

TESTIMONY OF CATHERINE VANDEMOER, PH.D.
Before the House Judiciary Committee
Regarding H.B. 629
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Chairman Kerns, members of the House Judiciary Committee, my name is Catherine Vandemoer, and I am testifying today in opposition to HB 629, the proposed water compact of the Confederated Salish and Kootenai Tribes. I am a resident of Tucson, Arizona and came to Montana in November 2012 to study this Compact at the invitation of Concerned Citizens of Western Montana.

My background and experience are well suited to this task. I have a bachelor's degree in Geology from Smith College (Massachusetts) and a doctorate in Watershed Management (University of Arizona) and am a hydrologist and water manager. For 26 years of my professional career, I have worked for and on behalf of Indian Tribes in the quantification, protection, and management of Indian federal reserved water rights as a tribal employee and as consultant. I have also been a water rights specialist for the Assistant Secretary for Indian Affairs within the Department of the Interior, where I served as Chair of a federal water rights negotiating team, negotiated agreements between federal agencies and Tribal governments regarding the endangered species act, and implemented activities to protect aboriginal treaty fishing rights. I have applied all of this experience to my work here, and am the primary author of the report "Five Reasons to Reject the CSKT Compact." Based on my experience, the proposed CSKT Compact is unlike any previously negotiated compact in Montana and unlike any other litigated or settled federal reserved water rights agreement in the United States.

My testimony today will focus on the very important subject of water administration and management. The proposed Unitary Management Ordinance is found on pages 24-38 and 46-118 of the Compact, fully 86 pages. And what is shown in the bill is still not the complete Unitary Management Ordinance as released by the Compact Commission in February 2013. Based on my review, the UMO is not about managing water as a unitary resource; it is about control of water and will stifle water development for everyone on the reservation.

Before discussing the water management plan proposed in the Compact, it is important to identify the are several flawed assumptions underlying the management system and the proposed CSKT Compact that are, in my view, fatal to the entire Compact. While you will not find any of these assumptions clearly outlined in the proposed Compact bill or any of its attachments, they are fundamental to each of the components of the proposed compact, including the Unitary Water Management Ordinance (UMO, or Law of Administration), the Water Use Agreement involving the Flathead Irrigation Project, and the assertion of off-reservation aboriginal rights to instream flow.

- The first assumption is that the United States and the Tribes own all of the surface and ground water within the exterior boundaries of the Flathead Indian Reservation. This assumption has been asserted in the Compact Commission's public meetings and is found in the definition of the Reservation on page 6 of the proposed Compact, lines 15-17. 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.
 - Based on this assumption, the CSKT/United States asserted ownership of all the water within the Flathead Irrigation Project. This led to the development of the FIP Water Use Agreement which took these water rights from irrigators and changed their use to instream flow. This is the so called water 'quantification' shown on page 9, lines 9-15 of the Compact—it is water that legally belongs to someone

else. The proposed FIP agreement 'returns' to the irrigators approximately 11% of the water initially used for irrigation purposes for over 100 years.

- Based also 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 and uses on the reservation. The Unitary Management Ordinance or "law of administration" is found on pages 24-38 and pages 46-118 of the proposed Compact.
- **The second assumption is that there is 'a regulatory vacuum on the reservation' and that the State of Montana has no authority to administer water use on the reservation even for state based water users.** This oft-repeated phrase is used to support the development of an entirely new water administration system (the UMO) that effectively removes state-based water users from under the constitutional protection of the State. In reality, this assumption is also incorrect. **In the mid-1990's, a series of legal decisions known as the Ciotti cases determined that "until the CSKT quantify their water rights, the DNRC could not issue new well water permits".** As Mr. Tweeten described in a meeting in August 2012, the Compact Commission decided to 'make permanent' this ruling and forever disavow any state authority to administer state water use on the reservation. The decision effectively removes a whole class of citizens out from under the constitutionally-mandated protection of the State...a decision that neither a Commission nor the state Legislature has the authority to make.
 - Based on the flawed theories that the Tribes own all the water on the reservation, and that there is a regulatory vacuum, the Commission allowed the creation of a new administration program for the reservation. This "Unitary Water Management Ordinance" is a new rule that has been created for management of all water rights, including those of state water users, on the reservation. **It is simply unprecedented for any state to give up, delegate, or remove its statutory authority, duty and responsibility for water management for state water users within the exterior boundaries of any reservation, let alone an open reservation such as the Flathead Indian Reservation.**
 - The relinquishment of the state's authority also appears to be outside of what is allowed under the Montana Water Use Act and Montana Code:
 - **85-2-708. Water administration interim agreements within Indian reservations.**
 - (1) Because it appears to be to the common advantage of the state and Indian tribes to cooperate in matters involving the permitting and use of water within the exterior boundaries of an Indian reservation prior to the final adjudication of Indian reserved water rights and because the state does not intend by enactment of this section to limit, expand, alter, or waive state jurisdiction to administer water rights within the exterior boundaries of an Indian reservation, pursuant to the requirements of Title 18, chapter 11, the department may negotiate and conclude an interim agreement with the tribal government of any Indian tribe in Montana prior to final adjudication of Indian reserved water rights for the purpose of implementing a water administration plan and a permitting process for the issuance of water rights and changes in water right uses within the exterior boundaries of an Indian reservation.
 - (2) **An agreement entered into pursuant to subsection (1) must:**
 - (a) **provide for the retention of exclusive authority by the state to issue permits to applicants who are not members of the tribe and to issue change of use authorizations;**
 - (b) **provide that any permits must be issued in accordance with the criteria established by state law; and**

(c) provide that permits may be only for new uses with a date of priority in compliance with state law.

(3) Prior to concluding any agreement under this section, the department shall hold public meetings, after proper public notice of the meetings has been given and the proposed agreement has been made available for public review, to afford the public an opportunity to comment on the contents of the agreement.

Let us examine the new administration system in more detail.

The proposed Compact sets up an entirely new water administration system that vests all authority for water administration, management, and development in the Tribe. In this regard it is completely different than all other water compacts negotiated with the Tribes in Montana, where a dual sovereign system is maintained and the Tribe, pursuant to a Tribal Water Code, manages its water resources and uses according to Tribal law and where the State, through the DNRC and pursuant to Montana water law, administers state-law based water rights. The final forum for dispute resolution is a federal court.

The proposed Unitary Water Management Ordinance is a new rule that will affect 23,000 state-based water users on the reservation and vests power in a government within which these citizens have no vote. According to Montana Code, such a new rule must be scrutinized by the State Legislature before it can go into effect.

There are several elements of the proposed Unitary Water Management Ordinance that spell trouble for water management across the three counties that comprise the Flathead Indian Reservation. They are:

- Creation of a Politically-Appointed Water Management Elite
- The Burden of Proof
- Decision-Making
- Dispute Resolution

Creation of a Politically-Appointed Water Management Elite. The makeup of the reservation water management board consists of 5 people, with appointees by the Governor, the Tribes, and an at-large member appointed by both parties. If the State and the Tribes are unable to agree on an appointee, the Chief Justice of the Montana Supreme Court appoints the member. Membership on the board must consist of a person who owns a business on the reservation and people who have a home on the reservation but don't need to be full-time residents. The Tribal members of the Board are not disqualified from membership if they are an employee or are in the leadership of the Tribe. The State DNRC has an 'advisory' role but no membership on the reservation water management board.

To put it bluntly, this strikes me as a water management system composed of snow birds, politicians, and business owners whose business will rely on making decisions favorable to the Tribes. The political appointees—with no law guiding their actions—suggest that reservation water management will be either democrat or republican, or even perhaps libertarian depending on the political winds. In other words, water is managed not by principles of hydrology and law, but by political agendas and business interests. There are insufficient safeguards to assure the best possible sound decision-making for both Indians and non-Indians on the reservation.

The Burden of Proof. The burden of proof for the basic act of using water, whether an existing use or not, is unfairly placed on and rests with the individual...not with the Tribal Water Engineer, the Tribes' natural resource department, or the State Department of Natural Resources. As an example of the unfairness of this system, consider the situation in which the Tribe accuses your use of water as interfering with the Tribes' use of water. You, the individual must provide

the proof that you're not interfering with the Tribes. As an individual, you may need to hire a hydrologist or engineer, and then perhaps a lawyer, to defend your water use even though you already have a water right. The Tribe, on the other hand, is not required to prove that its use will impact your existing water right.

The individual is responsible for conducting well tests—aquifer pumping tests; gathering hydrologic data; and determining with precision the area of influence of his/her water right. The individual has no direct, funded access to the State DNRC for assistance. The Tribes, on the other hand, have available at their fingertips their own natural resources department as well as the state DNRC, “depending on funding and staff resources’.

Decision-Making. Decision-making initially outlined in the UMO was vested first in the Tribal Water Engineer, then the Reservation Water Management Board, and then a Federal Court. After objections from the State, the Federal Court was replaced by a ‘court of competent jurisdiction’. It is virtually certain that the Tribes would always choose a federal court, while regular water users would choose the Montana Water Court or a District Court. The Tribes will most likely argue that every issue of water use should be heard in federal court, and will most certainly appeal any local court decision to the federal court. I do not believe that the Tribal Court will be able or willing to take jurisdiction to resolve a water issue, even between tribal members.

What are the criteria for decision-making? Despite list after list of technical language that sounds good, the actual technical criteria for determining, for example, an area of influence of a well, are not developed for the Flathead Indian Reservation. There is no body of scientific information, standardized tests or uniform proof requirements that are employed for the decision-making of the Tribal Water Engineer.

Dispute Resolution. The UMO contains very specific timelines for resolving disputes that may be impossible to meet given the focus of the burden of proof as described above. If the dispute is not resolved within this short time frame (e.g. 30 days), two different things happen depending on who you are. If you are the Tribe, and the dispute is not resolved by the Tribal Water Engineer within the specified time frame, you can go ahead and conduct the action. If you are a non-member, you may not take the action. In some instances, the UMO specifies that the only thing that can be disputed about a Tribal Water Engineer’s decision is whether the Tribal Water Engineer abused his discretion. What kind of discretion does the Tribal Water Engineer have? What are his ‘side-boards’ for making decisions?

The Unitary Water Management Ordinance leaves too much room for arbitrary, capricious, and unprincipled decision making. It is not based on the best available science, and there are no guarantees that there will be sufficient technical staff to advise the board on the hydrologic elements of water use, resolving water disputes, or decision-making.

- This new system has itself numerous pitfalls, among them:
 - The establishment of a political board to control water use and to decide disputes;
 - The replacement of the State Water Court with a federal court as the final venue to resolve issues;
 - The paucity of both technical staff and technical criteria by which to make critical water management decisions, and the placement of the burden of such technical work on the individual
 - The establishment of processes and procedures that will require a significant investment in water administration infrastructure.
- The new water administration program will affect 23,000 non-members on the Flathead Indian Reservation, and will require the Legislature to review the impacts of this rule on citizens, businesses, and state agencies. It extends Tribal jurisdiction over water uses and water use priorities that is unheard

of anywhere in the United States. The rights of individuals will be controlled by a government in which they have no say or representation.

- A third assumption that affects water use and management is that an aboriginal right to take fish off the reservation automatically translates into a water right. It does not. Across Indian Country with Tribes who have this same “Stevens Treaty” language in their treaties, the struggle to assert aboriginal rights to take fish has focused on access to fishing grounds and the right to harvest a certain amount of fish. Where in stream water is required to protect an aboriginal right to take fish, the amount of water in-stream has been subordinated to existing uses and importantly, the water is managed by the respective state, in these instances, Idaho and Washington, or the Tribe has taken a seat on local water management boards. In Washington state, a court ruled the aboriginal right to take fish itself was diminished as a result of Congressional action and intent. The Stevens Treaty language regarding the right to take fish does not and never has been ruled as an ‘intent to reserve water’. It is an intent to secure a right to take fish. A recent article, which I shall provide to the Committee with my testimony, is salient on this point, and discusses the questions raised here.
 - Based on this assumption, the Compact Commission asserted that the CSKT have ‘water rights’ in several major rivers across western Montana, and that further, the Tribes have the administrative right to make a ‘call’ on the water off reservation. The facts show that the Tribes may not have an off reservation water right associated with the right to take fish, and also that they do not have any administrative authority to ‘call’ for water off-reservation to satisfy a right to take fish. There is no place in Montana or the United States that grants this authority to any Tribe.
 - Of particular concern to those of us who have worked with federal reserved water rights is the early assertion by the Compact Commission that ‘aboriginal rights to take fish’ were equivalent to ‘federal reserved water rights’. After public outcry, the Compact Commission finally admitted that aboriginal rights to take fish were ‘federally-derived’ rights, although the Commission continued to insist the right to take fish was a ‘water right’. This should be of significance to this committee because by the time one is finished reading the first five pages of the proposed Compact; one gets the impression that off reservation aboriginal rights are the same as federal reserved water rights. More significantly,
 - The Montana Courts are empowered only to hear cases involving federal reserved water rights according to the McCarran Amendment.
 - The Montana Reserved Rights Compact Commission is empowered only to address federal reserved water rights.

I conclude that the system proposed for management and administration of the water rights on the reservation cannot be implemented. The Unitary Management Ordinance is fine as a Tribal Water Code, for only Tribal water users and uses, but cannot and should not be used to manage state-based water rights. The Tribes do not own all the water on the reservation, only that amount that is duly and legally quantified as a ‘federal reserved water right’. Leasing of Tribal water for use off the reservation will require Congressional authorization. There is considerable evidence and case law that suggests a treaty-based right to take fish does not automatically lead to a Tribal water right for instream flow.

Mr. Chairman and members of the Committee, the falseness of these three assumptions underlying the proposed Compact and its seminal water administration system doom any effort to ‘tweak’ or amend this Compact. 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 as stated in the Compact Commission’s legislative mandate. The federal, Tribal, and state negotiating parties have failed their constituents.

I respectfully urge you to reject this Compact in its entirety. With permission, I would like to give the committee copies of my testimony and aforementioned articles. Thank you for your consideration.