water users to question whether State officials represent them and their interests. Similarly, in the proposed Agreement, in Articles

XXI and XXIII, there are numerous ways for the tribes or the United States to back out of the Agreement, even after Montana tax payers have paid considerable sums under the proposed compact. However, there are very few ways Montana can withdraw or terminate the Agreement.

19. **Future Disputes.** Disputes must be resolved in Montana Courts, not federal court. See the proposed Agreement, Article XXIV, paragraphs 77 and 78.

20. **No Entry of a Decree in Federal Court.** Article VII C of the proposed compact provides a federal court decree will be entered as a consent decree in Federal District Court. This is wholly unacceptable and leaves the door open for the tribes to argue that jurisdiction exists in the federal court related to any disputes related to the compact. Consistent with this position, the compact calls for the State to dismiss its general stream adjudication and the compact includes language suggesting that the Montana Water Court would not have continuing jurisdiction over the compact. Under no circumstances should Montana agree to these provisions.

21. **Crucial Details Omitted.** Article VII paragraph D relating to the "settlement of tribal water right claims" is left blank and is apparently still being developed. The parties cannot agree to any compact when crucial terms such as these have not been outlined and not provided to the public for comment.

22. **Individual Water Right Holders Must be a Party to Any Compact or Settlement Agreement in this Case.** Throughout the entire compact, individual water right holders have not been made a party. However, when the compact begins to discuss who is bound by the terms of the compact, it, for the very first time, mentions individual water right holders. Specifically, the compact provides in Article VII F 1: "After the effective date of the compact and entry of a final decree, its terms shall be binding upon: 1. The State and any person using, claiming, or in any manner asserting any right under the authority of the State to the use of

water in the state;..." Therefore, tribes, the U.S., and Montana seek to bind the hands of the individual water right holders, both tribal members and non-Indians, without giving them a seat at the table. Further, the Flathead Irrigation Joint Board has refused to provide information when requested. Therefore, individual water right holders' ability to provide meaningful comments have been hampered. As a result, the integrity of this process has been compromised. Montana, the U.S., and the Tribes need to slow down, propose draft settlement documents that tackle the tough issues, and include the type of details necessary for a meaningful review and opportunity to provide more meaningful comments based on full disclosure of the proposed settlement.

23. **Instream Flows With a Priority Date of "Time Immemorial."** The proposed Agreement, Article IV, paragraph 13, seeks to give the tribes an "instream flow" having a priority date of "time immemorial." There is no basis in law for the tribes to be a "co-owner" of an instream flow. Water users fear this creates a mechanism to deny water to water users, tribal members and non-tribal members alike, particularly irrigators, either in an effort to create a market to sell water or to force irrigators to sell their land for less than market value. By creating uncertainty and unpredictability as to the rights of tribal members and non-tribal members, the tribes are able to decrease the value of lands and make it more difficult to make a living farming, particularly during dry years when irrigation water is needed the most and an instream flow right would be more likely to attempt to deny irrigation delivery to water right holders with a priority date junior to "time immemorial" water rights. Without water rights, the lands of irrigators would be worth a fraction of their current values.

24. **Water Duties.** In the Agreement, Article IV, paragraph 5, the parties seek to define the "Water Turnout Allowance (FTA)" as a maximum of 1.4 acre-feet per acre per year. Montana, the U.S., and the tribes cannot reduce or convert existing water rights under State law defined in terms of miner's inches or cubic feet per second (a "flow rate") into a maximum

quantity of acre-feet per acre per year (a "volume of water"). Any such conversion or reduction would result in an unconstitutional taking and subject Montana and the U.S. to actions for unconstitutionally taking local irrigators' real property rights. Water rights are an interest in real property and any attempt to diminish the quantity, amount of area irrigated, or priority date would be an unconstitutional taking.

In the proposed Agreement, Article IV, paragraphs 16, 20, and 22, the proposing parties make clear the tribes seek to take part of local irrigators' water rights by unilaterally imposing requirements to make "operational improvements" that will result in a reduction of the amount of water delivered to local irrigators' lands. Once they have reduced the amount of water delivered to those lands, the tribes seek to capture this "reallocated water" and dedicate it to an alternate use. Indeed, water conservation efforts are to be encouraged. No one denies there is a need in every irrigation system to use resources wisely and efficiently. However, to authorize a tribally controlled entity to reduce the amount of water delivered to tribal and non-tribal members' lands under the guise of "operational improvements" is a covert attempt to secure more water for them to lease to others downstream, to coerce tribal and non-tribal members into paying the tribes for some of the water they have historically received for irrigation on their lands, or to enforce local irrigators to sell their land to the tribes.

25. **"Adaptive Management" is a Fiction.** In the proposed Agreement, Article IV, paragraph 1, the parties use the term "adaptive management." In negotiating a compact or settling water rights claims with the United States or Indian tribes, the parties must be attuned to new terminology. In most circumstances, the terms offered by the U.S. and tribes that are different from State laws are intended to denote an entirely different meaning. There is no use of the term "adaptive management" in Montana law. One can only believe that this term is intended to mean that the tribes and U.S. intend to change or "adapt" the law without warning to

accomplish their purposes. To replace a system of State water administration that provides all irrigators, both tribal and non-tribal alike, with certainty and predictability as to the water rights with a new tribally-controlled system that is "adaptable" and provides no certainty or predictability would be a disservice to all water users, both Indian water users and non-tribal members alike.

26. **Only the State of Montana "Owns" the Water.** In the proposed Agreement, Article V, paragraph 1, it uses the term "reserved water rights **owned** by the United States..." The United States does not **own** any reserved water rights. See *Montana v. CSKT et al,* 712 P.2d 754, 767 (Mont. 1985). Further, the United States does not own the water, nor can Montana's ownership of the water be transferred to the tribes. Instead, reserved water rights are awardable to reservation lands under the *Winters* doctrine, upon proper proof of their claims, and the U.S. may hold it "in trust" for the tribes, but an Indian reserved water right is awarded to the individual Indian water users' lands. Reserved water rights are a usufructary right awarded to reservation lands and are not a commodity separable from the land that is owned either by the tribes or the United States. To use such language confuses people into believing that the tribes "own" the water. There is no State or federal authority for that position and, to the extent the federal team encourages or allows the tribes to believe otherwise, does a disservice to tribal members and encourages the tribes and its members to become polarized in negotiations. Polarizing language such as this is not helpful in achieving the amount of consensus necessary to advance long-term resolution.

27. **Two Different Priority Dates.** The proposed Agreement, Article V, paragraph 3, proposes the "water the CSKT shall make available to serve the irrigation project under this Agreement" has a priority date of July 16, 1855. However, elsewhere in the proposed compact and Agreement, the documents assign the instream flows a priority date of "time immemorial."

It appears the proposed settlement seeks to establish a hierarchy of reserved water rights in which certain "tribal water rights" trump other "tribal water rights" used in the federal irrigation project. In other words, any water rights that would be used to irrigate individual Indians' lands and non-tribal members' lands is proposed to have a priority date of 1855, while the tribes would be awarded, in essence, a "large bucket" of instream flow water rights that would have a priority date that trumps water used in the irrigation project. The potential exists for use of an instream flow water right to deny water to tribal and non-tribal members irrigating in the irrigation project. The potential to bypass irrigators' headgates and deliver the "instream flow" water out of State, and possibly out of the country, must be addressed before any settlement could occur.

28. **Incidental Uses.** The proposed Agreement uses the term "incidental uses" in addition to irrigation. It is unclear precisely what is meant by this term. If this is an attempt to secure additional water in excess of what has been historically used or to convert water historically used for irrigation for other purposes, then that is inappropriate and unsupported by law.

29. **Water Rights for Lands Under the Irrigation Project Must be "Appurtenant" Water Rights, Not Water Rights "Running With the Land."** The proposed Agreement, Article VII, paragraph 16, uses language that might tend to give assurances to local water users, but in reality, it fails to resolve the most controversial aspects of the proposed settlement. For example, paragraph 16 uses the term "runs with the land" to describe irrigation water rights rather than using the term "appurtenant" or "attached." Further, paragraph 16 uses the term "fully transferable under applicable law." What the proposed settlement fails to explain is the administrative scheme proposed transfers administration to the tribes or joint tribal entity and State law is no longer the applicable law. This is typical language used by the federal

agencies in other water rights negotiations. Local area water users are suspicious of language that seeks to hide the true intent of U.S. agencies.

30. **<u>The Proposed Compact Seeks to Make the Prior Appropriation Doctrine Irrelevant.</u>** In the proposed Agreement, Article VIII, paragraph 18, the proposed settlement seeks to upset the prior appropriation system by delivering "available water in a given year in the following order of priority..." Paragraph 18 goes on to explain that minimum and enforceable instream flows and reservoir pools will have the highest priority, irrigation water and river diversion allowances will have the next priority, target instream flows will have the third priority, and the maximum farm turnout allowance will have the lowest priority, with a limit of 1.4 acre-feet per acre per year at the farm turnout. This does not guarantee 1.4 acre-feet per acre per year will be delivered to each individual water users' headgate. It merely provides that 1.4 acre-feet per acre per year will be delivered to the project's main headgate and whatever amount makes it down the canal to each individual water users' land is the amount they will receive. Therefore, the proposed settlement seeks to upset the prior appropriation system, even given the fact that the reservation's reserved water rights would have the highest priority date on the river system.

31. **<u>Attempt to Cut Off Water Users' Access to the Montana Water Court to Adjudicate Water Rights.</u>** Article X, paragraph 24 (h), of the proposed Agreement states that the tribes shall "file and prosecute objections to water right claims filed with the Montana Water Court that... claim irrigation project water as a private right, whether State or Federally based, both on and off the reservation;" Water users on and off-reservation should be alarmed by the State-sanctioned attempt to deny them the right to have their water rights adjudicated before the Montana Water Court as provided in the Montana Code. The proposed compact seeks to give the tribes extra-territorial jurisdiction outside the reservation and deny off-reservation water right

holders or claimants due process under Montana law. Further, this appears to be an attempt to defeat Walton water rights and deny them the opportunity to have their water rights adjudicated and declared appurtenant to the reservation lands upon which they are used. The proposed settlement supports the conclusion that the tribes believe any water rights for lands used under the irrigation project, whether owned by a tribal member or non-tribal member, belong to the tribes, is not appurtenant to the land, and is not awarded to the specific reservation lands. Any approval of a compact awarding reserved water right to tribes rather than lands would result in an unconstitutional taking by the State of Montana and the U.S.

32. **Tribal Taking of "Reallocated Water."** Article X, paragraph 25 (e), of the proposed Agreement states that reallocated water saved by operational improvements will be transferred to the tribes for instream flows. In short, the tribes seek to reduce the amount of 1855-priority water rights delivered to area irrigators in an effort to convert it into a "time immemorial" instream flow. The proposed settlement seems to suggest that the tribes are better able to determine the amount of water needed to irrigate certain lands than individuals who actually own land and operate farming operations. Farmers do not need more bureaucrats telling them how to run their operations, particularly tribal bureaucrats who have no jurisdiction over them and who would benefit the tribes by denying them irrigation water. Further, the proposed Agreement gives the "Project Operator" nine (9) different tasks, the last of which is to deliver water to irrigators. The fact that delivering irrigation water is listed last, after ensuring instream flows, participating in "adaptive management," transferring reallocated water to the tribes, and defending off-reservation water diversions, amply illustrates the priorities set by the tribes and the U.S., with the blessing of Montana. Further, paragraph 25 (h) refers to the water right of the irrigation project as a "water use right" rather than a water right. Therefore, it appears the tribes and the United States are attempting to draw a distinction between the tribes "water rights" and

the irrigation project's "water use right." If there is no difference between a water right and a water use right, then the proposed settlement Agreement should refer consistently to "water rights." However, any time there is a difference in the language used and the language is inconsistent with State law, local irrigators can rightly assume that the words chosen by the federal government and the tribes have a different, unexplained, and undefined meaning. It is reasonable to interpret "water use right" to mean that local irrigators and the project to be able to "use" the water right related to the tribes, but do not hold a water right and use the "tribal water right" as the tribes deem fit. As stated previously, any Indian reserved water right must be awarded to reservation lands, not to the tribes themselves.

33. **"Piecemeal" Adjudication.** Article XII of the proposed Agreement carves out certain water rights that will not be adjudicated as part of the proposed settlement and leaves the burden on local irrigators to adjudicate their own water rights at their own expense. That is not the purpose of a general stream adjudication and would result in precisely the type of "piecemeal" adjudication the Montana Supreme Court warned against in 1985. Montana must not agree to any compact that adjudicates certain rights, but then places a burden on other water users to adjudicate their own water rights, at their own expense, within a limited time frame. In this way, the proposed compact shows favoritism by the U.S. agencies and Montana for the tribes over other water right holders and denies equal protection to those individuals. Further, the Tribes explicitly preserve in the proposed settlement its right to object to the adjudication of certain water rights. See paragraph 31 above.

34. **Secretarial Water Rights.** It is unclear what the parties proposing the compact mean by "secretarial water rights." Please provide a copy of the Secretarial Water Rights Findings dated June 2, 1927, as well as a complete list of all water right holders who arguably hold "secretarial water rights" and a description of their lands for all lands under the general

stream adjudication so local irrigators will have a better understanding of how the tribes, the U.S., and Montana seek to categorize individual water users. It is impossible to provide meaningful comments without this information as local area irrigators have no idea which category the tribes, U.S. and Montana argue each individual water user belongs in.

It is possible that what the tribes and the United States identify as "secretarial water rights" are either water right holders under State law or Walton water right holders. Most water rights exist under State law, including those water rights with state permit, as well as those put to use as territorial water rights, and water rights under State law prior to the enactment of Montana statutes requiring filing for a permit.

35. <u>Rehabilitation and Betterment.</u> The proposed compact uses terms such as "rehabilitation and betterment" and "operational improvements." However, the vast majority of these improvements and the rehabilitation and betterment have nothing to do with irrigation within the project. These terms are used in an attempt to justify State and federal government bailouts under the guise of environmental work. Further, to the extent that any of these environmental projects interfere with the delivery of water, local water users must object to those bailout projects. Further, Article XV of the proposed Agreement proposes another State bailout by allowing the tribes to run the project but be paid State funds for a project that the parties purport to transfer to the jurisdiction of the tribes. Local water users question whether State funds may be used as a gift to the tribes and whether such a gift is permissible under State law. Further, the settlement documents are careful not to divulge the amount of money the tribes are already seeking to be awarded from the federal government if and when any compact is ratified by Congress. Therefore, local area irrigators are concerned with the bailouts, one at the State level, and a second at the federal level. Local area irrigators must resist any transfer of the irrigation project to the tribes. However, if such a transfer were to occur, Montana should resist

efforts to transfer it to the tribes and then subsidize it with State funds. Article XV, paragraph 34, states that State funds are necessary "...in order to assure that the resulting benefits of the pumping accrue to instream flows and adequate irrigation water supply." Therefore, there is the implied threat that, if Montana does not provide the funds, they will not administer water rights fairly and that tribal and non-tribal water right holders will not receive their irrigation water. Further, the bailout from the State is intended to exceed what is necessary for its immediate need. Paragraph 36(b) of the proposed settlement Agreement states that the "excess" of the implementation fund will be invested "in order to produce an annual income payment to fund" six other enumerated categories of federal spending priorities.

36. <u>Reallocated Water.</u> See comments regarding reallocated water above. In addition, Article XVI of the proposed Agreement proposes to reallocate individual irrigators' water right to further supplement a "tribal" instream flow. It appears the tribes desire to add to a tribal instream flow with a "time immemorial" priority date. However, any water saved by conservation efforts should be available to be appropriated consistent with State law. If an instream flow is desirable, then an agency authorized to hold an instream flow right may certainly file for an instream flow permit with a present-day priority. However, if this is not done, then the water should be available for other water users to use to benefit the local economy. Montana officials must remember that although some Courts have awarded a reserved water right for instream flows, other Courts have ruled that the Tribes are not entitled to an instream flow. See *Big Horn III.*

Paragraphs 41 and 42 of the proposed Agreement further illustrate that the tribes seek a hierarchy of reserved water rights. They seek to place a tribal instream flow above any water rights to be used for irrigation. Further, they seek a system in which the irrigation project water users, both tribal members and non-Indians alike, are mandated to use less of the lower priority

1855 water rights so they can be reallocated into instream flows with a "time immemorial" priority. There is no authority for conversion of an 1855 priority reserved water right in to "time immemorial" water rights at the expense of individual tribal and non-Indian irrigators by causing them to conserve water. As observed by the Wyoming Supreme Court in *Big Horn I*, to allow tribal administration would be like the "fox in the hen house," if it were allowed to administer individuals' water rights. *Big Horn I.* A tribal entity that attempts to benefit from denying water to irrigators is not only illegal, but for reasons set forth in the numerous paragraphs above, it is also unworkable.

37. <u>"Remotely-Controlled Water Diversion Structures."</u> The proposed Agreement, Article XVII, paragraph 43, proposes to use "remotely controlled water diversion structures." Although high-tech gadgets sound appealing, particularly suits who gaze at the Potomac River from their leather office chairs rather than irrigators on local canals and ditches, they are expensive, unnecessary, dangerous. Further, opening, closing, and regulating headgates require an on-the-ground inspection of local area conditions and weather conditions and forecasts, which is unlikely to occur under the proposed scenario and can result in costly damage to the diversions structures, ditches, lands and crops if not done under the right circumstances. Further, it is likely that Montana's tax payer dollars would be the ones used to install this unnecessary system or, as suggested in other places in the proposed settlement, ordered by the tribal engineer to be paid for by the individual tribal members and non-Indians with water rights under the project. In the northern Rocky Mountain region of the United States, where weather conditions vary greatly and can change quickly, it is nonsense to opt for a detached, high-tech remote-controlled headgate over a system of water administration that has worked adequately for over 100 years. Further, remote-controlled headgates do not take into consideration whether a person is in the structure or down-ditch from the structure who might be injured from opening

and closing the head gates, whether debris has built up that would damage a head gate by closing the headgate or damage the ditch by flushing it into the ditch with no warning, whether ice has or will freeze the headgate in place, or otherwise injure livestock, wildlife, pets, and children in and around the ditch. This appears to be an effort by tribes to create a mechanism to deny water to individual tribal members and non-Indians with water rights under the irrigation project in a manner that does not require them to be accountable to local irrigators and answer questions as to why their headgates are being closed. Further, remote-controlled head gates could be closed during the night to deny irrigators water at times when they are unable or unlikely to check on whether they are receiving their full water rights.

38. **"Interim Instream Flows."** In Article XVII, paragraph 46, the proposed Agreement refers to "interim instream flows." We are unaware of any instream flows recognized under State law that would in any way involve the irrigation project. Please provide a map and a description of all drainages upon which the tribes, the U.S. or Montana argue that there are currently any "interim instream flows" being recognized by the irrigation project or the BIA. Further, explain under what authority these "interim instream flows" are being recognized and whether Montana is recognizing interim instream flows for which there is no water right permit.

39. **"Water Accounting Program."** Keeping track of how water is being used and where it is used is not, in and of itself, a bad thing. Most irrigation projects already do this. However, to create a "water accounting program" run by the tribes appears to be nothing more than a conduit through which water historically used for irrigation can be funneled to the tribes through this proposed compact. See proposed agreement, Article XVII, paragraph 48; see also Article IV, paragraph 28 (stating the "water management program" is "located in the CSKT Natural Resources Program" and which will "...become responsible for water measurement,

instream flow monitoring and reporting…"). Further, Montana cannot agree to such a program because the Montana Constitution clearly mandates the State to ". . . provide for the administration, control, and regulation of water rights and . . . **establish a system of centralized records,** . . ." Montana Const., Art IX, § 3 (emphasis added).

40. **<u>Kerr Hydroelectric Project.</u>** Article XVIII of the proposed Agreement describes circumstances related to the tribes taking over the Kerr Project. However, in paragraph 57, it states that the Flathead Joint Board of Control, on behalf of local area irrigators, "… waives and disclaims all future interests in the capacity set forth at Article 40 (a) (i) of the FERC license…" Therefore, the tribes seek to bargain away the rights of local area irrigators under the project, with the blessing and full knowledge of the State of Montana, to its rights under the project. By doing so, the Flathead Joint Board of Control gives up significant rights of local irrigators that would not have been given up by its non-tribal counterpart who controlled the project just a few short years ago. First, the Flathead Joint Board of Control must vigorously defend and pursue its rights under the FERC license for the Kerr Project. Second, this provision amply demonstrates the fear of local water users that, when the tribes would benefit from any type of action, the Flathead Joint Board of Control will take whatever action necessary to benefit the tribes at the expense of local area irrigators. This is just one example of how the Flathead Joint Board of Control does not have the interests of local are irrigators at heart and is controlled by the tribes. The State of Montana cannot sit idly by and watch local irrigators lose their valuable property rights or participate in taking their valuable property rights.

41. **<u>Kicking the Can Down the Road and Not Adjudicating All of the Water Rights as Part of the Compact.</u>** Ironically, the Tribes have argued against "piecemeal adjudications" to the Montana Supreme Court numerous times in the past as a violation of the McCarran Amendment. However, in light of the fact that the proposed settlement does not

resolve Walton claims, Secretarial water rights, non-Indian water rights on the Reservation, or adjudicate water rights for tribal members and award them to tribal members' lands, the proposed compact is nothing more than a piecemeal adjudication of only some of the reserved water rights claimed in this adjudication. One must question why Montana is willing to enter into a compact allowing tribes to quantify certain water rights and placing the burden on other water right holders to pursue adjudication of their own water rights separately and at their own expense. The only one who benefits from the proposed settlement is the tribal government. Therefore, why would Montana dismiss the general adjudication it filed numerous years ago if the proposed compact seeks to adjudicate one of thousands of water rights?

42. <u>The Proposed Agreement Must be Incorporated Into the Proposed Compact and Montana Made a Party to Those Terms.</u> The State of Montana cannot simply wash its hands of certain issues that play such a vital role in the proposed compact by disengaging itself from negotiation of the issues in the proposed Agreement.

43. <u>The Settlement Documents Define the "Flathead Indian Reservation" or "Reservation" of All Lands Within the "Exterior Boundaries" of the Initial Boundaries Established Under the Treaty of 1855.</u> At first blush, such a definition appears innocuous. However, the proposed definition of reservation is overly broad as a matter of law, as confirmed by multiple decision of the Ninth Circuit Court of Appeals and other Courts. However, this definition goes to the fundamental jurisdictional issues involved and ignores the fact that some reservation lands were ceded to the U.S. government and were homesteaded and the size of the reservation was diminished after the initial treaty date. As much as the tribes and the U.S. would like local landowners and the Montana Legislature to believe they have jurisdiction over a solid block of land and all persons within "exterior boundaries" of the treaty boundaries, as a matter of law, the land over which the tribes have jurisdiction looks more like a piece of swiss cheese.

This was recognized in the Montana Supreme Court's 2007 decision in *CSKT v. Clinch,* 158 P.3d 377 (Mont. 2007). In addition to these constraints on territorial jurisdiction, the tribes' personal jurisdiction is limited to tribal members and does not apply to non-tribal members as a matter of law.

44. <u>Where is the Proof of the Primary Purpose and Quantification of Reserved Water Rights?</u> Although the tribes would be awarded significant amounts of reserved water rights under this process, no empirical data is provided to explain how they calculated these amounts, a quantification of the reserved water rights, provide legal descriptions for "practicably irrigable acreage," maps of these proposed lands, proof that such tracts are practicably irrigable, proof what the "primary purpose" of the reservation is, or any other data to support the numbers proposed.

In the Unitary Administration and Management Ordinance, § 1-1-104 (27), the term "Flathead System Compact Water" identifies 229,383 acre-feet per year "the tribes may withdraw from the Flathead River or Flathead Lake, which includes up to ninety thousand (90,000) acre-feet per year stored in Hungry Horse Reservoir, ..." Please provide empirical and technical data to demonstrate how this amount was calculated. To the extent that this amount exceeds the amount of water historically used on reservation lands owned by tribal members, the amount is too large. Direct flow water rights are not a guarantee and cannot be converted from a flow rate to a volumetric amount and awarded in acre-feet per year. This ignores the practical realities of water in the arid West. Some years there are ample supplies, and some years are dry. The *Winters* decision addressed this reality by awarding Indian lands a water right with a flow rate with a priority date of the treaty, which was superior to most water users. However, the *Winters* doctrine does not provide that tribes get both the highest priority and volumetric guarantee.

Further, local water users question how and under what authority tribes can be given water from Flathead Lake and other reservoirs in an amount that will vary from year to year and be significantly larger during those years when direct flow water is not available from the Flathead River. Further, local residents question how and under what authority tribes can be awarded water from Hungry Horse Reservoir. Please provide a detailed accounting of the water available from both Flathead Lake and Hungry Horse Reservoir and how much of that water is currently allocated to irrigation water contracts, irrigation water, and other uses. Further, the proposal is unlawful to the extent that it would interfere with Montana's water leasing program and reservoirs, including, but not limited to Hungry Horse reservoir. M.C.A. § 85-2-141.

45. **Instream Flow is Not Defined.** The proposed ordinance, § 1-1-104 (33) fails to define "instream flow." Local water users cannot provide meaningful comments without definitions of crucial terms. Water users suspect it is not defined is because this is an extremely controversial area and there is tenuous legal support for the propped definition.

46. **"Joint Administration" is a Really Tribal Administration.** Proposed ordinance, § 1-1-108 states: "the Board shall cause all water rights information generated or authorized by the board to be entered into the DNRC [tribes] water rights database in a format agreed to by the Board and the DNRC [tribes]." Therefore, it is proposed that the tribes be the recordkeepers of all water rights on the reservation. There are numerous other examples throughout the proposed settlement document that amply demonstrate that "joint administration" by Montana and the tribes is a fiction and Montana is being asked to unlawfully delegate its constitutional and statutory duties to administer the waters of the State of Montana to the tribes, who lack jurisdiction over State water rights, non-tribal members, and non-Indians' fee lands. Montana Statutes specifically provide: "The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation,

protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan." M.C.A. § 85-2-101 (2). Further, Montana Statutes provide:

> It is the intent of the legislature that the state, to fulfill its constitutional duties and to exercise its historic powers and responsibility to its citizens living on and off reservations, comprehensively adjudicate existing water rights and regulate water use within the State. It is further the legislature's intent that the State, to the fullest extent possible, retain and exercise its authority to regulate water use and provide forums for the protection of water rights, including federal non-Indian and Indian water rights, and resolve issues concerning its authority over water rights and permits, both prior to and after the final adjudication of water rights.

Id., at (6). In light of this clear mandate, it is difficult to see how Montana could now take the position that it is authorized to unlawfully grant jurisdiction to the tribes and not "retain and exercise it authority to regulate water use and provide forums for the protection of water rights, including federal non-Indian and Indian water rights,..." Montana Statutes further provide that, in furtherance of this legislative intent: "...(b) any judicial determination of the State's authority to issue provision of permits on and off reservations should be decided in the appropriate State forum." *See id.,* at (6) (b). Therefore, the Montana Legislature has made it abundantly clear that the adjudication and regulation of on and off-reservation water rights must be performed by the appropriate State court, in this case the Montana Water Court.

For example, section 1-1-115 (t) states that, to the extent that there is any inconsistency between this ordinance and Montana water laws that are later amended, the tribes' ordinance will control water administration on the reservation. Although the ordinance also includes the reciprocal provision in the event the tribal ordinances change in a manner inconsistent with State law, Montana would be giving away so many of the rights of State water right holders under this

proposed settlement, such a provision offers little comfort and is akin to closing the barn doors after the horses have already gotten out.

47. **"Adaptive Management" is Not Defined.** In proposed ordinance, section 1-1-113 fails to outline what the tribes, the U.S., and Montana mean by the term "adaptive management." Adaptive management is one of the most controversial aspects of this compact. Local landowners can only speculate what the term means, but fear it would allow a tribal bureaucracy to administer Indian and non-Indian water rights in whatever manner it sees fit with no defined parameters, with a preference given to instream flows over irrigation demands and that unexpected water management decisions are likely to occur during times of low flows and low reservoir levels. In short, area water users fear the proposed settlement allows a tribal bureaucracy with no jurisdiction over many water users to make up the rules as they go.

48. **Any Compact Must Resolve All Controversies Related to Water Use.** In the proposed ordinance, section 1-1-114, the tribes attempt to leave the door open to later argue that the allotment of Indian lands as tribal members or the homesteading of those lands is illegal and in violation of the treaty. The tribes cannot have it both ways. Either all issues related to water rights and irrigation on the reservation are resolved as part of the compact or there can be no settlement. For this reason, section 1-1-114 must be deleted.

49. **Proposed Settlement Requires Montana to Defend Unlawful Provisions of Proposed Settlement.** In the proposed ordinance, section 1-1-115, as well as in other sections, the tribes and U. S. seek to force Montana to not only approve a compact that contains unlawful provisions, but defend those unlawful provisions for the decades and centuries to come. In short, the tribes and U.S., seek to make Montana taxpayers fight their own citizens to defend unlawful compact divisions that are not good for the people of Montana and that would cost Montana taxpayers considerable amounts in litigation costs in an effort to discourage judicial review. For

this reason, this paragraph must be deleted. Further, if the proposed settlement is ratified, then both the U.S. and Montana will be named defendants in numerous legal actions, including but not limited to takings actions. The compact seeks to make the Montana taxpayers defend each of those actions against Montana residents.

50. "Registration" of Water Rights by the Tribes is Really a Form of Tribal Permitting and an Attempt to Get Non-Indians to Unwittingly Consent to the Jurisdiction of the Tribes. The proposed settlement seeks to allow the tribes to "register" water rights on the reservation, including those held by non-tribal members. As stated above, there is no authority for this or tribal jurisdiction over state-war rights, non-tribal members, or their lands. Once again, paragraph 2-1-101 of the proposed ordinance, which is the section designated to describe what registration means and how the process works, is blank. It is yet another example of how the proposed settlement fails to provide adequate details so meaningful comments can be provided. "Registration" this is a highly contentious issue. To provide incomplete details as to what is meant by "registration" or how this process would work is unacceptable. Local water users anticipate that the details not provided would be adverse to their interests.

One detail provided related to "registration" is that, the tribes may determine an application for registration is defective or incomplete and return it to the individual water user, who only has thirty (30) days to correct it and refile it. To the extent that this provision implies the water right will be lost if not corrected and refiled within thirty (30) days would result in an unconstitutional taking. The potential for abuse by this tribal bureaucracy would be too great. Further, the registration process appears to be a covert attempt to coerce non-tribal members to file documentation with the tribal entity submitting themselves to jurisdiction of the tribes where in fact no such jurisdiction exists. Further, section 2-1-107 allows the tribes to require water

users to "register" water rights that were exempt or accepted from filing under State law pursuant to M.C.A. § 85-2-222 and 85-2-306. This clearly violates the laws of the State of Montana.

Although many of the details related to "registration" are not provided, 2-1-108 demonstrates that this "registration" process is merely a means by which Montana would unlawfully delegate its obligation and jurisdiction over water rights to this tribal bureaucracy and its engineer and give it the authority to deny "registration." Further, the proposed ordinance proposes that, if the water user whose "registration" is denied must appeal its decision to this joint tribal board and any appeal must be made to a "court of competent jurisdiction." The tribes and the U.S. have historically argued the "court of competent jurisdiction" is the federal court system, not the Montana Water Court or any Montana court. See proposed ordinance, paragraph 2-1-108 (8) and section 2-2-112.

Finally, at the end of the section related to "registration," it states that failure to "register" an existing use of water shall "divest the water user of any legal protections," thus denying them their water right. This is an attempt to unlawfully delegate the responsibility of the Montana Water Court under the McCarran Amendment to a joint tribal entity with no jurisdiction over Montana citizens. The entire "registration" scheme must be abandoned.

51. **Abandonment.** Local water users are alarmed that, even though the tribe argues that its reserved water right it not subject to abandonment, Section 2-1-113 authorizes an "appropriator" to bring an abandonment action against a local water user to abandon his water right. After reading through the definitions of an "appropriator" and "person," it appears that the tribes are authorized to bring an action to abandon water rights before this joint tribal board of water rights held by tribal members or non-tribal members. This is unacceptable, unsupported by law, and demonstrates how tribal administration would be like letting "the fox in the hen house." No settlement should be entered into that allows tribes to bring an abandonment action

to abandon water rights held by tribal members or non-tribal members. Further, any such abandonment cannot be handled by joint tribal entities as that entity has no jurisdiction over non-tribal members, their lands, or water rights existing under State law.

52. **Installation of New Headgates, Etc . . .** The tribes should not be allowed to order tribal and non-tribal members to install new headgates, weirs, valves, meters, gauges, remote controlled water diversion structures, and other structures and devices. However, section 2-1-114, section 3-1-110, and other provisions of the proposed ordinance give the joint tribal board and engineer the ability to order water users to install expensive weirs, headgates, valves, meters, and other equipment on and including expensive remote-controlled water diversion structures, or the engineer can have them installed and require the water user to pay for them. As stated numerous times before, the tribes have no jurisdiction to do so, nor would and joint tribal board or other employee or entity.

53. **New Uses Off-Reservation Are Not Permitted.** The proposed ordinance, section 2-2-118, proposes to authorize the tribe to market water off-reservation within the same watershed or outside the watershed. As stated previously, the only purpose of a reserved water right under the *Winters* doctrine is to allow a water flow rate for the primary purpose of the treaty for use on the reservation. There is no authority for granting more water to the tribes than is needed to fulfill the primary purpose of the treaty; therefore, there must be no water rights awarded to the tribe in excess of the irrigation use currently taking place on the reservation or for practicably irrigable lands on the reservation. This provision demonstrates this proposed settlement has more to do with money and less to do with water. The tribal government seeks to "monetize" the water rights at the expense of its tribal members and non-Indian water right holders.

It is only natural for parties to a dispute to seek more than they know they are entitled to at the beginning of a settlement process. This is exactly what is happening in these proposed settlement documents. This is a "wish list" proposed by the tribes and the U. S. The State of Montana must not take sides in this case and advocate in favor of the tribes. Instead, it is the responsibility of the State to abide by the Constitution and State and federal law and advocate equally for all Montana water users. In doing so, Montana should insist upon State jurisdiction over all non-tribal members, their fee lands, and State water rights, and resist any effort by the tribes to acquire more water right than those to which they are entitled for the "primary purpose" of the reservation and which can be quantified by technical and empirical data to support each and every reserved water right claim. To date, such data has not been provided.

54. **Emergency Provisions.** The proposed ordinance, section 2-2-120, proposes to allow unidentified entities to use water for emergency purposes. The term emergency includes eminent injury to "life, property, or the environment." Therefore, it appears that the tribes could declare an emergency in the case of low stream flows and dedicate those uses to instream flows rather than allowing that water to be used for irrigation. Such a result is unacceptable. To the extent that "emergency uses" are intended to mean fire suppression water, then the language should be tightened up to clarify the matter and prevent abuse.

55. **Request for Documents.** In order to assist local water users in evaluating the proposed settlement, please provide the following information and documentation.

a. All datum provided by the U.S. and Tribes to Montana to prove what the primary use under the treaty is;

b. All technical datum, maps, legal descriptions, soils studies, land classifications, used to quantify the reserved water rights for **historically irrigation lands,**

c. All technical datum, maps, legal descriptions, soils studies, land classifications, used to quantify the reserved water rights for **future irrigation on reservation lands,**

d. All technical datum, maps, legal descriptions, soils studies, land classifications, used to quantify the reserved water rights for **future uses proposed by the Tribes that are not related to irrigation lands** (which my clients assert is not supported by law),

e. All technical datum, maps, historic and current stream gage readings, water modeling, used to quantify the reserved water rights for instream flows;

f. All datum upon which the parties rely for their position that water can be saved within the irrigation project and the studies on water duties required to irrigate lands in the project;

g. A copy of all communications between the State agencies and the Tribes and Flathead Joint Board related to any and all parts of the proposed settlement.

h. A copy of all communications between the U. S. agencies and the Tribes and Flathead Joint Board related to any and all parts of the proposed settlement.

CONCLUSION

In light of the above, there is much work left to be done if a settlement is to be reached. Settlement remains a preferred alternative. However, as stated above, the proposed settlement documents are, at best, a "wish list." Montana's affected water users cannot, and will not, sit idly by and watch the federal agencies and Montana give away their valuable property rights and diminish the value of their lands. Local water users must have a seat at the table and see that any settlement achieved serves all the citizens of Montana, both tribal members and non-tribal

members. Montana cannot and should not assume tribal members with water rights on the reservation do not share the concerns of non-tribal members with water rights.

Thank you for the opportunity to submit comments. As stated above, settlement discussions should not be discouraged. However, if any settlement is to take place, it must address the issues outlined in these comments. If you have any questions or wish to discuss these comments, please call.

Truly Yours,
LAW OFFICE OF BRIAN C. SHUCK, P.C.

Brian C. Shuck

Cc: Bob Fain (reviewed and approved by phone)

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City of Whitefish

June 25, 2013
Letter #2013-066

RECEIVED
JUN 27 2013
D.N.R.C.

Arne Wick
RWRCC
P.O. Box 201601
Helena, MT 59620-1601

Dear Mr. Wick:

This letter is in response to Chris Tweeten's letter of June 4, 2013 related to addressing questions raised about the proposed Water Rights Compact with the Confederated Salish and Kootenai Tribes (CSKT) and the U.S. Government. I attended many of the public meetings in Polson and Pablo during the negotiations and the one public meeting in Kalispell after the compact was nearly in its final form for presentation to the Legislature. I want to say that I found the meetings informative and useful and the members of the negotiating parties and staff on all sides were very helpful and responsive.

The only question that the City of Whitefish was concerned about is whether the compact would have any effect on our current water rights and on our ability to expand our water rights in the future (primarily pumping from Whitefish Lake). Our concern focused on two areas:

1. Whether the proposed resolution of the CSKT "off-reservation" water rights, with the State of Montana agreeing to co-ownership of the State's "Murphy rights" (Article III, D-4), could force more or earlier water calls on our existing water rights. My final understanding was that it probably would not change the call dynamics or parameters because of co-ownership of the "Murphy rights", but any clarification that the RWRCC can provide on that topic would help us.

2. Whether the agreement for "on-reservation" water rights, especially as it relates to Flathead Lake water (and replenishment from Hungry Horse reservoir) could increase the likelihood of a call on our existing water rights or limit our ability to get new and additional water rights (probably from acquisition of creek water rights or filing for additional pumping water rights from Whitefish Lake). Again, any clarification of the potential for these impacts will be appreciated.

Our current water rights are shown on the reverse and the current proposal for adjudication of these water rights would give us 1,454.30 acre feet of water for this 18 cfs of historic water right.

CITY OF WHITEFISH WATER RIGHTS

	Claim #
May 5, 1958 - Whitefish Lake Pumping (Mountain Harbor)	17980
August 10, 1918 - First Creek of Haskill Creek	17982
August 10, 1918 - Second Creek of Haskill Creek	17983
July 28, 1929 - Third Creek of Haskill Creek	17984

I hope I have phrased our concerns with the proposed water rights compact with the CSKT and the federal government clearly enough. After attending all of the meetings, I did not feel our current water rights would be affected at all and that we would still be able to acquire new water rights either by purchase or by filing for additional pumping from Whitefish Lake. We do see a need to provide additional, clean water supply to a growing population in the future and we want to be able to obtain and provide that additional water supply.

Thank you very much for considering our concerns and you or staff may call me with any clarification questions or to discuss these matters.

Sincerely,

Chuck Stearns
City Manager
cstearns@cityofwhitefish.org

cc: Mayor John Muhlfeld
City Council Members
John Wilson, Public Works Director

Leta Tjon Wicka
53116 Marsh Creek Road
Charlo, MT 59824

June 23, 2013

Mr. Arne Wick, RWRCC
P.O. Box 201601
Helena, MT 59620-1601

To Whom It May Concern:

In response to a request for input regarding the CSKT Compact, I respectfully submit the following for consideration. The first segment addresses a question I asked and answers I received at couple of the public meetings held in the last six months of 2012.

The second segment addresses two major concerns with the compact itself.

SEGMENT ONE

First, a bit of background about myself. My name is Leta Tjon Wicka. I am a lifelong Montana resident, born and raised in Wolf Point, Montana, currently residing in the Mission Valley. My grandparents were all homesteaders/farmers who moved here in the early part of the last century. I have always been proud of our great state and the people who reside here. Recent events have given me pause regarding the behavior and conduct of our elected and appointed state officials.

I became aware of the proposed CSKT compact last May 2012. My curiosity and concern led me to a town meeting in Ronan where my concern changed to alarm. As a small landowner/irrigator in the Nine Pipes area of the Mission Valley, I was astounded that I had not yet heard of proposals being readied for final approval without the involvement of the citizens that would be impacted.

Mr. Bullock, your recent letter explaining your veto of SB 265 indicated that this agreement is the culmination of years of work and "public involvement." I beg to differ with your assertion of public involvement. It appears to me and many other citizens I have spoken with that the public involvement came on the heels of dissent from the people of Montana. The public meetings were then scheduled during the final six months of 2012 to present the final product to the people of Montana versus inviting discussion of a proposal for a CSKT Compact. Many of us local citizens who would be adversely impacted with the passage of the compact and chose to question the commission members were branded as outside troublemakers and treated disparaging.

During meetings I attended, I found the behavior of Mr. Weiner and Mr. Tweeten extremely unprofessional as well as arrogant and condescending towards the citizens of Montana who pay their salaries. At the meeting at the Community Center in Ronan, I asked why the state had not done an Environmental Assessment initially in order to gather concerns and formulate potential options so all of the issues would have been addressed up in front of the potential trouble areas. After all, the proposal involved people, fish, wildlife, farmers, ranchers, recreation, and water. The response from Mr. Weiner was that it was because it was a water issue and water is "minor" and they had a categorical exclusion. With that response, I began to search for the documentation from EPA referenced by Mr. Weiner which I never found. The next meeting I attended was in Libby, Montana. I noted that I was still concerned about the absence of an EIS and also that I was unable to locate the documentation for the Categorical Exclusion for the CSKT compact. This time, although my question was directed towards Mr. Weiner, Mr. Tweeten responded that I had misunderstood what had been stated at the meeting in Ronan. At the Libby meeting, I was told that an Environmental Assessment was not needed because the proposal was the result of litigation and not necessary under that purpose. I beg to differ. I had not misunderstood. The answer had changed. I understood from the answer that there was not an Environmental Assessment pending now or apparently in the future because all the work had been done by the compact commission members, presumably to avoid potential problems associated with public comment and involvement. I wonder how much taxpayer money has been spent on that process?

He then suggested that I really had no reason to attend the meeting in Libby since I was a Lake County resident and this meeting in Lincoln County was for "off reservation" concerns. Really? I lived in Lincoln County for 27 years and definitely have a firm connection to the area and the people and we always planned to return to Lincoln County once we retired.

I would also like to note that as a member of the FJBC I had no idea that the CME had been running the irrigation project since 2010 until last June when I started doing some research online. I actually found the historic document online at a Native News Blog from the Buffalo Post. I obtained copies of the EIS completed by the BIA which enabled the transfer of the operation from the BIA to the CME. I mention **Cooperative Management Entity** because this is what was agreed to via the transfer. As a matter of interest regarding public involvement for this process that resulted in the transfer to the CME, please note that two public meeting were held in 2004. Per information found in the Results of Scoping for the transfer approximately 14-20 people attended each meeting. There appeared to be little or possibly even no attempts to contact the affected irrigation members to provide during the scoping process for the process. The final EA was issued and approved March 2010 with a Finding of No Significant Impact.

In April 2010 Flathead Irrigation Agreement was signed which implemented the CME, I have attached the news articles that I located online which documents the signing of the Agreement and enabled the transfer of the operation from the BIA Management to CME Management (with BIA oversight). I also attached a summary of the EIS Process for the timeline of the Transfer of the Operation and Management of the Flathead Irrigation System from the BIA to the CME.

SEGMENT TWO

Though I have many concerns, I present for consideration TWO MAJOR CONCERNS WITH CSKT compact. I am relying for my data on MRWRCC document NUMBER LC0867, Jay Weiner, RWRCC Staff Attorney dated March 15, 2013 contained in packet prepared by the CSKT.

FIRST CONCERN

PAGE ONE
SUMMARY
UNITARY MANAGEMENT ORDINACE
CSKT - MONTANA WATER RIGHTS COMPACT

SUMMARY of the Unitary Management Ordinance wherein it states that the Water Management Board shall be composed of five voting members, two appointed by the Governor, two by the Tribes, fifth by the four appointed members. The sixth, non-voting member is appointed by US. WMB members must live on or do business within the Reservation . A Water Engineer, under the supervision of the WMB, will be responsible for the day-to-day implementation of the Ordinance and administration of water rights on the Reservation.

WHY is this a "concern?"

First, this concerns me because the transfer agreement mandated by law which stated that operation be turned over the to the owners of the irrigation project and agreed to in March 2010 when the Final Environmental Assessment issued by BIA was approved, provided for a **Cooperative Management Entity, NOT a Unitary Management Ordinance.**

If the UMO is approved, the effect would be disastrous for irrigators because **MEMBERS OF THE WATER MANAGEMENT BOARD ONLY HAVE TO WORK OR LIVE ON THE RESERVATION. THEY DO NOT HAVE TO BE IRRIGATORS WHO HAVE PAID FOR THE OPERATION AND MAINTENANCE OF THE PROJECT AND WILL CONTINUE TO PAY FOR THE RIGHT TO IRRIGATE THEIR CROPS AND FEED THEIR STOCK.**
Secondly, proposed HB 0629 bill states that "Water Management Board" or "Board" means the board created by Article IV.C of the Compact and vested with the responsibilities set forth in the Compact and in Tribal and State law for the administration of water within the Reservation." I am a non tribal resident living on an open reservation who will be subject to Tribal Law; in addition, the Board is guaranteed immunity from suit. WOW! I have

no standing with Tribal Law. I am not a member of that group; however, I did not relinquish US Citizen Rights when we purchased and paid for private property here in the Mission Valley. This is **not** acceptable and must be addressed before the water compact is approved.

SECOND CONCERN

Page 2 of LC0867 titled "Implement negotiated water compacts with Montana Tribal Governments Jay Weiner, March 15, 2013"

CSKT WATER RIGHTS OFF RESERVATION.

This is a premise based on the right to take fish and this right to take fish does not imply ownership of all of the water in Western Montana by the tribe. I have difficulty understanding why the elected and appointed officials of the state of Montana would so willingly give away the waters of Western Montana to a tribal entity that does not recognize the authority of state government without even exacting compensation for the giveaway of Montana's most valuable water resource. Explanations to date have proved unsatisfactory. Merely stating that the compact is "good" and should be approved is not enough.

Sincerely

Leta Tjon Wicka
/s/Leta Tjon Wicka

Cc:
Governor Steve Bullock
Office of the Governor
P.O. Box 200801
Helena, MT 29620-0801

Attorney General Tim Fox
Department of Justice
P.O. Box 201401
Helena, MT 59620-1401

Wick, Arne

From: Bob W [momnpopsnpolson@yahoo.com]
Sent: Monday, June 10, 2013 9:36 PM
To: Wick, Arne
Subject: specific information regarding the water compact adjudication

Dear Sirs and Madams,

Please be advised that serious concerns have finally surfaced concerning the CSKT's ability to provide creditable, truthful water compact information, data and facts during the numerous meeting they held these past years. Serious, factual and substantiated information was personally given to Chris Tweeten and all the members who held the public water compact meetings concerning a massive land fraud scheme being perpetuated by the BIA and the CSKT. This information was ignored and not allowed to surface during question and answer sessions and tribal authorities refused to comment.The refusal and inability of the CSKT, the BIA and the water compact committee to disclose the fact, that an ongoing scheme has allowed the CSKT and the BIA to fraudulently convey thousands of acres of Indian Trust land to unsuspecting land purchasers without BLM or Federal authority is a federal and a state crime. Moreover, most conveyances stripped water and mineral rights as a direct result of the each conveyance.

On June 7,2013 a multi-million dollar complaint was filed by the Missoula law firm of Tipp and Buley on behalf of their client. The complaint was filed against the US Department of Interior on their form #1105-0008 with a enclosed a cover letter.Furthermore, a class action lawsuit is anticipated by hundreds of unsuspecting Lake County residents whom have been defrauded by the BIA , the CSKT,and several other State and Federal entities in this matter.

The result of these lawsuits will be an inability of the CSKT to quantify the size of their reservation or their water needs until a Federal adjudication can determine who owns this wrongfully conveyed property. This land fraud is not isolated to the CSKT and has expanded to other reservations east of the mountains as well as other states.

All data provided by tribal authority and the committees who represented their interests concerning the water compact, is based upon a fraud of massive proportion. The FBI has been investigating this fraud for approximately four years and indictments will surely follow because this is additionally a fraud upon the federal government. The office of the Commissioner of Securities and Insurance and the Montana DCI have also been advised.

An immediate and emergency Court Injunction needs to be filed as a result of these frauds. I additionally believe that the Governor needs to appoint a speciaal investigator to determine the impact this fraud has had upon the water compact and the legal representations being made by the committee representatives and the chair.

Please contact Rich Buley at Tipp and Buley for additional information.

Sincerely, Robert Williams

RECEIVED
JUL 18 2013
D.N.R.C.

Montana State Senate

SENATOR DEE L. BROWN
SENATE DISTRICT 2

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PO BOX 200500
HELENA, MONTANA 59620-0500
CAPITOL, RM 412
PHONE: (406) 444-4800

HOME ADDRESS:
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HUNGRY HORSE, MONTANA 59919
PHONE: (406) 387-9393

The Big Sky Country

COMMITTEES:
VICE CHAIR - STATE ADMINISTRATION
BUSINESS AND LABOR
VICE CHAIR - ETHICS
HIGHWAYS AND TRANSPORTATION

July 15, 2013

Reserved Water Rights Commission
Box 201601
Helena, MT 59620-1601

Dear Ms. Hoeglund,

I have been very concerned that the RWRCC has not answered several questions the legislators had during the 2013 session. For that reason many of us felt that an extension of the discussions would be a productive way to handle the negotiations through SB 265 which Governor Bullock vetoed.

The main question I always asked was how much water does the tribe need for their own use. Until the acre feet are quantified and known, there are few means of knowing how much more water off the reservation they would require. The irrigators and other consumers on tribal lands should also be set before off reservation needs.

I hope that the RWRCC will consider the many questions from western Montanans and come up with a solution on which we can all agree. Thanks for your time on this matter.

Sincerely,

Dee Brown

Jones, Stan

From: Gina Klempel [klemlog@aboutmontana.net]
Sent: Tuesday, July 02, 2013 7:57 PM
To: Wick, Arne
Subject: water compact
Attachments: water compact.docx

Please see attached comment. I have attended many meeting regarding this issue and am NOT in favor of it.
Gina Klempel

This is in regard to the Water Compact that is currently being reviewed and must not be approved.

I am opposed to this for many reasons. The Indian Nation and people claim to be sovereign and by its very definition that leaves many questions on the forefront. If a body of persons wants to be labeled as sovereign then why are they funded in so many aspects by the government who is in tern the taxpayer. I am sovereign in many respects, I am not funded in anyway and I collect no funds of the government for my business or personal needs.

I as a tax payer am a sovereign CITIZEN of Montana, and I have been required to list my water use with the DNRC and for you or any other entity to now come forward and say that I shall be subject to a Water Compact that was diminished in 1904 when the reservation was opened is unjust to me as a citizen of Montana and the United States of America. There is absolutely no compensation for the devaluation of property that this will encompass in the future not mention the economy and my rights as a taxpayer. State based water rights MUST remain under control of the state. Americans are already burdened with more government and I am certain you will again burden the taxpayer of Montana with more employees to somehow reign in this monster you call a fair and equitable solution to a problem that doesn't even exist.

The Federal Government encouraged citizens and people from all walks of life to set up residency in these areas many years ago. I can clearly see that that was chicanery then and is chicanery now. To me aboriginal treaty rights are not water rights we are all citizens in common no one race or people are greater than another.

Shall we also take into account that cavemen were here before any of us were so when does this end?

This is being submitted on July 2, 2013.

Sincerely,

Gina Klempel

1484 Ashley Lake Road

Kalispell, Mt.59901

William L (Bill), Grace B. & Alan W. Slack
32930 East Post Creek Road
St. Ignatius, Montana 59865

RECEIVED
JUL - 8 2013
D.N.R.C.

June 30. 2013

Ch, Chris Tweeten, Attn. Arne Wick, RWRCC
PO Box 201601
Helena, Montana 50602-1601

Dear Ch. Tweeten,

Re. Your letter dated June 4, 2013 regarding Governor Bullock directing an interim study and report on objections to the CSKT proposed Water Right Compact with Montana.

Our objections center on the three fundamental flaws demanded in their proposal and granted in the compact:

1. Tribal ownership of ALL the water rights on and around the reservation
2. Tribal administration and control of all recognized water rights through a Water Management Board (WMB) easily dominated by the ten-member Tribal council.
3. Abrogation of State responsibility and authority to manage its waters, both off and on the Reservation.

(1.) ARTICLE I – RECITALS presumes Tribal ownership by accepting that pursuant to the Hellgate Treaty the "Tribes reserved the Flathead Indian Reservation" (see the first declaration of conditions upon which the compact is based, page 1). This becomes the basis of the entire compact and the abrogation of a decreed water right for the Flathead Irrigation Project (FIP) and State administration. The cited Statute is clear that the US President and Congress made the reservation for the purpose to settle Indians of various Tribes. The Compact makes no attempt to identify and quantify the water required for that purpose except unreasonably high in-stream flows that exceed the time proven requirements to protect the fisheries. It has no acknowledgement of the legitimate opening of the reservation and establishment of other water rights under State law.

This must be corrected.

We own land that depends upon water rights both within and outside the FIP. The Compact depends upon the acceptance of an agreement by us and others to withdraw water right claims for FIP lands (WUA Appendix C,) which we categorically reject, leaving it incapable of implementation. Patents to our land were issued by five US Presidents, each granting ownership to individuals, their heirs and assigns along with all appurtenant rights, specifically including water.

(2.) We object to the establishment of a Water Management Board (WMB) as "the exclusive regulatory body on the reservation" (ARTICLE IV, C, 1.) We depend upon the State to defend, quantify and administer our right to an adequate supply of water for our land.

We see the WMB as dominated by the Tribes through their legitimate right as State citizens to influence a Governor in his appointment of two members, their exclusive appointment of two others, the four of whom would select a fifth voting member acceptable to them (Art, IV, C, 2.)

Under the compact's WUA, FIP water rights will become a Tribal water right and any change of use applicant must "secure the written consent of the Tribal Council" (Art. IV, B, 4.) We object to that Tribal domination. All our other water rights also appear to be covered.

We object to these provisions.

(3.) Treaty language allowing Indians, who were not yet citizens, the privilege of taking fish from usual and accustomed streams along with citizens" hardly entitles a yet to be formed Tribal Government to assume an equal part in State administration of its waters. (Art, III, F,) Your repeated acceptance and that of the Federal teams, of these contrary claims demonstrate abandonment by our State and Federal Governments and a failure to defend our rights

The Tribes' proposed "Framework for a Compact" upon which this one was negotiated is a clear attempt to establish our domination by a handful of our neighbors and friends. We believe that the compact must be altered to remove these faults and simply identify and quantify the reserved water rights needed, and used, by the Indian people along with others who have been invited and encouraged to settle here.

Respectfully, William L. Slack
Grace Slack
Allen Slack

cc. Governor, Steve Bullock
Attorney General, Timothy Fox

Wick, Arne

From: John Yatchak [mtdirect@centurytel.net]
Sent: Sunday, July 14, 2013 10:45 AM
To: Wick, Arne
Subject: CSKT Compact draft

Arne,
I cannot support the existing Compact Commission draft. It should be scrapped. I do support the alternative position defined in the CSKT Compact critical review.

John Yatchak
PO Box 3091 Columbia Falls, MT

Wick, Arne

From: Margie Hendricks [margiehendricks@bresnan.net]
Sent: Friday, July 05, 2013 2:21 PM
To: Wick, Arne
Subject: Water Compact interest

July 5, 2013

1701 Hillcrest Drive

Polson Mt. 59860

Arne Wicks,RWRCC

P.O. Box 201601

Helena, Mt. 59620

Dear Sir,

I have just learned interested parties received letters from your office giving an extremely short period of time to respond with opinions concerning the Water Compact. I am an irrigator and a resident of Polson dependent on the municipal water supply for my residence. I received no letter although I have attended Compact meetings and have an interest in this issue. For the past eight years I have consistently addressed water rights issues and flawed estimates regarding city water capacity whenever the Polson City Commission has addressed annexation and subdivision development. June 17, 2013 a proposal to rezone and annex a 157 acre parcel of land southeast of the city was on the City Commission agenda. I wrote a letter to the city documenting why I though the city had not been transparent about water rights issues concerning four out of the six existing city wells and suggested that it was important the issues be discussed and that citizens be given an opportunity to know how the recent Water Compact with the Salish Kootenai Tribes would affect the outcome of existing and future city wells. At the Commission meeting I read a private correspondence dated, February 12, 2007, in which Polson Mayor Marchello wrote, " In response to the question you raised at the city council meeting Monday last, the City Attorney apprizes me that the legal status of the city's existing and potential future public water supply well permits depends on the resolution of several direct and resulting questions now pending in connection with negotiations between the Tribes and the State of Montana....." The city council consistantly ignores my questions in public meetings. The personal letter in responce to my question was not a matter of record, nor was my question recorded in the minutes. In my June 17th statement to the City Commission I said I was unable to get a clear picture as to how the city's unique water rights issues were handled in the Compact submitted to the State Legislature in 2013. I suggested the city be clear about what was negotiated in the compact concerning the city's water rights before promising water service for development.

Water Superintendent Tony Porrazzo responded to my presentation saying, " The Compact does not control this. The city is in a whole different ball game. We came up with the Brueggeman Bill in 2003.The Compact that their doing is personal wells and irrigation wells." However, an article in a local news paper, dated March 6, 2003, quotes Mr. Brueggeman to say, " This is not a change to existing use, the bill should not affect the (water rights) negotiation process."

It is clear that for over fifteen years Polson city residents have had no idea that over 1000 water hook-ups were being promised while elected officials withheld the information that the wells needed to supply the water for development had no valid water right. Irrigators have complained that they felt left out of the negociation process, but what about Polson city resident's who had a right to know, and a right to participate, in the annexation and subdivision process, but a vital piece of information regarding the city water supply was not disclosed. I think the Compact Committee must take into account whether interested parties were legitimately informed about the negociations taking place and to be informed as to how the final Water Compact resolved the city's water supply issues. Transparency concerning this issue affects the health, safety and Welfare of the community , yet it can be clearly documented citizens were never reasonably informed elected officials were taking a risk concerning water supply.

Margie Hendricks

MINERAL COUNTY BOARD OF COMMISSIONERS

PO Box 550
300 River Street
Superior, MT 59872
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mccommissioners@co.mineral.mt.us

RECEIVED
SEP 26 2013
D.N.R.C.

September 20. 2013

Mr. Chris Tweeten, Chair
Montana Reserved Water Rights Compact Commission
1424 Ninth Avenue
Helena, MT 59620-1601

Dear Chairman Tweeten,

This letter is in reference to the Flathead Water Compact dated February 13, 2013. After reviewing information and documents about the pending Water Compact, Mineral County is against any changes in the original aboriginal treaties in existence prior to the formation of Montana as a State, from that as a Territory. When Montana became a State, as recognized by the US Congress and the Citizens of Montana, no further constraints were required nor expected, than those incorporated into the newly formed Montana Constitution. As a result, any changes, limited or large, shall not come about without a Montana Constitutional amendment. Any abridgement to these original effects of the interactions or treaties with Tribal entities shall be null and void.

This Water Compact is an end run around the people of Mineral County, and the people of Montana. The end outcome is that all water rights in Mineral County will become voided in their primacy, and subject to arbitrary or even vindictive whims of the future, of which the people shall have no say, no representation, and no self determination, as guaranteed in our Montana and US Constitutions.

As a result, Mineral County is adamantly against any and all attempts to change, modify, or amend the original status of the original Treaty in effect at the time of our Statehood inception. Mineral County reserves all rights of the County and its Citizens for all waters flowing into, falling upon, or migrating through Mineral County, including moisture vapors, cloud formations, subterranean and overland flows, impoundments and aquifers.

As provided in the Treaty's words, the water shall be shared by all, outside of any physical original boundary delineation of the Confederated Salish and Kootenai Tribes. No more, no less. This decision is not made lightly, but it is made definitively and assertively.

The Water Rights Commission needs to stay in its original areas of allotments as provided by the Treaty for the Flathead Indian Reservation. Mineral County's Citizens' water rights are currently controlled by the State of Montana. These are not to be given to, nor denigrated by a group with no representation or responsibility to the Citizens of Mineral County. The Clark Fork River, and all of its tributaries that flow through or drain into Mineral County affects all of Mineral County is some way. This includes all of the aforementioned above and below ground, surface and aerial waters.

In summary, Mineral County is opposed to any encroachment by the Tribe or Water Compact, in any way that is beyond the original Treaty allowances, and as intended at the time of its enactment and at the inception of Statehood of Montana.

Sincerely,
BOARD OF MINERAL COUNTYCOMISSIONERS

Sincerely,
Mineral County Commissioners

Laurie Johnston, Member

Duane H. Simons, Member

Roman Zylawy, Chairman

Office of
The Board of County Commissioners
Granite County

Post Office Box 925, Philipsburg, Montana 59858-0925

Office Telephone 406-859-7022 Office Fax 406-859-3817 Web Site www.co.granite.mt.us

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OCT 22 2013

D.N.R.C.

Scott C. Adler, Chairman
750 Frontage Road West
Drummond MT 59832

Clifford Nelson, Commissioner
25 Nelson Lane
Philipsburg MT 59858

Bart C. Bonney, Commissioner
P O Box 701
Philipsburg MT 59858

October 8, 2013

Mr. Chris Tweeten, Chair
Montana Reserved Water Rights Compact Commission
1424 Ninth Avenue
Helena MT 59620-1601

Revised To Correct Typographical Errors

Dear Chairman Tweeten:

This letter is in reference to the Flathead Water Compact dated February 13, 2013. After review and study of the documents, and listening to both proponents and opponents of the compact, the Granite County Commissioners voice our opposition to the current proposed compact.

This decision was not made lightly. We understand the importance of settling the reserved water rights for the Confederated Salish and Kootenai Tribes. Unfortunately, the current proposal does not reflect a fair and equitable division of waters, nor is there enough information provided by the Compact Commission concerning the amount of federal reserved water right so that adverse effects of this compact on Granite County can be determined.

We are in support of efforts to secure a dramatically different compact that adheres to the following principles:

- The commission stays on the reservation and restricts the compact to quantify and include only the federal reserved water rights of the CSKT for the Flathead Indian Reservation
- Private land ownership and appurtenant water rights must be respected and maintained
- The State of Montana must retain jurisdiction and control over the administration of all state-based water rights, including those on the reservation
- Financial contributions from the state should address the needs of all citizens

- The state should make no contribution with respect to the federal irrigation project on the reservation as it is a federal responsibility
- The compact must include studies showing economic, environmental and property value impacts
- The compact must be a fair and equitable agreement for all Montana citizens

We appreciate the opportunity to comment on this important matter.

Sincerely yours,

BOARD OF COUNTY COMMISSIONERS
OF GRANITE COUNTY

Scott C. Adler, Chairman

Clifford Nelson, Commissioner

Barton C. Bonney, Commissioner

cc: Governor Steve Bullock
Senator Gene Vuckovich
Representative Kathy Swanson

October 29, 2013

RECEIVED
NOV 1 2013
D.N.R.C.

Dear Governor Bullock and Attorney General Tim Fox,

As a preface to the attached letters, the authors of the letter would like for you to be alerted to the following:

1st You have been receiving letters from a group of people expressing their **support** of the Flathead Reservation Compact and the Water Use Agreement. The first was dated August 5, 2013. These letters were accompanied by list of typed names. Many people were undecided or confused by the subject at the time of contact and not aware their names would be added to the letters.

2nd Please note that the names on this letter are all original signatures of people who have read the letter and agreed with it.

Carol Lyons, Elaine McPherson, Maxine Whitson and Sheila Vallejo.

Thank you, now read the letter:

Carol Lyons
Maxine Whitson
Elaine McPherson
Sheila Vallejo

October 8, 2013

Governor Steve Bullock
P.O. Box 200801
Helena, MT 59620-0801

Attorney General Tim Fox
P.O. Box 201401
Helena, MT 59620-1401

Dear Sirs:

Yes, this is one more letter concerning the proposed CSKT Water Compact. We are the farmers, ranchers and homeowners on the Flathead Indian Reservation who are actually working and making our living on the land affected by this proposed compact. We would like to put these concerns before you in this letter.

As irrigators under the Flathead Irrigation Project, we are very concerned with the ownership of the water-rights to the irrigation water delivered by the Project and the amount of irrigation water we will be given, and who will be administering the water.

As homeowners with domestic wells, we are very concerned with the reduced amount of well water allowed for any future wells that we may need, and who will administer these wells.

We support the Flathead Joint Board of Control and all individuals that are attempting to continue discussions with the Tribes, The State, and the U.S. so a fair agreement can be reached that will protect all water users, whether through irrigation, domestic wells or any other historical beneficial use of water. We approve the Flathead Joint Board of Control letter dated September 18, 2013, sent to you by Wayne Blevins, Vice President of the FJBC.

We are opposed to a special session of the Montana Legislature at this time that would be called to revisit the CSKT Water Compact as it is written. We ask that Tribal water rights are quantified and adjudicated before the CSKT Compact is ratified!!

People need the time to realize what this compact will do now and how it is going to affect future generations. We need to follow the Montana Constitution laws that will make this water issue fair and equal to each and every Montana citizen.

We also respectfully state that it is the duty of our elected officials to uphold the Montana Constitution. We hereby request that the State of Montana assume it's true and correct role to protect the water right of its citizens and not relinquish that duty to other entities.

Thank you for your time and attention to this matter. See signatures attached.

Copy to: Reserved Water Rights Compact Commission

** duplicates

Signature	Printed Name	Address
Ted Schall	Ted Schall	Arlee
** Dean Brockway	DEAN BROCKWAY	ARLEE **
Lee Megers	Lee Megers	Arlee Mt
G.D. Rogers	G.D. ROGERS	ARLEE MT.
Ron	Ron Gibson	Arlee MT
Wes Mapston	Wes MAPSTON	Arlee Mt. 59821
Judy Morton	JUDY MORTON	Arlee MT 59821
Estee Fleming	Estee Fleming	Arlee, MT 59821
[illegible]	DAN TRUMBETTE	ARLEE MT 59821
K. J. Grover	K.J. Grover	Arlee, MT 59821
SUSAN E. GROVER	SUSAN E. GROVER	ARLEE, MT 59821
Mary Anne Rolbein	Mary Anne Rolbein	Arlee, Mt 59821
Ken & Julie Hill	Ken & Julie Hill	DIXON, MT 59831
Gary & Sharon Hill	Gary & Sharon Hill	Powell, Mt 59863
Sidney Powell	SIDNEY POWELL	Arlee Mt 59821
Ron Olmsted	RON OLMSTED	ST. IGNATIUS MT. 59865
LaVonne Olmsted	LaVonne Olmsted	St. Ignatius MT 59865-9672
Melvina Krantz	Melvina Krantz	St. Ignatius MT 59865
Loretta Adams	Loretta Adams	Arlee, MT 59821

Signature	Printed Name	Address
Carol Lyons	Carol Lyons	St. Ignatius
Brent Powell	Brent Powell	St Ignatius
Charley Lyons	CHARLEY Lyons	ST Ignatius
** Gene Erb	[redacted] Gene Erb	Dixon MT
Helen Detert	HELEN DETERT	ST. IGNATIUS
Allen Detert	Allen Detert	St. Ignatius MT
Roger Detert	Roger DeTert	ST. IGNATIUS, MT
Rosemary Detert	Rosemary Detert	St. Ignatius MT
Frank Pope	FRANK POPE	ST IGNATIUS, MT
Pat Marks	Pat Marks	ST. IGNATIUS, MT.
Joan B Mason	JOAN B. MASON	ST. IGNATIUS, MT
Lynn D Mason	Lynn D Mason	ST. Ignatius, MT
Jerry Laskody	JERRY LASKODY	ST. Ignatius, MT
[illegible]	STEVE TOKA	Ronan, MT
Sheila Vallejo	Sheila Vallejo	St. Ignatius, MT.
R. Roy Vallejo	R. Roy VALLEJO	St Ignatius, MT
[illegible]	Garrett Hobbs	St. Ignatius, MT.
George Biggs, Barbara Biggs	GEORGE BIGGS	59802 Foothill Rd. MT.
[illegible]	John Swenson	[redacted] Ronan MT
** Dennis Roush	Dennis Roush	Charlo MT.
Maxine Whitson	MAXINE WHITSON	St Ignatius, MT

Signature	Printed Name	Address
Evelyn Ivanoff	EVELYN IVANOFF	25989 Grey Wolf Arlee, MT
Wilda McKnight	Wilda McKnight	31498 Jocko Rd. ARLEE MT 59831
Jill Ulsom	JILL ULSOM	34300 White Coyote
Craig H. Blevins	Craig H Blevins	47268 Rocky Butte Rd, Ronan MT
Beth M Blevins	Beth M Blevins	47268 Rocky Butte Rd Ronan, MT
Marvin Rehbein	MARVIN ~~FRANK~~ REHBEIN **	Arlee MT 59821
Shannon Carr	Shannon Carr	Hot Springs MT 59845
** Christopher S. Sullivan	CHRISTOPHER S. SULLIVAN	166 MT HWY 212 DIXON, MT 59831

Signature	Printed Name	Address
Elaine McPherson	Elaine McPherson	35625 Hawkins Rd St. Ignatius
Kurt McPherson	Kurt McPherson	35625 Hawkins RD. St. Ignatius
E.H. Clawson Jr	Post Creek Properties E.H. Clawson, Jr	4660 Gordan Ln, Missoula
Russell Smyth	Russell Smyth	57538 Lower Crossing St Ignatios
Robert L. Starks	Robert L. Starks	56949 Watson Rd St. Ignatious, M
Edward V Wehrheim	Ed Wehrheim	52695 Kuntz Ln. Charlo, MT
Teri Swerson	Teri Swerson	38147 Rolling Rd. Ronan
William Howell	William Howell	57469 Moiese Uly Rd Moiese, MT
Christopher Chavasse	Christopher Chavasse	30050 Round Butte Ronan
Michael H. Gale	Michael H. Gale	42452 Canal Rd. Ronan
Buffalo Wallow LLC	Buffalo Wallow LLC	34373 Repass Trail St Ignatius
David Passieri	David Passieri	57301 Crow Dam Rd Charlo MT 59824
Dean Brockway	Dean Brockway	25900 Gray Wolf, Arlee
Judie Schock	Judie Schock	37141 Pinsonault Rd St. Ignatius
Gene Schock	Gene Schock	37141 Pinsonault Rd St Ignatius
George Beebe	George Beebe	26711 Ryan. 93 Ravalli
Stuart Maynard	Stuart Maynard	37663 Hawkins Rd 59865
Susan Chatfield	Susan Chatfield	36614 Hawkins Rd SI 59865
Thomas Chatfield	Thomas Chatfield	36614 Hawkins Rd SI 59865
Donna B. Cook	Donna B. Cook	74570 US Hwy 93 SI 59865
James D. Cook	James D. Cook	74570 Hwy 93 S.I 59865
Christina Eyelo	Christina Eyelo	74426 Hwy 93 St. I 59865
Curtis Eyelo	Curtis Eyelo	74426 Hwy 93 ST I 59865
Molly J Mathey	Molly J Mathey	57898 Woodrose Ln St Ignatius MT 59865
Jeff Smyth	Jeff Smyth	57489 Lower Crossing Rd St. Ignatius
Bob Rosenbaum	Bob Rosenbaum	54582 Kerr Dam Rd Charlo MT
Mark McNeel	Mark McNeel, DVM	41721 Gallagher Ln Charlo, MT 59824
Billy Cordis	Billy Cordis	74521 Hwy 93 St Ignatius MT 59865
Bill G Cordis Sr	Bill G Cordis SR	74521 Hwy 93 St Ignatius MT 59865
Shirley Cordis	Shirley Cordis	74521 Hwy 93 St Ignatius MT 59865
Boyd Frame	Boyd Frame	74521 Hwy 93 St Ignatius MT 59865

Signature	Printed Name	Address
E Anne Swenson	E ANNE SWENSON	33305 Red Horse Rd St. Ignatius
Ray Swenson	Ray Swenson	33305 Redhorse Rd ST. Ignatius
Alan W. Slack	ALAN W. SLACK	32930 E. Post Creek Rd St. Ig
William L. Slack	William L. Slack	32930 E Post Cr. Rd. St. Ig
Grace Slack	GRACE SLACK	32930 E. Post Cr. Rd. St. Ignatius
Bonnie Cable	Bonnie Cable	33920 McDonald Lk Rd St. Ignatius
Pat Cable	Pat Cable	33134 McDonald Lk
Norman Reum	NORMAN REUM	32505 McDonald Lk. Rd. ST. Ignatius

Signature	Printed Name	Address
Marsha Straus	MARSHA STRAUS	42452 Canal Rd; Ronan 59864
Diane Speer	Diane Speer	31328 Sunrise Hts., Polson 59860
Andrew W Speer Jr	Andrew Speer	31328 Sunrise Hts Polson
Carolyn Palmquist	Carolyn Palmquist	41119 Melita Dr. Polson
Elsa Dufond	ELSA DuFond	905 15th Ave. E. Polson
Rory Horning	RORY HORNING	38698 MASUMOLA RD. POLSON
John Banks	John Banks	41252 St Mary LKSD St. Ign.
Teresa Banks	TERESA BANKS	41252 ST MARY'S LAKE RD
J. Shane Shima	J. Shane Shima	48001 Hughes Rd Ronan
Carissa Shima	Carissa Shima	48001 Hughes Rd, Ronan
David Koger	DAVID KOGER	33366 EMORY RD., RONAN
Ludmilla P. Koger	Ludmilla P. Koger	33366 Emory Rd Ronan
Grant R. McPherson	Grant R. McPherson	70468 MAPLE DRIVE - Arlee MT 59821
Charles Jacquier	CHARLES JACQUIER	58608 HILLSIDE - ST IGNATIUS

Signature	Printed Name	Address
Ross Middlemist	Ross Middlemist	10575 Hwy 200 Dixon, MT
Jack Brewer	Jack Brewer	10538 Hwy 200 Dixon MT
Diane Brewer	DIANE BREWER	10538 HWY 200 DIXON MT
Harley Hettick	Harley Hettick	11067 MT Hwy 200 DIXON Montana
Joey A Hettick	Joey A Hettick	11067 MT Hwy 200 Dixon MT 59831
Karen Halter	Karen Halter	11069 MT Hwy 200. Dixon 59831
Cassie Silvernale	Cassie Silvernale	12 King Rd. Dixon
Fawn Silvernale	Fawn Silvernale	12 King Rd. Dixon
Daniel Boone Cole	Daniel Boone Cole	11482 MT Hwy. 200, DIXON
Sharon R. Cole	SHARON R. COLE	11454 MT Hwy 200, Dixon
Reece W. Middlemist	Reece W. Middlemist	10829 MT HWY 200 Dixon MT 59831
Katelyn Middlemist	Katelyn Middlemist	10829 MT Hwy 200 Dixon 59831
Christopher S Sullivan	CHRISTOPHER S. SULLIVAN	166 MT Hwy 212 DIXON, MT 59831
Stacy Sullivan	Stacy Sullivan	166 MT Hwy 212 DIXON, MT 59831

Signature	Printed Name	Address
Edna R. Esterby	EDNA R. ESTERBY	54001 ESTERBY LN CHARLO, MT. 59824
Neal Coulter	Neal Coulter	59107 Hwy 212 Charlo
Dennis Roush	Dennis Roush	38357 Dallas Rd Charlo
Del Palmer	DEL Palmer	PO Box 55 Charlo MT
Robert Miller	Robert Miller	38410 Olsen Rd Charlo

Signature	Printed Name	Address
W.E. Harper	W. E. Harper	POB-663 Ronan, MT 59864 57936 WoodRose Ln St-Ig-59865
Louis Polinsky	Louis Polinsky	56598 Nine Pipe Rd St Ignatius Mt
Mary Jo Dunham	Mary Jo Dunham	57754 WoodRose Ln St Ignatius Mt 59865
Robert W Apland	Robert W. Apland	57754 WoodRose Ln St Ignatius Mt 59865
[illegible]	James L. Pettit	47370 glacier lily Lane Ronan, MT 59864
** Sharon R Cole	Sharon R. Cole	11454 MT Hwy 200 Dixon, MT 59831

Signature	Printed Name	Address
Lynn Delecaris	Lynn Delecaris	P.O. Box 1133 St. Ignatius, MT. 59865
		32260 Allison Rd
Gene Erb	Gene Erb	P.O. Box Dixon, MT. 59831
Suzie Hunt	Suzie HUNT	60329 Old Freight Rd St. Ignatius

Signature	Printed Name	Address
Christine M. Laskody	CHRISTINE M. LASKODY	32178 Ashley Lake Rd St. Ignatius, MT 59865
Johanna Clark	Johanna Clark	56381 Hillside Rd St. Ignatius
William H Fry IV	William H FRY IV	62444 Edelwiess Ln ST Ignatius MT 59865

Signature	Printed Name	Address
Charlotte Priddy	CHARLOTTE Priddy	DIXON, MONTANA
[illegible]	Jeffrey J Brad [illegible]	USA

Wick, Arne

From: Alan Mikkelsen [alanmikk@gmail.com]
Sent: Thursday, November 07, 2013 10:53 AM
To: Wick, Arne; Hornbein, Melissa
Subject: Letters to Governor, Attorney General
Attachments: Mission-Jocko District Letter to Governor Bullock.docx; Letter to Governor Bullock.docx

Arne, Melissa,

It's been a few weeks since I've sent these to you. There have been several more large operations sign up, so the acreage number is probably low. As before, I would appreciate it if you would take these to the Governor's office and AG's office. Thanks.

--
Alan Mikkelsen
Alpine Research, L.L.C.
61342 Hillside Rd.
St. Ignatius, MT 59865

406-240-0703 phone
406-745-3363 fax

November 7, 2013

Governor Steve Bullock
P.O. Box 200801
Helena, MT 59620-0801

Attorney General Tim Fox
P.O. Box 201401
Helena, MT 59620-1401

Dear Governor Bullock and Attorney General Fox,

As Mission Irrigation District and Jocko Valley Irrigation District farmers and ranchers, we want to join with Flathead District farmers and ranchers who have already sent you a letter expressing support for the Flathead Reservation Compact and the Water Use Agreement. Like them, we have some grave concerns about the misinformation that is circulating about the proposed Water Use Agreement and the Compact.

Every legal water right has four attributes—a point of diversion—a place of use—a flow rate—and a priority date, or date of appropriation. Of these, the last—priority date, is most important, especially in times of drought. Under western water law, 100% of the senior water right must be satisfied before water can be released to a junior right. There is no sharing of water shortages between junior and senior rights. In times of drought, that means that junior rights may not receive any water at all, depending on the available supply.

In the Klamath River Basin in southern Oregon, a negotiated settlement was reached several years ago that provided for water and sharing in times of shortages between junior and senior water rights involving irrigation districts and the Klamath Tribes. Other irrigators refused to participate in the negotiated settlement, however. This year, the irrigators with the negotiated settlement are receiving water and the irrigators who refused to negotiate are having 'calls' placed on their water, which means they cannot irrigate because the water they are using needs to satisfy the senior Indian water right. According to news articles, this involves at least 58,000 acres of irrigated land.

We do not want that to happen here, on the Flathead Indian Irrigation Project or on the Flathead Indian Reservation. We believe the proposed Water Use Agreement and the Flathead Reservation Compact should be approved and implemented by the State of Montana, the U.S. and the CSKT.

The FJBC spent millions litigating instream flows in the late 1980's and early 1990's. The FJBC lost. We believe the FJBC will lose again and we do not want to pay for more litigation. We do not want to pay for increased pumping costs which may approach $6.00-$7.00 per acre after 2015. We do not want to lose the benefits of a secure supply of irrigation water guaranteed by the water use agreement. We do not want to lose the benefits of state and federal dollars fixing our irrigation project.

We would like to address and rebut some erroneous claims being promoted by Compact opponents:

First, the Compact does not allow CSKT control of all the water in western Montana, or even on the Flathead Indian Reservation. In fact, simply reading the proposed Water Use Agreement and Compact proves that to be a false claim. The Compact clearly states that Montana will administer all off reservation water, including water rights co-owned between the CSKT and Montana and water rights held by the CSKT. The Water use agreement clearly states that private and secretarial water rights are not included in the Agreement or Compact and that the Montana Water Court will adjudicate those claims. Finally, The CSKT also do not have unilateral jurisdiction on the Flathead Reservation, either. The Compact sets up a six member board, with five voting members to oversee administration of water rights and permits on the Reservation. Only two of these six members are appointed by the CSKT. Does this sound like the CSKT will have unilateral control of water in western Montana? No.

Second, the Water Use Agreement provides a good, secure water supply for irrigators, including a mechanism for irrigators to continue to receive extra duty water. This provides Flathead Project irrigators with a reliable supply of water, without any litigation costs and also provides large amounts of state and federal dollars to improve the irrigation project. These are dollars that irrigators will not have to raise themselves to affect much needed repairs.

Third, There is no provision in the Water Use Agreement or Compact that allows the CSKT to monitor or meter wells. The Unitary Management board may require meters on new large wells, as is done in other areas of the state, but that is for the protection of existing small wells, as is done in other areas of the state.

Fourth, the Compact specifically provides a mechanism not only for the protection of existing water uses, such as all the wells that have been drilled since 1996 without any permits, but also provides for the development of future uses, including new wells. These Compact provisions virtually mirror Montana law. The Compact and Water Use agreement provide certainty and security that is now lacking, without spending millions of dollars in litigation costs.

Governor Bullock, we respectfully request your support for the Flathead Reservation Compact to be addressed in a special session of the Montana legislature. We cannot afford the alternative.

Signed**:

Glen & Karen Raisland, St. Ignatius
Rocky & Robin Schock, St. Ignatius
Teri Carns, St. Ignatius
Cheryl Colacuricio, St. Ignatius
George & Denise Gooddale, St. Ignatius
Aspen & Brian Incashola, St. Ignatius
Walt Schock, St. Ignatius
Jake Wadsworth, St. Ignatius

Scott Wadsworth, St. Ignatius
Paul Wadsworth, St. Ignatius
Karen Stewart, St. Ignatius
Dennis Miller, St. Ignatius
Greg Schock, St. Ignatius
Mark Castor, St. Ignatius
Jerry & Valerie Johnson, St. Ignatius
Lynette Mikkelsen, St. Ignatius
Wayne & Maccine Scammon, St. Ignatius
Steve Hughes, Polson
Robert Watson, St. Ignatius
Jerry & Janet McGahan, Arlee
David Rockwell, Dixon
Roy Anderson, St. Ignatius
Linda Helding, Arlee
Mary Stranahan, Arlee
Rod Richardson, St. Ignatius
Bret Schlueter, St Ignatius
Henry & Dorothy Jorgensen, St Ignatius
Gary & Lavonn Grandy, St. Ignatius
Brad Kling, St. Ignatius
Jack & Claudia McReady, St. Ignatius
Penny Nord, Arlee
Shirley Juhl, Placid Lake (non-district)
Steve Dagger, Arlee
Gordon Doney, Arlee
Dale Doney, Arlee
Clark Matt, Arlee
Malone Trust, Arlee
Randy Tiensvold, Arlee
Walter Mahler, Arlee
Bonnie Burnett, Arlee
Maxine Doney, Arlee
Kerry Doney, Arlee
Ron Kernvelt, Arlee
Cub & Glenda Dumontier, Arlee
Dan & Janet Chilcote, Arlee & Missoula
John & Lydia Fleming, St. Ignatius
Rick Runkle, St. Ignatius
Bill & Marilyn Wolf, St. Ignatius
Kim & Betsy Manore, St. Ignatius
Wilma Manore, St. Ignatius
Joe Weydt, Arlee
Don & Donna Coffman, St. Ignatius & Sidney, MT
Peggy Johnson, St. Ignatius
Justin Krantz, St. Ignatius

Lindy & Gary Tachick, St. Ignatius
Penny Rockwell, St. Ignatius
Alan Harriman, St. Ignatius
Merrill Bradshaw, Arlee
Thelma Olsen, St. Ignatius
Bob Brannen, St. Ignatius
Bob & Chantel McCauley, St. Ignatius
Kathryn (Kate) Campbell, St. Ignatius
Betty Mae Schall, Arlee
Tracy Kay Schall, Dixon
Linze Brockmeyer, St. Ignatius
Wendy Olsen, St. Ignatius
Larry & Lauri Randall, St. Ignatius
Bob & Susie Thoft, St. Ignatius
Alan Zemple, St. Ignatius
Dennis Wheeler, St. Ignatius
Mark & Kathy Schmidt, St. Ignatius
Charlie & Katie James, St. Ignatius
Cherie Garcelon, Arlee (non-district)
Yvonne Grenier, Arlee (non-district)
Patricia Hurly-Rogers, Ravalli (non-district)
Roger Christopher & Elizabeth Reinhardt, Arlee
Kathee Dunham, Arlee
Patrick L. Rardin, St. Ignatius
Charlie & Katie James, St. Ignatius
Les Billington, 7F Ranch, St. Ignatius
Bea Hill, St. Ignatius
Linda Werdin, St. Ignatius & Lewistown
Theo & Marian Green, St. Ignatius
Dorthy Roseleip, St. Ignatius
Denise Incashola, St. Ignatius
Pattiglen Angus Ranch, LLP (Terry & Betsy Murphy), St. Ignatius
Simon Miller, St. Ignatius
Hope Litzsinger, St. Ignatius
Thomas & Cynthia Mullins, St. Ignatius
Stuart & Donna Morton, St. Ignatius
Marjorie Rollins, et.al., St. Ignatius
Deb Chapman, Arlee
Lloyd A. & Geraldine F. Turnage, St. Ignatius
Dennis & Melvina Krantz, St. Ignatius
Dan Piccitte, Arlee
Eric Cutter, Arlee
Kayo Gardner & Aspen Smith, Arlee
Bob Hartman, Arlee
Anthony & Michelle Hoyt, Arlee
John & Clare Walker, St. Ignatius

Ray Hitchcock, Arlee
Mary Bick, St. Ignatius
Verna Krantz, St. Ignatius
Kenneth H. & Kathryn Krantz, St. Ignatius
John & Loma Kauffman, St. Ignatius
Allen Kauffman, St. Ignatius
Jeniel J. Bennefield, St. Ignatius
Terrence Jacob Simkins, St. Ignatius
Myrna Lynn Vanderburg, St. Ignatius
Bryce Christiaens and Rebecca Shoemaker, Arlee
Niki F. & Howard J. Kent, St. Ignatius
Nick J. Herak & Karen Kleinklaus, St. Ignatius
Cal Polinsky, St. Ignatius
Robert A Larsson, St. Ignatius
Aimee S Kudrna, St. Ignatius
Dave and Eva Prather, St. Ignatius
Julie Pavlock, Foothill Farm, St. Ignatius
Jim & Sara Udall, St. Ignatius
Barbara J. Burns, St. Ignatius
Dorothy Irvine, St. Ignatius
Kay H. Kelly, St. Ignatius
Lila Faye Krantz, St Ignatius
Barbara A. Conley, St. Ignatius
Maria Henry, St. Ignatius
Ben Selby (Selby 2002 Revocable Trust), St. Ignatius
John & Elizabeth Lee, St. Ignatius
Karen Weeast, Missoula (Mission District)
Patricia Jean Sandvig, Missoula (Mission District)
Lois Sally Mitchell, St. Ignatius
Alvin & Christine Old Coyote, St. Ignatius
Jack & Vivian Sabers, Salem, South Dakota (Mission District)

**These farmers, ranchers and district landowners operate more than 10,000 acres in the combined 22,000 acre Mission and Jocko Valley Irrigation Districts.

Wick, Arne

From: Alan Mikkelsen [alanmikk@gmail.com]
Sent: Thursday, November 07, 2013 10:53 AM
To: Wick, Arne; Hornbein, Melissa
Subject: Letters to Governor, Attorney General
Attachments: Mission-Jocko District Letter to Governor Bullock.docx; Letter to Governor Bullock.docx

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--
Alan Mikkelsen
Alpine Research, L.L.C.
61342 Hillside Rd.
St. Ignatius, MT 59865

406-240-0703 phone
406-745-3363 fax

November 7, 2013

Governor Steve Bullock
P.O. Box 200801
Helena, MT 59620-0801

Attorney General Tim Fox
P.O. Box 201401
Helena, MT 59620-1401

Dear Governor Bullock and Attorney General Fox,

As Flathead Irrigation District farmers and ranchers, as irrigators who make their living from the land, we have some grave concerns about the misinformation that is circulating about the proposed Water Use Agreement and the Flathead Reservation Compact.

Every legal water right has four attributes—a point of diversion—a place of use—a flow rate—and a priority date, or date of appropriation. Of these, the last—priority date, is most important, especially in times of drought. Under western water law, 100% of the senior water right must be satisfied before water can be released to a junior right. There is no sharing of water shortages between junior and senior rights. In times of drought, that means that junior rights may not receive any water at all, depending on the available supply.

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Signed**:

Duane Weible, Charlo
Paul & Sharon Guenzler, Ronan
Chris Hertz, Charlo
Jack Horner, Ronan
Roger Starkel, Ronan
Ken & Gina McAlpin, Ronan
Randa McAlpin, Polson
Cody and Libby Sherman, Ronan
Ken Cornelius, Ronan

Ed Starkel, Polson
Larry & Dee Coleman, Charlo
Harley & Sharon Coleman, Charlo
Chuck & Doris Stipe, Moiese
Larry & Anita Coleman, Charlo
Roy & Evelyn Lake, Ronan
Jack & Susan Lake, Ronan
Harold & Pat Hughes, Valley View
Dave Stipe, Charlo
Kathy Emerson, Ronan
John Bartel, Ronan
Russ & Joan Sherman, Ronan
Ralph Salomon, Ronan
Dan Salomon, Ronan
Steve Hughes, Polson
David Morigeau, Ronan
Haack Family Farms, Polson
Susie Aders, Polson
Jim Smith Family, Ronan
Tomi & Jeff Clairmont, Ronan
Jamie & Craig Cornelius, Ronan
Zon Lloyd, Ronan
Dean Wang, Charlo
Danny Krantz, Charlo
Paul Wadsworth, St. Ignatius
Scott Wadsworth, St. Ignatius
Pat Salomon, Polson
Mark Jackson, Ronan
Robert Sterling Trust B, R.A. Sterling, Trustee, Polson
Rory & Jan Schauss, Ronan
Karen & Daniel Ryan, Ronan
Barry Baker, Ronan
Joel Clairmont, Polson & Helena
Mac (James) Binger, Polson
Greg & Lyn Gardner, Polson
Bob & Kathy Smith, Ronan
Northwest Holdings, L.L.C., Polson
Dennis Duty, Polson
Corey & Carrie Guenzler, Hot Springs
Jack & Claudia McReady, St. Ignatius
Troy & Tonya Truman, Charlo
Dianne Lerwick, Albin, WY
David Lake, Polson
Daniel Lake, Polson
Tim Lake, Polson
Pat Lake, Polson

Leroy Hoversland, Ronan
Joseph F. Stiley, Ronan
Mandy M. Tupin, Ronan
Theresa Wall-McDonald, Ronan (non-district)
Thomas R. McDonald, Ronan (non-district)
Raymond C. & Mary J. Carl, Ronan (non-district)
Ken Matheny & Sandy Moore, Ronan
Cory Symington, Ronan
George & Nancy Delie, Ronan
Trent & Melissa Coleman, Charlo
Thompson Smith & Karen Stallard, Charlo
Ninepipes L.L.C., Charlo
Rick & Kathy Woodruff, Charlo
Eileen McMillan, Ronan
Florence P. Saloane, Ronan
Bill & Lorna Kolstad, Ronan
Rodney & Martha Hyvonen, Charlo
Wayne & Louise Billings, St. Ignatius
Cort Potter, Charlo
Vern & Barbie Stipe, Charlo
Nick J. & Martin J. Herak, Charlo
Lawrence & Lorraine Cornelius, Ronan
Marilyn Koester, Ronan
Ann L. Fleming, Ronan
Esther Bick, Charlo
Pat & Neil Fleming, Ronan
Doug Hahn, Ronan
Marion Hahn, Roy, Washington (Ronan area property)
Jimmie & Donna Johnson, Ronan
Agnes Wangerin, Ronan
Rick & Marsha Giannini, Ronan
Edward (Kent) Duckworth, Ronan
Dick Vinson, Thompson Falls (non-district)
Verlin & Marabeth Mintz, Charlo
Judy Rasmussen, Carl Guenzler Retrieverland L.L.C., Ronan
Sidney & Reba Turnquist, Ronan
Doug & Kathy Crockett, Ronan
Eugene Bilile, Ronan
Janet Franz, Cheney, Washington (Charlo)
Glenwood Farms North, Will & Jan Tusick, Polson
Sigurd Jensen, Elmo (non-district)
Paul Hunsucker, Polson
Virgil & Barb Rinke, Ronan
Paul Cullen, Ronan
Valley View Charlais Scott & Buddy Westphal, Polson
Gail & Jean Patton, Hot Springs

David Dutter, Charlo
Ron & Carmel Couture, Ronan
Bill Meadows, Trout Creek (non-district)
John Salomon, Ronan
Bob & Myrna Gauthier, Ronan
Donald Olsson Jr., Ronan
Curtis & Janette Rosman, Charlo (Mission & Flathead District)
Krantz Family Limited Partners, Ronan
Cynthia Gabriel, Charlo
Oliver & Lois Dupuis, Polson
Kendall & Linda Dupuis, Polson
Lila Nelson Normandeau, Ronan
Paddy Trusler, Polson

**These farmers and ranchers and landowners operate more than 42,000 acres of land on the Flathead Indian Irrigation Project