United States Department of the Interior

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Pacific Northwest Region
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December 20, 2013

Joe Durglo, Chairman
Confederated Salish and Kootenai Tribes
P.O. Box 278
Pablo, Montana 59855

Chris Tweeten, Chairman
Montana Reserved Water Rights Compact Commission
1424 Ninth Avenue
Helena, Montana 59620-1601

Re: Proposed Water Compact for Confederated Salish and Kootenai Tribes

Dear Sirs:

The federal government was an active participant in the recent negotiations addressing the water right claims of the Confederated Salish and Kootenai Tribes (CSKT or Tribes). Over the past six years, this negotiation has been one of the most active tribal water right negotiations in which the federal government has been participating.

In February of this year, negotiations among the State, Tribal and federal governments culminated with the release of a proposed CSKT water rights compact and associated agreements. The proposed compact was introduced in the 2013 Montana Legislature. The bill was referred to the Montana House, but the House did not act on the bill. In legislative hearings and in other public meetings, interested groups and members of the public expressed support, opposition or concerns about the proposed compact.

As part of the deliberations addressing whether further action on the proposed compact is warranted, I would like to provide the federal negotiation team's comments and perspectives on key issues and concerns that have been raised about the proposed compact. In particular, there are four categories or themes that are important to address:

1. The Confederated Salish and Kootenai Tribes have cognizable claims to water rights for off-reservation instream flows, and it is appropriate to seek to resolve those claims in this compact negotiation.
2. With respect to federal policies and directives addressing tribal water administration, the proposed Unitary Management Ordinance is an appropriate approach for resolving how Tribal and non-Tribal water rights would be administered on the Flathead Reservation.

3. The proposed Water Use Agreement is a fair and appropriate approach for confirming the water rights and water delivery obligations of the federal Flathead Indian Irrigation Project and the integration of the Tribes' on-reservation instream flow water rights.
4. Providing for 90,000 acre-feet of storage in Hungry Horse Reservoir (a federal Bureau of Reclamation project on the Flathead River) as part of the Tribes' water right in the proposed compact is an important and appropriate element that would preserve Project benefits for Tribal and non-Tribal members throughout western Montana.

1. Off-Reservation Instream Flow Water Right Claims

The CSKT negotiations introduced a category of Indian reserved water right claim which is relatively common in the Pacific Northwest but has not been addressed previously in the other tribal compact negotiations in Montana: Indian reserved water rights for instream flow protections for streams outside of a tribal reservation's boundaries. These off-reservation water right claims – the subject of considerable litigation and negotiations over the past several decades – derive from language in the several treaties negotiated in 1854 and 1855 between Indian tribes and the Governor of the Washington Territory, Isaac Stevens.

The Hellgate Treaty, one of the "Stevens treaties," established the Flathead Indian Reservation. The Salish and Kootenai Tribes negotiated language in the Hellgate Treaty that reserved "[t]he exclusive right of taking fish in all the streams running through or bordering said reservation . . . and also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." This treaty provision reserving tribal fishing rights is in virtually all of the Stevens treaties.

In litigation brought in the 1980s by CSKT, the federal courts confirmed that the treaty language reserving the "exclusive right of taking fish" on-reservation also reserved to the Tribes instream flow water rights in all of the streams running through or bordering the Flathead reservation. *See, e.g., Joint Board of Control et al. v. United States et al.*, 832 F.2d 1127 (9th Cir. 1987). This round of litigation did not, however, address whether the reserved right to take fish in common with non-Indians off the reservation supported an instream flow water right, thus leaving this category to a later day for resolution. Given the novelty of off-reservation instream flow claims in Montana, it is understandable that questions and concerns have been raised about the appropriateness of addressing these claims in the CSKT compact negotiations. As there is a strong federal interest that all tribal water right claims be resolved, including any off-reservation instream flow claims, the rationales that support addressing the off-reservation claims in the proposed compact are provided below.

First, there is substantial legal precedent which supports the pursuit of an off-reservation instream flow water right claim by CSKT. Court cases have focused on the underlying need for and right to water to support the off-reservation fisheries reserved by the tribes. For example, in *Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir. 1985), the Ninth Circuit upheld a trial court's order requiring the Bureau of Reclamation to release stored

water for the protection of the Yakama Nation's (another Stevens Treaty tribe) Chinook salmon treaty fishery outside the boundaries of the Yakama Reservation.

Second, it is important to clarify that the Montana Water Court has jurisdiction to hear and resolve at the trial level any CSKT off-reservation instream flow water right claims, whether those claims are litigated or resolved through negotiations. If a state initiates a general stream adjudication that complies with the federal McCarran Amendment, 43 USC § 666, then all categories of tribal reserved water right claims – whether consumptive or non-consumptive or on- or off-reservation – must be brought before the state court overseeing the adjudication. In 1985, two years after the United States Supreme Court determined that all tribal reserved water right claims could be subject to state court water adjudication proceedings (*Arizona v. San Carlos Apache Tribe,* 463 U.S. 545 (1983)), the Montana Supreme Court determined in *Greely* that the Montana Water Use Act and the Montana Water Court proceedings facially comported with the McCarran Amendment. *State ex rel Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation,* 712 P.2d 754 (Mont 1985). The way was then open for a complete adjudication of all tribal water right claims in Montana, including any potential off-reservation instream flow reserved water claims on behalf of CSKT.

Third, it follows that the Tribes' potential off-reservation instream flow claims were an appropriate category of claim to be addressed in the CSKT compact negotiations. Early in the negotiations, the Compact Commission recognized this and expressly requested the opportunity to make an offer for resolving off-reservation flow claims. This offer subsequently became the basis for the negotiated settlement of this category of claim. If for any reason there had been a question on the part of the Compact Commission or another party as to whether this category of claim was an appropriate subject of the negotiations, the federal negotiation team would have clarified that it was appropriate and necessary to address potential CSKT off-reservation water right claims in the CSKT compact negotiations. A primary objective of the federal government in tribal water negotiations is that *all* potential categories of tribal water right claims be fully resolved in the final settlement.

Finally, I note that the proposed resolution of CSTK's off-reservation water right claims as captured in the proposed compact has been reviewed by the federal negotiating team and referred to policy makers. At this time, the federal government has not reached final determinations on all aspects of the CSKT negotiations. Nonetheless, with respect to the treatment of off-reservation claims in the proposed compact, our review has found that the negotiated set of off-reservation water rights and protections in the proposed compact, when considered in the full context of the proposed compact, represent an appropriate treatment of the off-reservations claims.

2. Water Right Administration on the Flathead Reservation – Unitary Management Ordinance

A significant benefit to negotiating tribal water right claims is that the parties to the negotiations have the opportunity to address and resolve questions about tribal administration of existing and new water rights on the reservation. Virtually every tribal water right settlement in the West has

addressed on-reservation water right administration. The Department of the Interior supports efforts to resolve tribal water administration issues in negotiations. From the federal perspective, a successful resolution will provide clarity and certainty for all parties on (a) how existing tribal, allottee and non-tribal water rights on the reservation will be administered and enforced, and (b) whether and how new water uses and water rights can be established on the reservation. There is, however, no specific formula for addressing these questions.

The parties to this negotiation took advantage of the chance to resolve water right administration questions by negotiating the proposed Unitary Management Ordinance and the related provisions in the proposed Compact, including the establishment of the independent Flathead Reservation Water Management Board (Board). Early in the negotiations, CSKT negotiators made a strong case that circumstances warranted a single unified administration of all water rights rather than the dual administration approach used in other tribal water settlements in Montana and elsewhere. In a written statement to the other parties, the Tribes explained:

> Water rights disputes can cross jurisdictional lines. Three different sovereigns with diverse jurisdictional requirements, limitations and immunities coexist within the Reservation. All prior Indian water compacts in Montana set up a water right dispute system where non-Indian water use is subject to Montana law, Indian water use is subject to Tribal law, and federal irrigation projects are subject to federal law. Disputes that cross State and Tribal sovereign authorities are submitted to a "Compact Board" for attempted resolution. If either party is dissatisfied with the results of that forum, they can seek judicial review in a "court of competent jurisdiction." In other words, it would be a race to the court house of personal choice with the jurisdictional issues to be fought over at that time. It is unclear whether the United States would submit to the Compact Board or waive immunity in either State or Tribal court, thereby increasing the complexity of any final dispute resolution

With the extensive tribal and non-tribal water rights on the reservation as backdrop (including the paramount need to integrate tribal time immemorial instream flow rights for the first time in a Montana settlement), the Tribes' proposal for a unified administration approach was the subject of extensive negotiations.

The federal team appreciates the careful consideration and analysis that the Tribes brought forward for addressing water administration in the negotiations. The unitary approach presented fundamental state-law issues of first impression for the Compact Commission negotiators, and the federal negotiation team commends them for the forthright way they brought forward these issues and developed regulatory and oversight functions under the UMO that will ensure consistency with state law.

The unitary water management approach was equally novel from the federal experience, and thus required our careful scrutiny. Generally, in the course of implementing a settlement and pursuant to authorization in the federal legislation approving the settlement, the tribe will enact a tribal water code that is approved by the Secretary of the Interior and that provides exclusive

jurisdiction to the tribe over the administration of tribal water rights and the approval of all future water rights, tribal and non-tribal, on that tribe's reservation. CSKT's approach varied from that paradigm: rather than have sole tribal administration over new water uses on the Reservation, the Tribes proffered to share that responsibility via a joint Tribal-State board. Accordingly, the federal negotiation team undertook extensive legal and policy review of the UMO.

Federal negotiators agree that the rationales articulated by the Tribes lend strong support for a unified administration approach in this instance. A review of just one of the provisions in the proposed UMO illustrates that the UMO provides workable and legally supportable solutions that reflect the specific facts and circumstances of the Flathead Reservation.

Negotiators knew that, with the extensive and intertwined tribal, allottee and non-tribal water rights on the Reservation, proposals for changes to the purpose or place of use of existing water rights post-settlement would pose particular complexities. Under the UMO, the Tribes would agree that proposed changes to existing Tribal water rights and proposed new uses of CSKT's Flathead System Compact Water would be subject to an independent review and decision under the purview of the Board. Further, under clear and refined procedures, other water right holders are able to raise objections directly to the Board that the proposed use or change of use adversely affects their existing water rights.

This is strikingly different from how potential adverse impacts are evaluated under other Montana compacts and in other tribal water settlements in the West. Typically, a tribe will agree as part of its settlement that changes to or new uses of the tribe's water rights will not impact existing non-tribal water rights, but the tribe will make initial decisions about these new or changed tribal uses without direct input from the water right holders who potentially are impacted. Under the UMO approach, a complete and independent administrative record would be developed by the Board before there is any decision on approving the proposed changes, and this record would provide significant clarity for any judicial reviewer. Under the standard approach, there is a fundamental lack of detailed process to enable an informed decision. While this may be appropriate for reservations where there is little likelihood of impacts between tribal and non-tribal water rights, a lack of clarity at Flathead will guarantee, as noted by the Tribes above, a race to the courthouse and, further, that court review would proceed without the benefit of a robust record and independent review of the facts on the ground.

Another key consideration for the UMO negotiations was defining the role of the federal government in water rights administration generally on the Flathead Reservation, and specifically in the approval and implementation of the UMO. To this end, the federal team worked with the other parties to address three key issues: federal approval of the UMO, treatment in the UMO of Indian allottees entitlements to water, and federal participation on the Board.

For some tribal governments, including the CSKT, major tribal ordinances and substantial changes to those ordinances are submitted to the Department of the Interior for review and approval. This includes tribal ordinances enacting tribal water codes. Accordingly, the UMO

provides for Secretarial approval of the UMO and any subsequent changes. The parties also understand that federal legislation approving the settlement will need to address the UMO by providing authority to the Secretary to proceed with approval and implementation of the UMO. Through these UMO provisions and with the authorizing legislation, the federal government will have the ability to review and approve the UMO should approval be sought.

The federal government also has a responsibility to ensure that any tribal water administration ordinance provides legal protections for entitlements to water associated with Indian allotted lands held in trust by the federal government. As there are such allotted lands on the Flathead Reservation, the parties negotiated language to clearly define that "[a]ll tribal members' and Allottees' entitlements pursuant to 25 U.S.C. Section 381 are hereby recognized and confirmed." Proposed UMO, 2-1-104. The UMO further details the process by which allottees claims will be confirmed and quantified in the implementation of the UMO.

Finally, negotiators focused on whether and how the federal government should be represented on the Flathead Reservation Water Management Board. Negotiators for the Compact Commission held to the position that the Board should not have a voting member appointed by the federal government, and the CSKT Tribal Council concluded that a Board without a federal voting member could be acceptable. Accordingly, early in the negotiations, the federal team sought legal and policy guidance on this issue. Through this review, the federal negotiation team confirmed that, if the final UMO meets the federal objectives and requirements discussed above, the Department of the Interior could agree to a non-voting federal member. It should also be noted that, while the federal appointee will be non-voting, this appointment should serve as a useful adjunct for the Board by marshalling any needed federal information or perspectives for Board deliberations.

3. Flathead Indian Irrigation Project – Water Use Agreement

As noted above, a primary goal of federal negotiators in any particular Indian water negotiation is to obtain a comprehensive settlement of all tribal water right claims. When, as is the case in the CSKT negotiations, there is a federal irrigation project under the supervision of the Bureau of Indian Affairs (BIA) that serves tribal lands, resolution of that project's water right claims is necessary to ensure a comprehensive settlement. From a federal perspective, the Flathead Indian Irrigation Project (FIIP) Water Use Agreement (WUA) represents an appropriate resolution of the outstanding claims and concerns about the water rights for the FIIP irrigation water supply. After some introductory points, I detail below reasons for supporting the WUA.

Congress authorized the Department of the Interior to construct and operate the Flathead Indian Irrigation Project in the early 1900s to provide an irrigation water supply for tribal trust, individual trust and fee lands on the Flathead Reservation. The FIIP remains a federal irrigation project generally under the purview of BIA. At the time of project development, federal agents filed with the State of Montana certificates claiming water rights for some of the project diversions. There is, however, currently no conclusive determination on the exact nature and extent of the water rights for the project's water supply.

As with all other water uses on the Flathead Reservation, water right claims for FIIP will be resolved in the Montana general stream adjudication before the Montana water court. In 1982, the United States filed in the Montana adjudication general claims for the approximately 130,000 acre irrigation project. If the project claims are adjudicated through litigation, BIA will be on point to pursue water right claims for the project water supply. In pursuing those claims, the federal government will fulfill its responsibilities to assert project water rights for the benefit of all project water users and in concert with its trust responsibility to CSKT. The Flathead Joint Board of Control has filed a competing claim for the water right for FIIP's irrigation water supply.

The FIIP diverts its irrigation water supply from myriad streams throughout the Reservation. As noted above, for these and all other streams on the Reservation, the Tribes confirmed in federal court litigation in the 1980s that they are entitled to reserved water rights for instream flows to protect reserved on-reservation tribal fisheries. Thus, the FIIP irrigation water supply and the Tribes' instream flow compete for the same water supplies. This competition is ultimately resolved, however, through the relative priority dates of the two sets of water rights. At this time, it is unclear exactly what priority date or dates the project water rights are entitled to, but in any event, the project's water rights will be junior to Tribes' reserved instream flow water rights, which, as clarified by the federal courts, have a priority date of time immemorial.

When addressing BIA irrigation project water right and water supply issues in an Indian water right negotiation, several interrelated and complex questions need to be addressed:

- Who will hold the project water right and how will title to the right be conditioned on the responsibilities to deliver water to project beneficiaries?
- How will the BIA project irrigation water deliveries continue to be provided to project water users?
- To what degree does the settlement of project water rights need to be integrated into the resolution and administration of the tribe's water rights?
- How will the project's water rights and water deliveries be administered?

In addressing these and related issues, negotiators must also develop a proposed decree that defines all of the attributes of the BIA project's water right. This proposed decree is then submitted to the Montana water court for review, hearing of any objects and, ultimately, issuance of a final decree. This is the process that is being followed for all of the other tribal water settlements in Montana that involve BIA irrigation project water right claims.

Federal review of the proposed FIIP WUA

The federal negotiation team was actively involved in the negotiations leading to the proposed WUA and has reported to Interior policy makers our conclusions that the proposed WUA and the associated provisions of the proposed compact represent an appropriate solution for FIIP's water right claims by meeting the objectives and requirements outlined above. The federal negotiation team also recognizes, however, that the proposed WUA has been the subject of intense scrutiny

and challenge. In particular, questions and concerns about who "owns" the FIIP water rights have dominated the comments on the WUA.

Questions – and answers – about who holds the water rights to BIA irrigation projects are complex and very important, but are only part of the inquiry. Under the typical water right, an individual appropriator obtains entitlement to divert and use water and then in turn puts that water to an authorized beneficial use. In an adjudication, that individual would be on point to defend all attributes to the water right. Contrast this to the situation where an irrigation project developer develops the irrigation water supply but does not actually put the water to beneficial use. Irrigators who receive project water do not hold title to the project right, but, as the ones who actually put the water to use, have a beneficial interest to continue to receive project irrigation water supplies to the extent that water is legally and physically available.

Further complications with BIA projects arise because of residual questions about whether some or all of the BIA project water supply was part of the tribe's reserved water rights, which have attributes different in key ways from state based water rights. Finally, FIIP presents two unique complications. The status of lands served by FIIP give rise to questions whether, after the adjudication, lands within the project would have to be served in priority, with Tribal and allotted lands having the earliest priority and lands patented under homestead entry having a junior priority. Also, as noted above, CSKT instream flow water rights are senior to the project water rights, and, whether through negotiation or litigation, these senior instream rights must be factored into FIIP operations.

The CSKT settlement proposal, which became the basis for negotiating FIIP water rights, addresses these complexities by proposing that:

- The legal title to the FIIP water rights would be held by the United States in trust for the CSKT with an 1855 (treaty) priority date;
- The irrigation water supply would continue to be delivered to project water users according to the irrigation demands for project lands;
- If agreement can be reached, funding from the tribal settlement could be made available for projects that improve FIIP as well as provide ecosystem and fisheries benefits;
- The Tribes' instream flow water rights would be recognized and implemented over time and in a manner that preserved deliveries of irrigation water.

The Tribes' settlement proposal that title to FIIP's water rights be held in trust comports fully with how BIA irrigation project water rights have been determined in Montana and elsewhere. As John Tubbs, the director of the Montana Department of Natural Resources and Conservation recently explained in his July 24, 2013 letter to Steve Hughes, "[i]n the cases of the Fort Peck, Fort Belknap, Blackfeet, and Crow compacts – as with the proposed CSKT Compact – the Tribes obtained title to the project water rights, and non-Indian irrigators were protected from call by the Tribe's senior right and allowed to benefit from its earlier priority date." In Idaho state courts, title to BIA's Fort Hall Project water rights was decreed in trust for the Shoshone-Bannock Tribes with a treaty priority date of 1867. *See, In Re: SRBA Case No. 39576, Fort Hall*

Water Users Ass'n v. U.S., 921 P.2d 739 (Idaho 1996). Further, state courts in Washington, when determining in litigation the water rights for the BIA's Wapato Irrigation Project on the Yakama Reservation, decreed that project's water rights as part of the Yakama Nation's reserved water rights (i.e., in trust with an 1855 priority date) even though the project serves both tribal and non-tribal lands. *In the Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin*, 850 P.2d 1306 (Wash. 1993). Based on these extensive and persuasive precedents, having the title to FIIP's water rights be held in trust for CSKT, as set out in the proposed WUA, is appropriate as a matter of law and policy.

Having the title held in trust for the Tribes would also provide significant benefit and clarity on the intra-FIIP water right priority questions. By decreeing a single priority date of 1855 for the entire project, there will be no need to distinguish among tribal, allotted and homesteaded lands when making project water deliveries. This approach also resolves the related issue of whether FIIP water supplies are, as a legal matter, part of the Tribes' reserved water rights and thus under the purview of federal and not state law.

Further, with respect to title, the federal negotiation team agrees with Mr. Tubbs that, in tribal water negotiations, "ownership of title to the Project right matters less than obtaining a legally enforceable agreement that entirely protects project irrigators from the risk of loss of their project water." The bulk of the negotiations among the United States, the Tribes and the FJBC focused on developing the necessary and permanent assurances for continued deliveries of project water to project irrigators.

In addressing this question, the parties were faced with inadequate or non-existent FIIP water delivery records. Also, some project lands are provided extra water, but there is no clear record that the proper administrative decisions and technical justifications were developed to justify these extra deliveries. To overcome gaps in the project records and ensure an objective basis for determining irrigation demand on the project, CSKT did extensive technical evaluations and review. Both the state and federal negotiators reviewed these technical work products. Beginning in the mid-2000s, federal experts provided substantial feedback and review of the methodologies used by CSKT, ultimately leading to endorsement by our experts. Most recently, representatives of the U.S. Bureau of Reclamation indicated that they were comfortable that the Tribes' methodologies and products, along with the underlying technical information provided by CSKT, supported the WUA. With this technical foundation, negotiators were able to justify and confirm protections for continued project water deliveries to project irrigators as captured in the WUA.

4. Benefits of 90,000 acre-feet of storage in Hungry Horse Reservoir in the Proposed Compact

A significant component of the proposed compact is the Flathead System Compact water right that would be decreed to the Tribes as part of the settlement. This right is composed of two water sources: natural flow from the Flathead River and up to 90,000 acre-feet from the Hungry Horse Reservoir, a federal Bureau of Reclamation project on the Southfork of the Flathead River.

This right represents a new water right for the Tribes and also compensation for water sources and rights given up by the Tribes to ensure protection of non-Indian water rights on the Reservation.

Under the circumstances, it was logical and appropriate for the negotiators to consider Hungry Horse Reservoir as a potential water source for the settlement. There exist, however, significant hurdles to securing any new water out of the Hungry Horse project. As an example, a significant portion of the available water stored at Hungry Horse has been legally committed under the Endangered Species Act to augment Columbia River flows below Grand Coulee Dam in Washington State for migrating endangered salmon and steelhead. Some parties in downstream states in the Columbia Basin have argued strenuously that even larger amounts of water from Montana should be released for this purpose. Several other constraints, such as flood control and operations to protect bull trout (listed for protection under the Endangered Species Act) and other resident aquatic species, must also be addressed by any party wishing to tap into water stored at Hungry Horse.

The proposed compact represents a successful navigation of these constraints. The federal negotiation team and Reclamation provided significant hydrologic and modeling resources to confirm that delivery of 90,000 acre-feet could be part of the settlement. This success provides several benefits. First, it secures access to a substantial existing water source for use in western Montana, and not out-of-state downstream. Under the proposed compact, the Tribes are entitled to lease Flathead System Compact Water to tribal and non-tribal members throughout western Montana. Second, the parties would agree that 11,000 acre-feet would be available for lease for domestic, municipal, commercial and industrial purposes within the Clarkfork River basin. Third, the parties have confirmed that use of the 90.000 acre feet will be done in a way that avoids impacts on local aquatic species important to Montanans. Cumulatively, and importantly, benefits resulting from use of stored water at Hungry Horse in the proposed Compact represent access to that water source that, absent settlement, will be extremely difficult to obtain through other means.

Conclusion

In conclusion, I would again express the appreciation of the federal negotiation team for the professional manner in which each of your negotiation teams approached the CSKT water negotiations. We look forward to continuing to work toward a successful negotiated resolution of these important and difficult issues.

Sincerely,

Duane Mecham
Chairman, Federal Negotiation Team
Confederated Salish and Kootenai Tribes' Water Rights Negotiation