

OFFICE OF THE GOVERNOR
STATE OF MONTANASTEVE BULLOCK
GOVERNORANGELA McLEAN
LT. GOVERNOR

January 21, 2015

Flathead County
Board of Commissioners
800 South Main, Room 102
Kalispell, MT 59901

RECEIVED

JAN 22 2015

FLATHEAD COUNTY
COMMISSIONERS

Re: Proposed Water Compact with the Confederated Salish & Kootenai Tribes

Dear Members of the Flathead County Commission:

Thank you for your letter of January 8, 2015, concerning the proposed water compact with the Confederated Salish & Kootenai Tribes (CSKT). In 1979, the Legislature created the Montana Reserved Water Rights Compact Commission for the purpose of establishing water compacts to settle tribal and federal claims to water within the boundaries of this state. The Commission has successfully negotiated 18 of these federal and tribal water compacts. The compact with the CSKT is the last of these compacts and has undergone years of negotiation, legal and technical work, and public involvement. In 2014, all parties reopened negotiations to work through several issues raised during the 2013 state legislative session, and on December 11, 2014, the parties came to agreement on these issues. The Compact will be presented to the 2015 state legislature for approval.

Some of the key improvements to the renegotiated Compact include (1) water delivery entitlements that run with the land for irrigators receiving water through the Flathead Indian Irrigation Project; (2) a new technical team with irrigator representation that will ensure irrigation needs are met while fulfilling the instream flow requirements of the Tribes; and (3) local government participation in nominating the appointees who will represent the State on the water administration board that will manage water permitting on the Flathead Reservation. These changes respond directly to questions raised during the 2013 session and through discussions with stakeholders.

I have attached to this letter a memorandum from my chief legal counsel responding to the various concerns you have raised. I believe – based on my engagement with this issue over the course of the last two years – that many of your concerns are rooted in significant misunderstandings about the Compact. As the memorandum makes clear, the Compact protects the homes, businesses, and communities of Flathead County. I have reviewed both the Compact and the attached memorandum with Attorney General Tim Fox, and he agrees with my conclusions. I would hope that you reconsider your opposition.

The negotiations have resulted in a fair compromise which protects the interests of the parties and stakeholders. I would not support an agreement that did otherwise.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Bullock".

STEVE BULLOCK
Governor

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FLATHEAD COUNTY
COMMISSIONERS

MEMORANDUM

To: Governor Bullock
From: Andrew Huff
Re: Letter from the Flathead County Commission concerning the proposed water compact with the Confederated Salish & Kootenai Tribes
Date: January 19, 2015

On January 12, 2015, the Governor's Office received a letter from the Flathead County Commission (FCC), expressing opposition to the proposed water compact between the Confederated Salish & Kootenai Tribes (CSKT) and the State of Montana. You have asked that I prepare a memorandum responding to the concerns expressed by the FCC. I do not believe that the County's opposition to the Compact is well-founded, for both legal and factual reasons.

(1) The County has expressed concern that the proposed Compact is the only compact in Montana to include off-reservation water rights.

Response: First, it is important to note at the outset that CSKT has, as part of the proposed Compact, agreed to cede the vast majority of its off-reservation water rights claims. These claims cover about half the state and would, if pressed by CSKT, result in significant disruption to the statewide water adjudication proceedings. Instead, the Compact recognizes 8 off-reservation water rights to be held by CSKT and 14 to be held jointly by CSKT and the State. CSKT has agreed to exercise these rights pursuant to carefully crafted limitations which mitigate or eliminate impacts to existing water users.

It is correct that the proposed water compact with CSKT is the only compact to include off-reservation water rights derived from treaty fishing rights. The reason for the inclusion of this type of off-reservation right is very straight forward – CSKT is the only Tribe in Montana to have entered into a "Stevens Treaty." The Hellgate Treaty is one of several treaties that were negotiated in the 1850s between the United State federal government and the Tribes located within the Columbia River basin of the Pacific Northwest. These treaties, negotiated by federal territorial governor Isaac Stevens, have been held by the U.S. Supreme Court to preserve meaningful off-reservation fishing rights for tribes. U.S. v. Winans, 198 U.S. 371 (1905);

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). Because CSKT is the only Tribe in Montana to have entered into a Stevens Treaty, the proposed Compact is the only compact in Montana to include this type of right.

(2) The FCC writes that the Compact “—for the first time – grants these off-reservation water rights to a tribe, which is a new type of water right, and not supported by the Treaty of Hellgate.”

Response: Again, because CSKT is the only Tribe in Montana with a Stevens Treaty, it follows that this Compact is the first time this type of off-reservation water right has been included in a state-tribal water compact. However, the assertion that these rights are a “new type of water right” and that they are “not supported by the Treaty of Hellgate” is legally incorrect.

Instream flow rights for fisheries have been recognized as a water right under both state and federal law. In the context of the Montana statewide water adjudication proceedings, it is well-established that instream flow rights may be decreed to protect fisheries, for both state and tribal purposes. See, e.g., In re Missouri River Adjudication, 2002 MT 216 (2002)(holding that a “beneficial use” under the Montana Water Use Act includes non-consumptive instream uses for fish); Greely v. CSKT, et al., 219 Mont. 76 (1985)(finding that a tribal reserved right for fishing “consists of the right to prevent other appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies”); Montana Trout Unlimited v. Beaverhead Water Co., 2011 MT 151 (2011) (holding that MTU could file objections in the Montana statewide water adjudication to enhance the water available for fish habitat).

The federal courts have also recognized tribal instream flow rights to protect fisheries. The Ninth Circuit Court of Appeals, in a decision dealing specifically with CSKT and the Flathead Joint Board of Control, has held, “To the extent that the Tribes here did exercise aboriginal fishing rights, the treaty language clearly preserved those rights, and the water needed for them. The priority date of time immemorial obviously predates all competing right asserted by the Joint Board for the irrigators in this case.” Flathead Joint Board of Control v. United States, 832 F.2d 1127, 1131 (1987). See also, Kittitas Reclamation Dist. v. Sunyside Valley Irr. Dist., 763 F.2d 1032 (9th Cir. 1985)(affirming the request of the Yakima Nation, pursuant to its Stevens Treaty, to release water from a reservoir to preserve salmon eggs threatened by low post-irrigation season water flows).

These legal precedents establish that (1) Stevens Treaty Tribes, specifically including the Hellgate Treaty of 1855, have off-reservation fishing rights; (2) these rights are substantive and continue to exist; (3) beneficial uses in Montana include instream flows for fisheries; and (4) a tribal reserved right for fishing includes the right to “prevent other appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies.”

Greely, 219 Mont. at 93. While it is true that a court has not yet adjudicated the precise issue of CSKT's off-reservation water rights as derived from the Hellgate Treaty, based on the language of existing legal precedent it is likely that the Tribes' claims to off-reservation instream flow rights will be upheld by both federal and state courts. It is therefore necessary for the compact to address off-reservation rights.

(3) The FCC has expressed concern that the proposed Compact quantifies more water than other state-tribal compacts.

Response: First, the water resources on the Flathead Indian Reservation are substantially greater than on any other reservation in Montana. It therefore makes sense that the Compact would need to deal with greater volumes of water. Second, instream flow rights are different from consumptive use rights, both in how they are used and how they are quantified. Instream flow rights require that a certain amount of water remain in streams, rivers and lakes, to maintain fisheries and for other purposes. These rights are measured not in acre feet diverted, but in water flow (typically cubic feet per second) past a designated point in a specific reach of water. Consumptive use rights divert water out of streams, rivers and lakes for irrigation and other purposes. These rights are often measured in acre feet of water diverted over a specific time period. Instream flow rights are not the equivalent of consumptive use rights because the Tribes are not able to remove this water from its source for consumptive use, and the same water that satisfies an instream flow right at one point on the stream can satisfy another instream flow or consumptive use right lower in the watershed. The FCC's assertion that the Compact reserves an average of 6,827 acre feet of water per tribal member apparently rolls the two forms of water right together in order to produce inflated numbers, and counts instream flow water that satisfies multiple rights multiple times including non-Indian water rights. Further, the chart attached to the FCC's letter contains no information as to the methodology behind its calculations and is therefore impossible to assess for accuracy.

(4) The FCC writes that the Compact will have "dire consequences to our citizens and businesses that own property and live in Flathead County."

Response: The FCC has not provided any reason or facts to support this statement. In truth, the Compact protects the citizens and businesses of Flathead County. CSKT has recognized water rights, both consumptive and non-consumptive, that are senior to all other water rights. Without the Compact, CSKT will be able to "call" any non-tribal user of water, including water for homes, businesses, cities and towns, and farms both on and off the Reservation, including Flathead County. With the Compact, all non-irrigation water users are completely protected from Tribal calls, including the homes, businesses and towns in Flathead County. Article III.G. of the proposed Compact states as follows: "The Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in this Compact, and the United States agree to

relinquish their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose purpose(s) do(es) not include irrigation." The Compact also includes significant protections for the irrigators served by the Flathead Indian Irrigation Project, including a water delivery entitlement for irrigators that are in compliance with Project rules and a \$30 million fund to offset pumping costs associated with Compact implementation and low water years and to fund water measurement, on-farm efficiency, groundwater mitigation, and other projects. Without the Compact, Project irrigators will be subject to call by CSKT and will receive no funding to complete much needed project repairs or obtain additional water in times of shortage.

(5) The FCC writes that it objects to "Montana taxpayers writing a check to the CSKT for \$55 million."

Response: I would point out that \$42 million of the proposed \$55 million funding package is comprised of funds that directly benefit Flathead Indian Irrigation Project irrigators, who are primarily non-Indian. More funding for Irrigation Project infrastructure improvement will come through the federal ratification of the Compact. In objecting to the funding proposed to support the Compact, the FCC is objecting to badly needed improvements to the irrigation infrastructure relied upon by irrigators in the Flathead River drainage below the Lake. The FCC is also objecting to the funding necessary to pump additional water into the Project to protect existing uses. Further, state monetary contributions to state-tribal water compacts do not represent an assumption of state responsibility to "support the tribes." Rather, state contributions are made because compacts represent the settlement of litigation that would otherwise result in fewer or no protections for junior water users and ultimately be far costlier to pursue, for both the state and impacted water users.

(6) The FCC has expressed concern that the proposed Compact "may not comply with Article IX of the Montana Constitution."

Response: Again, the FCC has not provided any reasoning or facts to support this statement. Article IX of the state Constitution consists of 7 sections. Section 3, which has four subparts, pertains to water rights. My assumption is that FCC's concern refers to part 4 of Section 3, concerning water administration. Part 4 requires that the legislature provide for the administration, control and regulation of water rights and establish a centralized records system. Since 1996, there has been a water administration void for everyone living and doing business on the Flathead Indian Reservation. In that year, the Montana Supreme Court decided that the DNRC could no longer process new water use applications on the Flathead Reservation, pending quantification of the Tribes' water rights. A later case made clear that this applied to both surface and ground water. Matter of Beneficial Water Use Permit, 278 Mont. 50 (1996); Salish & Kootenai Tribes v. Stults, 2002 MT 280. This void has created legal uncertainty with regard

to water development and has impeded economic development. The Compact, in providing a water administration framework, ends this 18 year administrative void and brings the Reservation into compliance with Article IX of the Constitution. The unitary management approach is the most efficient administrative method for water management on the Reservation and meets the state's obligation to comply with both Article IX and our federal law obligations to recognize tribal treaty rights. See, e.g., State v. Shook, 2002 MT 347. Further, the Compact requires that water rights managed under the new administrative framework be entered into a centralized database managed by the DNRC. Compact, Article IV.K.

(7) The FCC has requested five changes to the Compact.

Response:

- a. The FCC requests that the Compact provide a specific "quantification" of water reserved for the Reservation. The Compact already provides specific quantifications of the Tribes' water right, both on and off the reservation:
 - i. The Tribes' consumptive use water right from Flathead system water is quantified in Article III.C.1.c., appendix 9. The Tribes have a diversion right in the amount of 229,383 acre-feet per year from Flathead Lake, the Flathead River, and the South Fork of the Flathead River. Water that may actually be depleted is limited to 128,158 acre-feet per year. Use of this water right must comply with various Endangered Species Act requirements, requirements for federal dams and reservoirs, and with filling criteria for Flathead Lake.
 - ii. The water right for the Flathead Indian Irrigation Project is quantified at Art. III.C.1.a., appendices 3.2 through 3.7. The quantified water diverted into the Project is specified for each administrative area within the Irrigation Project, and varies depending on whether the water year is a wet, normal or dry year. For example, the "Pablo Feeder Canal" administrative area will receive 86,100 acre feet in wet years, 66,400 acre feet in normal years, and 45,700 acre feet in dry years at specified locations.
 - iii. The water right for on-reservation instream river flows is quantified at Art. III.C.1.d., appendices 10 through 14, and is measured in cubic feet per second at specific locations during specific times of the year. For example, the flow rate for Minesinger Creek from January 1 to January 31 is 0.20 cubic feet per second, measured at LAT 47°39'56.72"N LONG 114°1'57.58"W. Other non-consumptive water uses within the reservation are quantified at Art. III.C.e - 1, and accompanying appendices. The water right for off-reservation instream flows is quantified at Art. III.D and accompanying appendices. The water right for "Other Instream Flows," is quantified at Art. III.C.1.d., appendix 12. These flow

rates must accommodate existing uses and their enforcement is deferred until the water court has issued a final decree for the relevant basins.

- b. The FCC requests that the mutual defense clause in Article VIII of the Compact be eliminated. The mutual defense clause is language that is common to compacts for federally reserved water rights. Compacts are mutual agreements that settle litigation and benefit all Montanans, Indian and non-Indian alike. The State is committed to defending the Compact because it is in the best interest of Montanans to defend the Compact. The FCC has expressed concern that they do not wish to "fight the State of Montana" when defending private water rights. However, under the water rights adjudication process that is now in place and which governs the decree of pre-1973 water rights, the State of Montana is required to act as an institutional "objector" to water rights claimants that have unresolved issues concerning nonperfection or abandonment. See §85-2-248, MCA. Even under current law, therefore, water claimants must in certain circumstances defend their claims against the State.
- c. The FCC requests that the Compact be brought into compliance with Article IX of the Montana Constitution. As previously explained, the Compact is in compliance with Article IX.
- d. The FCC requests that the state monetary contribution to the settlement be eliminated. As previously explained, the Compact funding settles litigation and brings substantial benefits to non-Indian as well as Indians.
- e. The FCC requests that all claims for off-reservation water rights be removed from the Compact. As previously explained, the Tribes as part of the Compact have agreed to cede the vast majority of their off-reservation water rights claims. The off-reservation claims that remain will be exercised pursuant to limitations that mitigate or eliminate impacts to existing water users. These limitations can be found at Art. III.D through G, and accompanying appendices.