



# ENVIRONMENTAL QUALITY COUNCIL

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March 20, 2014

Chairman Vincent,

This letter is to inform you of a request made by the Environmental Quality Council to the Water Policy Interim Committee. The EQC voted 13-3 on a motion at its March 19 meeting requesting the WPIC to consider the proposal made by Reps. Nancy Ballance and Keith Regier and others to study various aspects of the proposed water rights settlement with the Confederated Salish and Kootenai Tribes.

The EQC would like a report at its May 2014 meeting on how the WPIC plans to address this request.

Sincerely,

John Brenden,  
EQC Chairman

**List of Questions for Proposed  
Legal/Constitutional, Economic, and Environmental  
Analysis of The Proposed CSKT Compact  
March 19, 2014**

**Legal/Constitutional Analysis**

1. What is the purpose of the Flathead Indian reservation?
2. Are the proceedings involving the sale of Kerr Dam and associated water rights to the CSKT likely to interfere with state-based water rights to the Flathead River and Flathead Lake?
3. Unitary Management Ordinance
  - a. Can the State of Montana delegate its constitutional responsibilities for water administration of its citizens to a foreign/sovereign government (Tribes, US)? UMO, 1-1-101
  - b. Does the State of Montana have the authority to remove its citizens out from under the protection of the laws and Constitution of Montana?
  - c. Does the Unitary Management Ordinance violate the equal protection clauses of the Montana and United States Constitution?
  - d. Does the Unitary Management Ordinance, and to-be-developed regulations for its implementation, comply with the legislature's intent to protect the constitutional rights of its citizens?
  - e. Does the Unitary Management Ordinance enable the taxation of Montana citizens by a Tribal government?
  - f. Does the land use ownership pattern on and demographics of the Flathead Indian Reservation convey a compelling need for an Indian tribe to have jurisdiction over state-based (and taxed) land and water rights?
  - g. Are there any judicial proceedings in which the construction or interpretation of the UMO is or could be at issue?
  - h. What are the "consensual agreements" in the Unitary Management Ordinance?
    - i. How will they be implemented
    - ii. How are they transparent
    - iii. Do they create an 'extra-legal' avenue to avoid the provisions of the Unitary Management Ordinance?
  - i. What is the court of competent jurisdiction, how will it be determined, are there standards?
  - j. Does the mutual defense clause constrain the right to or otherwise prevent the citizen to file suit or seek remedy or redress?
    - i. Under what conditions would the mutual defense clause be exercised?
  - k. Can other tribes whose compacts have been ratified by the state or are not ratified yet re-open their Compacts to seek jurisdiction over non-members if this compact is passed?
  - l. What power does the state have in decisions of the Unitary Management Board, especially where those decisions conflict with state law?
4. Off-reservation instream flow claims on ceded aboriginal lands
  - a. Are off-reservation claims to water "federal reserved water rights" within the context of Winters case and the McCarran Amendment?
    - i. Do federal reserved water rights exist absent a reservation of land by the federal government?

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- ii. Is the resolution of Tribal reserved water rights in a Compact part of federal reserved water rights proceeding?
- iii. Have off-reservation claims to water ever been included in a federal reserved water rights proceeding?
- iv. What are the precedential implications of including off-reservation water claims in a federal reserved water rights proceeding?
  - 1. For Montana Indian Reservations
  - 2. For other states
- v. Can other Montana Tribes whose Compacts have been or have not been ratified by the State reopen their Compacts to seek water for off-reservation rights granted by treaty?
- b. Does the inclusion of off-reservation water claims in the proposed Compact comply with the intent and requirements of the McCarran Amendment, the Montana General Stream Adjudication, and the jurisdiction of the Montana Water Court?
- c. Does a “right to take fish...in common with the citizens of the territory” convey an instream flow right to either the Tribe or Montana citizens?
  - i. Does the use of off-reservation instream flow to maintain habitat or flow change the purpose of the Treaty to “take fish” in common with the citizens of the Territory?
  - ii. Does the right to hunt maintain habitat or imply a water right to maintain

5. The Compact

- a. Does Montana have the legal and constitutional authority to review and alter a Compact after its ratification?
  - i. What provisions would be required in the Compact language to authorize such a review?
- b. Off-reservation, does an Indian Tribe or the federal government have any legal authority to manage, administer, “call”. or develop water resources?
  - i. Does the DNRC have the authority to issue water rights to the federal government outside of its finalized Compact, and without an analysis of the preclusion of future growth or private property assessment act evaluation?
- c. Is there a distinction between the ownership of water and the ownership of a water right?
  - i. If a federal reserved water right is owned by the federal government, does Montana still own the water?
  - ii. If Montana owns the water, who has the right to administer water rights, including federal reserved water rights?

**Socioeconomic and Private Property Analysis**

6. Compact, Water Use Agreement, Unitary Management Ordinance, Off-Reservation Water Claims

- a. Have any of the compact components been ruled or are (possibility) likely to be ruled by a State or Federal court as a deprivation of private property in violation of the United States or Montana Constitution or laws?
  - i. Owner of fee land with property rights on it transferred over to the tribe

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- b. Is there risk of economic liability to Montana of payment for property takings resulting from the implementation of the Compact? What is the risk and range of dollars involved?
  - i. If there is a risk, who is liable for payment? MT, CSKT, or Feds? What is the liability of the United States to Montana citizens or the State for property takings?
- c. What are the adverse economic effects of off-reservation claims for water, or the potential sale or lease of water by the CSKT, including basin closures, preclusion of future development, or private property takings?
  - i. Is there enough information available in the record to make such a determination at this point?
- d. What are the adverse economic impacts of off-reservation “calls” for water by the Tribes?
  - i. Under what conditions can the Tribes make a call for water, and who has the burden of proof for making that call?
  - ii. Can the Tribes make a call for water if they plan to sell or lease water downstream either in-state or out of state, and what would be the adverse economic impacts of this action?
- e. Could the entire Compact, or provisions of the Compact, be invalidated for failure to adhere to the analysis required under the Private Property Assessment Act, violations of the Montana Constitution or statutes, takings, environmental laws, rules of federal reserved water rights proceedings, economic impacts or any other reason?
- f. What are the economic impacts to Montana citizens of resolving water disputes in a ‘court of competent jurisdiction’?
- g. Is there any guarantee that the UMO will not be dominated by or operate under the control of tribal law?

**Environmental Analysis**

**7. Water Use Agreement**

- a. What are the physical and economic impacts of a change of use from irrigation to instream flow on shallow ground water levels and water wells?
  - i. How are wetlands be maintained?
- b. What is a ‘robust river’ standard? What is the standard for instream flows and how does that apply to water abstracts. Is standard focused on fish survival, habitat maintenance,
  - i. Are standards limited to fish survival, etc to flows necessary
  - ii. What are the impacts of a ‘robust river’ (page compact) standard for fish survival, stream bank stability, erosion, and integrity of irrigation structures? Increasing quadrupling instream flow in compact
- c. What are the growth inducing or socioeconomic growth inhibiting impacts of the on-reservation “robust river” standard for instream flow (economic)
- d. Is there enough information available to definitively determine the ‘water savings’ components of irrigation rehabilitation?
- e. Is there a process to ensure that extra duty water will be received by those who apply for it?
  - i. Does or will the time period for this application for extra duty water (5 years) risk the economic viability of his/her agricultural operation?
  - ii. Could there be an added charge for this water?

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8. Off-reservation instream flow claims

- a. What are the growth inducing or growth inhibiting impacts of the off-reservation instream flow claims?
  - i. Is there enough information to assess this question, including the aspects of basin closure, call results?
  - ii. How many times in 20 years will an irrigator be called on its water rights?

9. Compact

- a. What precedential components of the proposed Compact would commit the state to future actions with significant impacts or a decision in principle about such future actions?
- b. What are the growth inducing or growth inhibiting impacts of the proposed Compact?
- c. Does the proposed Compact or any part thereof restrict the use of private property, or impose undue governmental regulation that would prohibit the use and enjoyment of private property?
- d. Are there alternatives to the proposed CSKT Compact that were not considered which would minimize or eliminate impacts to the human environment?

**January 8, 2014**  
**Revised, March 19, 2014**

**MEMORANDUM**

**TO:** Environmental Quality Council

**FROM:** Representatives: Ballance, J. Bennett, Blasdel, Cuffe, Doane, Edmunds, Ehli, Fiscus, Flynn, Galt, Glimm, Greef, Hagstrom, Hansen, Howard, Ingraham, Jones, Kary, Kerns, Knudsen, Lang, Laszloffy, Lavin, Lenz, Miller, O'Neil, Randall, Redfield, Regier, Schwaderer, C. Smith, Wagoner, Warburton, White, Vance, Zolnikov  
Senators: Boulanger, D. Brown, Fielder, Jackson, Lewis, Moore, Priest, Sonju, J. Taylor, Thomas, Walker, Webb, Wittich

**SUBJECT:** Request for MEPA Analysis of the Proposed Water Compact with the Confederated Salish and Kootenai Tribes (CSKT)

As legislators responsible for the review, approval and ultimate passage of any water compact negotiated by the Montana Reserved Water Rights Compact Commission (RWRCC), we are writing to request that the Environmental Quality Council order and supervise a review of the proposed CSKT Compact under the Montana Environmental Policy Act (MEPA). Without such analysis, the Montana Legislature does not have the necessary information to properly consider the impacts of the proposed Compact or make an informed decision as to whether it is a fair and equitable settlement as directed by MCA 85-2-701.

The proposed CSKT Compact differs from every other Compact negotiated by the RWRCC in several important respects:

- The proposed Compact includes off-reservation, non-federal reserved water rights claims to streams and rivers across eleven counties in western Montana hence impacting property rights and future growth in these counties;
- The proposed Compact transfers large quantities of private fee land and water rights out of private ownership to the federal government;
- The proposed Compact increases on-reservation instream flows by up to 400% without the demonstration of fishery need, evaluation of the impacts of increased flow on stream bank and stream channel stability, or evaluation of the impacts to shallow ground water of removing water from irrigation canals and leaving it instream;
- The proposed Compact contemplates irrigation efficiency improvements without evaluation of the impact to ground water recharge and wells;
- The proposed Compact consumes all of the 'legally available' water in the basin without the necessary quantification of the federal reserved water right based on the purpose of the Flathead Indian Reservation in a manner consistent with the McCarren Amendment;
- The proposed Compact contains over 1,000 pages of Water Abstracts, not submitted with the 130-page proposed Compact bill (H.B. 629), that make it difficult—if not impossible—for legislators to fully understand and articulate the region-wide impacts of the Compact. These Abstracts were not analyzed and cannot be used to assess when and how often private property rights will be impacted;

- The proposed Compact imposes a new Tribal regulatory scheme on 28,000 Montana citizens residing within the exterior boundaries of the reservation, 23,000 who are non-members.

In addition, because the proposed Compact was submitted to the legislature late in the session, it did not undergo the required legal, fiscal, and constitutional review customary for bills of this magnitude involving significant state resources. If ratified by the State, Congress, and the Tribes in its current form, the proposed Compact will be a legal document that cannot be amended by the State of Montana at a later time.

The Montana Reserved Water Rights Compact Commission (Commission), defined as an ‘agency’ under MEPA, is required to conduct an environmental analysis upon taking an **action**, which is defined as:

*...a proposal by an agency to authorize, recommend, or implement an action to serve an identified need or solve a recognized problem. (Emphasis added)<sup>1</sup>*

The Commission is recommending to the legislature that it approve the proposed CSKT Compact whose components result in irretrievable actions that significantly affect the quality of the human and natural environment, preclude future opportunities, and restrict the use and enjoyment of private property free of undue government regulation.

Prior to the submission of the proposed Compact to the 2013 legislature, the Commission did not conduct an environmental analysis, claiming it had received a “Categorical Exclusion”(CE) because (a) it was settling litigation, and (b) the Compact was not an “action” and did not trigger an environmental analysis. However, a review of Commission and agency records indicates that the “settling litigation” CE applies only to federal agencies and that under MEPA, a Categorical Exclusion for the Compact could result only after agency rulemaking or a programmatic review. Under MEPA,

*a Categorical Exclusion is defined as a level of environmental review for agency actions that do not individually, collectively, or cumulatively cause significant impacts to the human environment, as determined by rulemaking or programmatic review, and for which an EA or EIS is not required. The rulemaking or programmatic review must also identify the circumstances that could cause an otherwise excluded action to potentially have significant environmental impacts and provide a procedure whereby these situations would be discovered and appropriately analyzed.*

Neither the Compact Commission nor the Department of Natural Resources and Conservation (DNRC) conducted a rulemaking procedure or a programmatic review of the Compact that would qualify it for a Categorical Exclusion before recommending it to the legislature for consideration<sup>2</sup>.

MEPA also requires an analysis of an agency action when it has private property takings implications and /or when the action will potentially restrict the use of private property. The proposed Compact has both private property takings implications and regulatory restrictions on the use of private property throughout the impacted areas. Although the *Private Property Assessment Act* (MCA 2-10-105) and the *Economic Review of New Regulations* (MCA 2-4-405) are also applicable to the review of the proposed Compact, such analyses could be conducted within the framework of a MEPA review. Finally, MEPA is invoked for state actions that have precedential implications<sup>3</sup>.

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<sup>1</sup> MCA 75-1-102 3(a); See also *A Guide to the Montana Environmental Policy Act*, 2013, Legislative Environmental Policy Office, Helena, MT.

<sup>2</sup> MCA 75-1-102 Section 3 5(a)

<sup>3</sup> MCA 75-1-201 Section 2-3-104 IV(f)

From our review of the proposed Compact documents, we conclude that an Environmental Impact Statement analysis under MEPA is necessary and required. Without such an analysis, legislators will be once again faced with making a permanent, long-term decision involving state resources and significantly affecting the economy and environment of Montana without sufficient information. Proceeding blindly into agreeing to this Compact would be a disservice to all Montanans, including the members of the CSKT.

We strongly urge the EQC consider that a detailed environmental impact analysis of the proposed CSKT Compact under MEPA is required so that proper analysis of the environmental and economic impacts associated with the Montana Reserved Water Right Compact Commission's proposed CSKT Compact can be known prior to its consideration in either a special session or the 2015 legislative session.

### **EQC Oversight of MEPA Study**

Because the Compact Commission has emphatically denied the need for an environmental analysis, and *because the DNRC and the Governor's office were heavily involved in the negotiation of the proposed CSKT Compact, we request the analysis be overseen and directed independently by the Environmental Quality Council, outside the authority of the DNRC and the Governor's budget office.* It is imperative to the citizens of Montana to assure the legislature receives clear, credible, unbiased information to ensure we make a responsible, informed decision.

The EQC would exercise its oversight authority by:

- Determining the level of environmental review, including the possibility that a full Environmental Impact Study would be needed because of the significance of potential impacts on the human environment;
- Determining the scope of review
- Identifying the major issues
- Identifying the affected environment and impacts
- Identification of the regulatory restrictions
- Identification of the potential legal issues

We believe that the EQC could employ the use of the Montana Bureau of Mines and Geology, selected divisions within the DNRC, and independent environmental and economic firms to provide the necessary studies that would guide the legislature's consideration of the proposed CSKT Compact.

### **Proposed Funding**

Funding for the MEPA review of the proposed CSKT Compact could be derived from the \$55 million dollar state contribution fund set aside in 2013 for the CSKT Compact.<sup>4</sup>

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<sup>4</sup> The Governor's Report on the CSKT Compact prepared by the Compact Commission admitted that environmental studies would need to be completed for most, if not all of the Compact's components. However no funds were identified to conduct these studies in this supposed 'final' agreement making certain future appropriations will be necessary.