

EXHIBIT 25
DATE 3/27/2013
SB 629

To: Montana Legislators, County Commissioners, and Public Officials

From: Catherine (Kate) Vandemoer, Ph.D.
Consultant to *Concerned Citizens of Western Montana*

Date: December 26, 2012

Subject: Confederated Salish and Kootenai Tribes (CSKT) Reserved Water Rights Compact

The Montana Reserved Water Rights Compact Commission, along with the federal government and the tribes have been working diligently to finalize the CSKT reserved water rights compact and move it forward to the Montana legislature in 2013.

While the compact has been in the works for several years, negotiations have flown under the radar for the general public. Public review and comment documents were posted to the Department of Natural Resources and Conservation (DNRC) website in early October. Since that time, many changes have been made to this frequently changing set of documents ranging from its current 1,100 pages to as many as 1,400 pages. As of today's date, four appendices are still missing, leaving an incomplete package for public review. Its content includes legal documents, maps and water abstracts, difficult for the average person to read and understand.

The public should reasonably expect that the negotiating parties perform all due diligence on a project that will have an impact on the water rights, property values and local economies of as many as 360,000 Montanans, but this is not reflected in the compact documents. The information necessary for the public to understand the implications of the compact has not been provided, nor have the necessary Environmental and Economic Impact studies of a project of this magnitude and scope been completed.

Additionally, the commission has not provided the public with a quantification of the amounts of water necessary to fulfill the purpose of the reservation. Instead, they concede senior water rights to most of the water in western Montana, and then lead the public to believe the compact will "protect existing uses of water". Not only is this statement false in the case of farmers and ranchers, this compact clearly sets the stage for restrictions to future growth and development throughout western Montana.

The enclosed documents were prepared on behalf of Concerned Citizens of Western Montana, who urge legislators to reject the compact in its present format, reset the commission, and to provide a clearly defined set of parameters and guidelines for a new compact commission to work within for developing a new compact that will deliver a fair and equitable division of water for all citizens in western Montana.

If you have any questions or concerns, please contact me at 520-369-1404 or Terry Backs at 406-626-3353

Enclosures: Five Reasons Why the CSKT Compact Should Be Rejected
Appendix A: Summary of CSKT Compact Water Rights Claims and Quantification
Comments and Questions submitted to the MRWRCC

FIVE REASONS WHY THE PROPOSED CSKT COMPACT SHOULD BE REJECTED

The 1972 Montana Constitution directed the initiation of State-wide general stream adjudication for the purpose of quantifying and protecting Montana's water rights. The Montana Constitution recognized and confirmed all existing water rights (Article IX Section 3 (1)) and ordered the Legislature to provide for a centralized system of administration, control, regulation and record-keeping (Article IX Section 3 (4)). For the purpose of quantifying the federal reserved water rights associated with Indian Reservations and other federal lands in Montana, the United States was enjoined into the Montana general stream adjudication through the McCarran Amendment (43 U.S.C. § 666 (1952)), which allows federal reserved water rights claims to be heard in state courts, in this case the Montana State Water Court.¹

The Montana Reserved Rights Compact Commission was established by the legislature in 1979 (MCA-2-15-212) to negotiate the federal reserved water rights of the Indian Tribes and other federal lands of Montana (MCA 85-2-702). While compact negotiations are underway, the legal proceedings in the Montana general stream adjudication are stayed (MCA § 82-2-217). The Commission will propose the Confederated Salish and Kootenai Tribes (CSKT) Compact to the Montana Legislature for approval in 2013.

The proposed CSKT Compact consists of three documents:

- (1) The Flathead Irrigation Project Agreement (FIP Agreement), a 'private agreement' between three irrigation districts, the CSKT, and the United States.
<http://dnrc.mt.gov/rwrcc/Compacts/CSKT/2012/121108CSKTAppendixList/Appendix3.pdf>
- (2) A water administration plan within reservation boundaries, known as the 'Unitary Management Ordinance (UMO)' <http://dnrc.mt.gov/rwrcc/Compacts/CSKT/2012/121108CSKTAppendixList/Appendix4.pdf>,
and
- (3) The Compact itself, which incorporates both of these two documents along with 37 other appendices, as the proposed CSKT Compact. <http://dnrc.mt.gov/rwrcc/Compacts/CSKT/2012/2012-11-8%20Proposed%20Compact.pdf>

This report outlines five primary reasons why the proposed CSKT Compact is not ready for legislative consideration and should be rejected at the Committee level. The five reasons are:

1. **THE MONTANA RESERVED RIGHTS COMPACT COMMISSION EXCEEDED ITS AUTHORITY**
2. **THE PROPOSED COMPACT VIOLATES THE MONTANA CONSTITUTION AND LAWS**
3. **REQUIRED ENVIRONMENTAL AND ECONOMIC IMPACT ANALYSES HAVE NOT BEEN COMPLETED**
4. **THE FEDERAL RESERVED WATER RIGHTS OF THE CSKT HAVE NOT BEEN QUANTIFIED AND THE COMPACT DOCUMENTS ARE NOT READY FOR LEGISLATIVE REVIEW**
5. **THE COMPACT FAILS TO CONSIDER FUTURE GROWTH AND UNDERMINES THE FAMILY FARM**

FIVE REASONS WHY THE PROPOSED CSKT COMPACT SHOULD BE REJECTED

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.²
 - 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.⁸

- 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).¹⁰
- 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.¹²
- 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 LEGISLATURE¹³**

- 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.¹⁴
- 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 2-4-405.¹⁵

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.¹⁶

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.¹⁷

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.¹⁸ 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 farmland¹⁹ 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.²⁰

END NOTES AND REFERENCES

¹ 43 U.S.C. § 666 (1952). The modern era of western water rights litigation began with the enactment of the McCarran Amendment in 1952. See 66 Stat. 560 (1952), codified at 43 U.S.C. § 666. Prior to enactment of this legislation, federal water rights could only be adjudicated in actions filed (or not opposed) by the United States because there was otherwise no waiver of sovereign immunity providing for the involuntary joinder of the United States to water rights adjudications. The enactment of the McCarran Amendment in 1952, which waived federal sovereign immunity for the joinder of the United States as a defendant in general stream adjudications. Over the next several decades, the United States Supreme Court issued a series of opinions that clarified the scope of the waiver and the procedural requirements that apply to such proceedings. For instance, the Supreme Court in such cases as *Dugan v. Rank*, 372 U.S. 609, 618-19 (1963), and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), ruled that the McCarran Amendment only provides a limited waiver of sovereign immunity for purposes of joinder to comprehensive, general stream adjudications in which the rights of all competing claimants are adjudicated. The waiver does not subject the United States to private suits to decide priorities between the United States and a particular claimant. Finally, the Court in *United States v. District Court in and for Eagle County*, 401 U.S. 520 (1971), ruled that the waiver of sovereign immunity under McCarran includes a waiver for the adjudication of federal reserved water rights. This ruling opened the door to much litigation over the existence and quantity of federal reserved water rights held for national parks, national forests, national wildlife refuges, Indian Reservations, and other federally reserved lands (<http://www.justice.gov/enrd/3248.htm>). See also Elizabeth McCallister, "The McCarran Amendment and Indian Tribes' Reserved Water Rights," *American Indian Law Review* Vol. 4 No. 2 (1976) pp 303-310.

² Carter, John. 64 MT L R 377. The McCarran Amendment did not address the issue of off-reservation aboriginal water rights. Aboriginal water rights had not been federally confirmed or established by the time of the MT Constitutional Convention in 1972. Although courts have ruled that these rights exist, they have not been part of a McCarran Amendment proceeding quantifying federal reserved water rights. *Ecology v. Yakima Reservation Irrg. Dist.* 121 Wn.2d 257, 850 P.2d 1306.

³ H.A. Ranquist, 1975 "The Winters Doctrine and How it Grew" *BYU Law Review* 1975 pp 679-723. The federal questions and issues concerning reserved water rights held for the benefit of Indian reservations could be removed for determination in federal court with all other issues being remanded to the state court. Proceedings in state court could continue on non-federal rights until the point is reached where the ladder of priorities must be matched against the available water supply.

⁴ The FIP agreement changes priority dates of project users, incorporates state water rights into the body of federal reserved water rights, allows the reduction of water to irrigated lands, and converts water uses to instream flow. Whether the Commission participated in the FIP or not, the Commission cannot include it in the Compact because the Commission has no statutory basis to determine priority dates, subordinate them to other uses, nor change uses of water. .

⁵ Water rights in Montana are property rights. They are afforded the protection of the United States and Montana Constitutions just like any other property right. Water rights have value and water users cannot be deprived of their property without due process of law. A water right is a right to use the water. It is not an ownership right in the water itself. Water rights are generally "appurtenant" to the land upon which they are beneficially used. This usually means that water rights automatically transfer with the land when the land is conveyed to someone else. However, water rights can be reserved from such conveyances and they can be freely bought and sold and made appurtenant to other land. If a state water right is reserved in order to become appurtenant to other land, DNRC approval is required before the right can be moved. <http://courts.mt.gov/content/water/guides/basiclaw2010.pdf> The general rule is that a water right acquired by appropriation and used for a beneficial and necessary purpose in connection with a given tract of land, is an appurtenance thereto (*Leggat v Carroll*, Mont 1904). But the question as to whether a water right is appurtenant to the land on which the water is used is a question of fact and requires proof.

⁶ The FIP irrigation works, including canals, laterals, pumps, and diversion structures, were built for the Indians and non-Indians on the Flathead Indian Reservation (34 Stat. L p 354) pursuant to the opening of the Flathead Indian Reservation to settlement as described in the Hellgate Treaty of 1855, Article VI and Article VI of the 1854 Omaha Treaty (by reference); and by subsequent acts of Congress appropriating funds for the same (35 Stat. L p, 83 and 448). The language suggests that after the water users had paid for 50% of the federal irrigation project, it would be turned over to them.

⁷ The MT Supreme Court did not bar the MT DNRC from administration of state water uses on the reservation; instead it held that until the federal reserved water rights of the Confederated Salish and Kootenai Tribes were quantified, the DNRC was prohibited from issuing any new ground water permits on the Flathead Indian Reservation (278 Mont. 50, 923 P.2d 1073 (1966), aka "Citotti");

297 Mont. 448, 992 P. 2d 244 (1999) aka "Clinch" or "Citotti II"; 312 Mont. 420, 59 P 3rd 1093 (2002), aka "Stults" or "Ciotti III"; and Mont. 302, 158 P.3rd 377 (2007) aka "Axe" or "Ciotti IV").

⁸ In *Montana v. United States* (450 US 544 1981), the U.S. Supreme Court ruled that the Crow Tribe of Montana did not possess the inherent sovereign power to regulate hunting and fishing by nonmembers of the tribe on lands owned by non-Indians within its reservation boundaries. The decision arose out of a dispute between the Crows and the state of Montana over the question of which entity had jurisdiction to control hunting and fishing within the reservation boundaries and primarily focused on the right to regulate fishing and duck hunting on and around the Big Horn River, which flows through the Crow reservation. The Crows based their claim on their inherent powers of tribal sovereignty and the language of the various treaties that created their reservation and, they argued, gave them ownership of the bed of the Big Horn River. Montana, on the other hand, argued that it took title to the riverbed at the time it became a state and that it had always maintained the authority to regulate hunting and fishing by non-Indians within the reservation. In an attempt to resolve the conflict, the United States, acting as trustee for the tribe, initiated a lawsuit in 1975 seeking a judicial resolution of both the threshold question of title to the riverbed and the accompanying jurisdictional dispute over hunting and fishing rights. The federal district court ruled in favor of Montana, holding that the state rather than the Crows owned the banks and bed of the Big Horn River. This ruling was affirmed by the U.S. Supreme Court. Two components of the ruling are key. On the question of title to the riverbed, the Court held that, notwithstanding certain ostensibly contradictory language in the 1851 and 1868 treaties by which the Crow Reservation was formed, title to the riverbed passed to the state of Montana upon its admission into the Union in 1889. With respect to the broader issues of inherent tribal authority, "Extension of tribal power beyond the realm of internal tribal matters, the Court ruled, would be "inconsistent with the dependent status of the tribes." Finding that control of hunting and fishing by nonmembers on lands no longer owned by the tribe (but still within its reservation) bears "no clear relationship to tribal self-government or internal relations," the Court held that the Crows did not possess the "retained inherent sovereignty" to regulate those activities.

⁹ Definition of the reservation in the 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", ignoring the provisions of Article VI of the same treaty that "and the residue of the land herby 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 be hereafter be prescribed the Congress or the President of the United States. The definition also ignores the Flathead Indian Reservation Allotment Act (33 Stat 302) providing for the sale and disposal of all surplus lands after allotment, and other subsequent acts of Congress.

¹⁰ The Takings Clause of the Montana Constitution contains "or damaged" language that applies to consequential damages to property affected by condemnation or inverse condemnation. The "or damaged" language does not apply to regulatory takings. *Buhmann v. State*, 2008 MT 465, ¶¶ 60-74, 348 Mont. 205, 201 P.3d 70. However, where the government action results in a permanent or indefinite physical occupation of all or a portion of private real property or deprives the owner of all economically beneficial use of the property, the "or damaged" language should be considered. To constitute damage, the impact of government action on property must be direct, peculiar, and significant. Thus, land that becomes waterlogged because of the effect of an adjacent government irrigation project on the ground water table is damaged and compensation is required. *Rausser v. Toston Irrigation District*, 172 Mont. 530, 565 P.2d 632 (1977). Construction that lowers the grade of a city street by seven feet, thus denying homeowners fronting the street with easy access to the street, damages their property. *Less v. City of Butte*, 28 Mont. 27, 72 P. 140 (1903). In contrast, landowners on a street subjected to increased traffic because of bridge construction have not suffered damage under the takings clause of the Montana Constitution. Although the value of the property for residential use has decreased, the value for commercial use has increased. *Adams v. Department of Highways*, 230 Mont. 393, 753 P.2d 846 (1988). However, if government road construction requires the physical taking of some property and other property adjacent to the road is diminished in value for its permitted use by 30% or more because of increased traffic or drainage problems, the remaining homeowners may be entitled to compensation for damage. *Knight v. City of Billings*, 197 Mont. 165, 642 P.2d 141 (1982).

¹¹ If the use of the guidelines, questions, checklist, and flowchart indicates that a proposed agency action has taking or damaging implications, the agency must prepare an impact assessment in accordance with Section 5 of the Private Property Assessment Act, Mont. Code Ann. § 2-10-105. Agencies should develop internal procedures to ensure that agency legal staff are consulted during this process.

¹² See “Water Rights Valuation”, Montana Department of Natural Resources and Conservation, Trust Land Management Division. [water-right-valuation.pdf](#)

¹³ Although an agency action triggers both state and federal environmental impact analysis, the Commission is asking the state legislature and Congress to sign a Compact whose impacts are significant without a thorough understanding of the scope of those impacts.

¹⁴ The Compact Commission Chair Chris Tweeten states the Commission has a ‘categorical exclusion’ on both the federal and state level and does not need to conduct an environmental or economic impact analysis.

¹⁵ 2-4-405. Economic impact statement. The cost of administering the Compact and the new rule for water administration has not been developed by the Commission, however they may be substantial. MCA 2-4-405 requires that (1) upon written request of the appropriate administrative rule review committee based upon the affirmative request of a majority of the members of the committee at an open meeting, an agency shall prepare a statement of the economic impact of the adoption, amendment, or repeal of a rule as proposed. The agency shall also prepare a statement upon receipt by the agency or the committee of a written request for a statement made by at least 15 legislators. If the request is received by the committee, the committee shall give the agency a copy of the request, and if the request is received by the agency, the agency shall give the committee a copy of the request. As an alternative, the committee may, by contract, prepare the estimate; (2) Except to the extent that the request expressly waives any one or more of the following, the requested statement must include and the statement prepared by the committee may include:

- (a) a description of the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (b) a description of the probable economic impact of the proposed rule upon affected classes of persons, including but not limited to providers of services under contracts with the state and affected small businesses, and quantifying, to the extent practicable, that impact;
- (c) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenue;
- (d) an analysis comparing the costs and benefits of the proposed rule to the costs and benefits of inaction;

More at link: <http://data.opi.mt.gov/bills/mca/2/4/2-4-405.htm>

¹⁶ Concerned Citizens read the entire compact and its appendices, and added up the amount of water presented in the 1,000 pages of water abstracts. See Appendix A to this report.

¹⁷ “The determination of regulatory authority [of Indians over non-Indians] is a fact-intensive inquiry, guided in part by the number of non-Indians that might be affected.” From Thorson, John, 2006, Tribal Water Rights: Essays on Contemporary Law, Policy, and Economics. <http://www.amazon.com/Tribal-Water-Rights-Contemporary-Economics/dp/0816524823>

¹⁸ See Appendix A

¹⁹ According to the DNRC Trust Land Management Division’s Water Rights Valuation, the reduction in value to agricultural lands could be as much as \$2,500 per acre per acre foot of water.

²⁰ See <http://www.farmland.org/programs/states/mt/default.asp>

Confederated Salish and Kootenai Tribes Reserved Water Rights Compact

Summary of CSKT Compact Water Rights Claims and Quantification							Note: 1 (a,b,c)		
CSKT WATER RIGHTS CLAIM	PGS	BASIN	PURPOSE	PRIORITY DATE	Off Reservation Note 4	On Reservation (Other) Note 3	On Reservation (Flathead Indian Irrigation Project) Note 3	TOTAL ACRE FEET	SEE NOTE BELOW
Documents									
Proposed Compact Summary	6								
Proposed Compact	51								
List of Appendices	1								
Appendices									
1 Hydrologic basin maps	14			N/A					
2 Flathead Indian Irrigation Project Influence Area Map	1			N/A					
3 Flathead Indian Irrigation Project	62			N/A					
4 Unitary Management Law	125			N/A					
5 Flathead Irrigation Project Water	85	76L,LJ	Irrigation	7/16/1855			179,539	179,539	
6 Map of Non-FIIP Historic Irrigated Acres - registration	2								
7 Bureau of Reclamation Report	43								
8 Hungry Horse Reservoir	15	76LJ	Any Beneficial	7/16/1855	90,000			90,000	
9 Natural Node Abstracts	103	76L,LJ	Fish and Wildlife	Immemorial		745,197		745,197	
10 FIIP Instream Flow Abstracts	34	76L	Fish and Wildlife	Immemorial			1,330,493	1,330,493	
11 FIIP Minimum Reservoir Elev	17	76L	Fish and Wildlife	7/16/1855			30,809	30,809	
12 Wetland Rights- Abstracts /Maps- non-FWP non-FWS	297	76L,LJ	Wetland	Immemorial				????	5
13 High Mtn Lakes - Abstracts	78	76L,LJ	Fish and Wildlife	Immemorial				????	6
14 Flathead Lake - Abstract	1	76LJ	Fish and Wildlife	Immemorial	9,396,400	9,396,400		18,792,800	
15 Boulder Creek - Abstract	1	76LJ	Power Generation	7/16/1855		5,792		5,792	
16 Hellroaring Creek -Abstract	3	76LJ	Power Generation	7/16/1855		4,374		4,374	
17 FWP Wetlands Abstract/Maps	10	76L,LJ	Wetland	Immemorial				????	5
18 FWP Claim to Tribes	1	76L	Fish and Wildlife	5/4/1962				????	5
19 Flathead Indian Irrigation Project	0	76F	Fish and Wildlife	7/16/1855			0	0	8
20 Flathead Indian Irrigation Project	0	76N	Irrigation	7/16/1855			0	0	8
21 Kootenai River Basin - Mainstem	4	76D	Instream Fishery	Immemorial	6,249,774			6,249,774	
22 Swan River Basin - Mainstem	4	76K	Instream Fishery	Immemorial	506,943			506,943	
23 Lower Clark Fork River Basin - Mainstem	2	76N	Instream Fishery	Immemorial	3,620,000			3,620,000	
24 FWP Co-Own Kootenai, Flathead, Rock Creek, Blackfoot (thru objection process)	1	76D,E,I,J	Instrm / Recreation		2,361,862			2,361,862	
25 FWP Co-Own Bitterroot, Flathead Basins (not thru obj objection)	2	76F,H,LJ	Instrm / Recreation		7,749,279			7,749,279	
26 Milltown Abstracts	6	76M	Instream Fishery	12/11/1904	1,036,074			1,036,074	
27 Milltown Dam - Enforceable levels	5	76M							
28 Painted Rocks Contract	10	76H			10,000			10,000	
29 West Fork Bitterroot - Water Purchase Contract	4	76H			32,000			32,000	
30 Lake Como	5	76H	Instrm / Recreation		3,037			3,037	
31 Unitary Management Board Forms	28								
32 Proposed Decree	0			N/A					8
33 1990 Flathead Agency Operating Procedures	0			N/A					8
34 Other reservation instream flows	52	76L,LJ	Fish and Wildlife	Immemorial		8,281,237		8,281,237	
35 Interim Instream Flows	1								
36 US FWP Wetland Abstracts	11	76L	Wetland	Immemorial				????	5
37 US FWP Coownership Claims	6	76L	Recreation	1918,1916,1952	3,964			3,964	
38 Placid Creek Abstract	1	76F	Instream Fishery	Immemorial	7,240			7,240	
39 Interim Instream Flow Protocols	1			N/A					
Grand Total	1,087				31,066,573	18,433,000	1,540,841	51,040,414	

NOTES:

1. Data Sources

- (a) CSKT water right claims from Compact Appendices and water abstract tables
 - (b) Annual stream flow from DNRC State Water Plan, DNRC Survey Books, U.S. Geological Survey stream gage data; Flathead Lake biological station
 - (c) existing water rights from DNRC water rights data base.
2. The Clark Fork Basin Water Management Plan (2004) concluded that both the state water resource data base and the state water rights database are incomplete and useful for general purposes only. Specific data can be used only with further research and field detail.
 3. On-reservation water claims are known as 'federal reserved water rights' claims
 4. Off-reservation water claims are known as "Stevens Treaty water rights" claims
 5. No volumes were given for these water rights, only "all surface and ground water necessary to preserve said wetland". Acreage of wetland claimed
 6. No volumes were given for these lakes, only acreages
 7. The analysis of 'available water' is preliminary and not intended for public use.
 8. Appendices not available as of 12/10/12, or were posted to DNRC website and subsequently removed

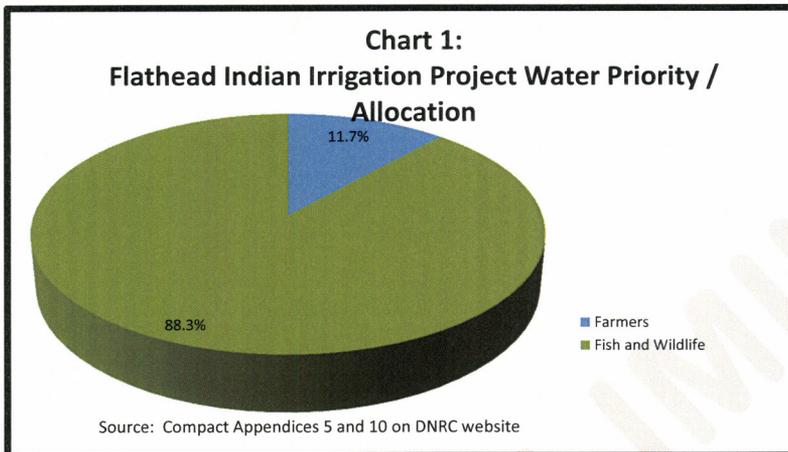
Confederated Salish and Kootenai Tribes Reserved Water Rights Compact

Summary of CSKT Compact Water Rights Claims Showing Impact on River Basin Water Availability Notes 2, 7

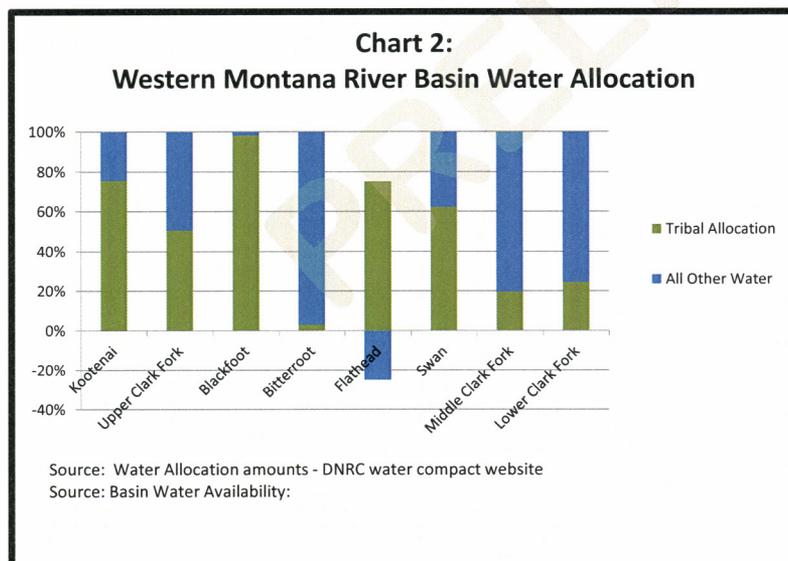
River Basin	Available Water *	Compact Water	Excess / Deficit for other users	Non-Consumptive Uses Note 10	State Rights Other	Total State Database Rights	% of Basin Water in Compact
Kootenai 76D (Libby, Troy, Eureka)	8,462,112	6,392,741	2,069,371	581,809	299,492	881,301	75.5%
Upper Clark Fork 76E,G,GJ (Phillipsburg, Anaconda, Deer Lodge, Drummond, Butte)	873,300	441,497	431,803	755,643	1,778,288	2,533,931	50.6%
Blackfoot 76F (Seeley Lake, Ovando, Potomac, Helmville)	1,136,807	1,115,115	21,692	1,136,545	542,344	1,678,889	98.1%
Bitterroot 76H (Darby, Hamilton, Stevensville, Lolo)	1,584,881	45,037	1,539,844	142,783	903,199	1,045,982	2.8%
Flathead 76I,J,L,L,LJ - Kalispell, Whitefish, Colum Falls, Polson, Ronan, St Ignatius, Dixon, Hot Springs, Charlo, Arlee, Evaro) Note 9	25,316,464	37,883,007	(12,566,543)	77,599,027	68,801,500	146,400,528	149.6%
Swan River 76K (Condon, Swan Lake, Big Fork)	815,900	506,943	308,957	528,165	23,659	551,824	62.1%
Middle Clark Fork 76M (Missoula, St Regis, Superior, Alberton)	5,313,290	1,036,074	4,277,216	1,534,641	648,235	2,182,876	19.5%
Lower Clark Fork 76N (Thompson Falls, Plains, Trout Creek, Noxon, Heron)	14,818,240	3,620,000	11,198,240	46,389,529	161,896	46,551,426	24.4%
Total Acre Feet of Water	58,320,994	51,040,414	7,280,580	128,668,142	73,158,615	201,826,756	87.5%

Data in Chart Form:

NOTES:



- The Clark Fork Basin Water Management Plan (2004) concluded that both the state water resource data base and the state water rights database are incomplete and useful for general purposes only. Specific data can be used only with further research and field detail.
- The analysis of 'available water' is preliminary and not intended for public use.
- Flathead Basin Available Water includes the non-storage portion of Flathead Lake totaling 17,001,800 acre feet of water, to allow for a comparison of water compact abstracts to total water availability 10. This may not be all inclusive. This figure represents Power Generation, Fish, Wildlife and Recreation categories of water rights from the DNRC database.



APPENDIX 'B'

SUMMARY OF SIX SCIENCE-BASED REASONS TO REJECT THE CSKT COMPACT

This appendix provides an abbreviated summary of the major science based reasons why the proposed CSKT Compact is not ready for legislative review, and should be rejected at the Committee level.

1. Application of Science to Natural Resource Decision Making. The proposed Compact does not present a sufficient set of scientific data required to ensure that the Compact will not have a deleterious effect on the farming landscape and hydrology of the reservation.
2. The Water Resource Concept Behind the CSKT Compact is to Change Agricultural Water Use to Instream Flow. There are no data provided in the compact to fully assess the impact of removing water from farmlands and transferring it to instream flow.
3. Agricultural Water Use, Management, and the FIP Agreement. The Compact uses water management to change major water use from agriculture to instream flow and devalues agricultural lands. The Compact ignores the BIA's \$80m in deferred O&M to FIP, makes no promises of significant rehabilitation of the irrigation project, and manages water in a way that destroys infrastructure. The Compact intends to diminish agriculture through regulation and mismanagement of agricultural infrastructure.
4. Instream Flow Determination, on and off reservation. Instream flow values are matched to water claims of the CSKT, not necessarily fish needs. Methods used to estimate instream flow values neglect seasonality, droughts, and habitat needs of fish.
5. Water Administration and Management. The Compact provides no scientific criteria for significant decision making planned for the UMO; therefore the UMO cannot be implemented. Water administration is a duplication of the State system ("parallel course") rather than a unified approach to water management. The Compact documents and authors have not identified a plan for of the duplicative water administration plan.
6. Water Availability for the Future. The Compact contains no analysis of what water claims would do to close basins on and off the reservation. There is considerable concern about the CSKT Flathead Lake claim and its impact on upper Flathead River ground water appropriations. The Compact contains no provision for an agricultural future, change in crops, or adaption of farming methods.

December 15, 2012

Mr. Chris Tweeten, Chair
Montana Reserved Rights Compact Commission
2705 Spurgin Road, Building C
Missoula, MT 59804

Re: Comments and Questions to the MT Reserved Rights Compact Commission

Dear Mr. Tweeten:

On behalf of numerous concerned citizens in the Flathead Basin, I am transmitting a set of comments and questions regarding the proposed CSKT Reserved Water Rights Compact, still in draft form as of this writing. Written responses to the questions are requested.

We strongly believe the Compact as proposed is not ready for legislative review, and that in its present form could suffer a definitive defeat. Why risk this outcome?

Thank you for your consideration. Kindly email your response to waterforworldpeace@gmail.com.

Sincerely yours,

Catherine Vandemoer, Ph.D.
Water Resource Consultant

Comments to Montana Reserved Rights Compact Commission Confederated Salish and Kootenai Tribes Proposed Compact

We present these comments on behalf of multiple land owners with a long-standing and productive presence throughout this region. We have attended most, if not all, of the Compact Commission's public presentations and negotiation sessions regarding the Compact for the last several years. We have read and analyzed all the documents made available to the public and much additional information.

Based on what has been presented in the public hearings and on the additional research we have conducted, we believe that the proposed Compact is incomplete, defective, and not ready for legislative review. The purpose of these comments for the public and written record is to highlight the several problems with the proposed Compact.

It has not helped that the documents proposed for public review keep changing. As opposed to making meaningful changes in response to public comments, the authors continue to obscure the true meaning, intent, and implications of the proposed Compact for all water users that it affects. We believe it is unconstitutional and unlawful to vest a water right in a political entity—the Tribes—and not the land itself. In Montana, water rights are attached to land.

The Compact is literally in three pieces: a private agreement to which the State did not participate; a unitary management ordinance that cannot be implemented with any certainty, and a 'catch all' Compact document that consists of hundreds of pages of water rights abstracts that contain 'side deals' affecting water management not discussed in any of the principle pieces of the Compact.

The FIIP Agreement

The FIIP Agreement—arguably a critical piece of the proposed Compact—is the primary place where the on-reservation federal reserved water rights of the CSKT were at least partially quantified. These water rights were determined using the primary purpose of agriculture. Without due process or examination, and over the objections of the on-reservation irrigation community, the agricultural water use was changed into instream flow which, when all is said and done, was made 'available' by reducing the farm turnout allowance based on a 'theoretical' hydrologic model, removing all "Non-Quota Water" usage, denying the valid science behind the 1946 Walker Report's double and triple duty water, and using tax payers' funds to save water but then denying that saved water usage to the local tax payers who saved it.

That the Commission was not involved in the most significant part of the federal reserved water rights quantification, and allowed the change of use and priority date of existing water rights without any review or legal authority, is a dereliction of duty. Furthermore, all the rhetoric about 'government to government' negotiations on key natural resource issues is made moot by both the Tribes and the State of Montana failing to enter into direct government-to-government negotiations over the federal reserved water right, under the faulty assumption that the FJBC fairly represented the irrigators, when it totally failed to accomplish any value whatsoever to them for their taxes.

The Commission may not now 'legalize' a faulty private agreement by 'folding it into the Compact', and then disclaiming any legal responsibility for what happens under the FIIP agreement to state-based water users.

The Unitary Management Ordinance

The 126-page Unitary Management Ordinance, or "UMO" is a monster of a document that cannot be implemented; it is also tied to the FIIP. The UMO has several shortcomings, among them (1) it sets up a political water management board ; (2) the scientific and technical criteria for making water management decisions have not been developed with specificity toward reservation lands and there is no clause to direct their development; (3) the UMO fails to identify with clarity who the water staff actually is, and (4) it cannot be used to effectively manage water. The UMO waives the State's constitutional and legislative responsibility to manage the water rights of non-Tribal users.

The UMO's lack of objectivity and scientific criteria betray its concealed but primary mission: to eliminate irrigated agriculture and to change all irrigated agricultural flows into fishery instream flows. Rather than wait until irrigation rehabilitation projects are completed and on-line to transfer water rights, the UMO allows the transfer of irrigated agriculture water rights to instream flow based only upon the notice of funding received for the rehabilitation project. A 'notice of funding' is not the same thing as making real water available for other uses through betterment of the irrigation structure.

The Commission has stated in public that it has not thought about the staffing, manpower, skills, or budget necessary to implement the UMO. The UMO does not spell out clear lines of decision-making, redress procedures, nor methods through which an impartial review of the facts of any dispute are to be assured. The UMO leaves too much room for political deal making outside of any formal and impartial water administration program.

The "Water Rights Abstracts" attached to the compact and referenced in the UMO contain in most instances 'notes' on the administration of each particular water right, which often include 'side deals' made between a Tribal technician and a State technician as to the disposition and administration of a particular water right. These 'side deals' or 'agreements' made in the Abstracts have not been integrated into the UMO, so it is impossible to tell which rule governs the administration of water on the reservation.

In short, the UMO is not complete and cannot be implemented as is written.

The Compact Document

The Compact document, being composed of essentially two (2) incomplete or defective parts (the UMO and FIIP private agreement), is not finished. Moreover, the Compact document itself has major flaws, including (1) it fails to quantify the federal reserved water right; (2) fails to specify clearly that two legally distinct water rights are being included in the Commission's discussions; and (3) fails to clearly articulate the volume of water being sought by the CSKT.

Failing to quantify the federal reserved water right is a fatal error in the document. Instead of articulating the volume of the rights claimed by the CSKT beyond the 229,000 acre feet in the FIIP, it buries millions of acre feet

of water inside the 'Water Right Abstracts', and in a form that makes it impossible to determine how much water is involved in the compact. For example, claiming a 'right to the natural flows to keep Flathead Lake at an elevation of 2883 feet' fails to specify that more than 16 million acre feet of water are required to keep the elevation of Flathead Lake at that level. A 'right to the high mountain lakes' is non-specific in terms of volume of water. Finally, a 'right to wetlands' is not specific as to the source and volume of water needed to maintain the wetland. Is it the water, the land, or the evaporation consumptive use that is being requested?

The Compact also fails to clarify for the public and the legislature that two legally distinct water claims of the Tribes are being 'resolved'. There is simply no legal or administrative precedent for claiming that the off reservation water rights under the Stevens Treaty for hunting, fishing and gathering are the same as on-reservation federal reserved water rights based on the Winters Doctrine. Furthermore, there is no legal precedent for the CSKT to have any right to 'call' for the enforcement of those water rights off reservation or exercise any administrative authority whatsoever.

The Commission fails to articulate that these distinct 'off reservation Stevens Treaty water rights' are set to exert claims for more than 20 million acre feet of water in Northwestern Montana.

Exempt from an Environmental Impact Statement?

Lawyers lobbying for the Commission continue to allege that this deal is "exempt" from the required Environmental Impact and Economic Impact Statements that customarily protect basins from environmental damages and economic ruin. Dried up irrigation ditches that have run continuously since 1894 and earlier, the drying up of wetlands and springs that have existed since the FIIP began, and the flood damage from deliberate flooding with waters formerly applied in beneficial use by agricultural irrigators means environmental impacts and damages!

The Public Hearings Process

The downfall of the public hearing process has been the focus of the Commission on 'selling' the Compact and not explaining it to the public. Platitudes that the Compact 'won't affect anyone' and that it 'protects existing water users' are just plain false. Our conclusion is that these public hearings have been ineffective. The Commission has focused on hiding the details of the agreement from the public, and many questions have gone unanswered. For this reason, we are attaching a series of questions which we attempted to ask in these hearings for which we have yet to receive any answers, and furthermore, we are requesting written responses to them.

Conclusion

For the foregoing reasons, we urge the Commission to not forward this document to the legislature for review, and instead, take the time to think through and finish all the key components of the document. We urge the Commission to seek clarification from the legislature regarding the Stevens Treaty rights. Finally, we urge the Commission to complete the full analysis of the economic and environmental impacts of the proposed Compact. Sending this forth as an incomplete document risks the reputation and legacy of the MT Reserved Rights Compact Commission and jeopardizes the water rights of Montanans and the CSKT.

GENERAL QUESTIONS FOR COMPACT COMMISSION PUBLIC MEETINGS

1. This question has to do with the DRAFT Compact and its three 'parts'—(1)the FIIP Agreement, (2) the Unitary Management Ordinance (UMO or "law of the compact"), and (3) the off-reservation Stevens Treaty water rights. The Compact document incorporates each of these parts.
 - a. Since the "Compact" is made up of these separate pieces, is the compact still valid if any or all of these 'parts' are not approved or finished? For example, if the FIIP Agreement is not approved, does the Compact still go forward?
 - b. If the Commission plans to move ahead with the Compact without the FIIP, will it ask the legislators to approve the Compact if such a major piece is missing or unfinished?
 1. Is this plan a "Nancy Pelosi" plan, where you 'have to pass it in order to find out what is in it'?
 - c. Regarding the FIIP agreement, we understand that the Compact Commission can't negotiate with private parties, and that is why the State was not a party to the FIIP agreement. Yet the Commission includes the FIIP as a major part of the Compact
 - i. Since the FIIP agreement actually did the 'work' of quantifying the on-reservation federal reserved water rights for irrigation and other uses, how can the Commission justify its decision to allow a private agreement of which it was not a part to determine a state's position?
 1. How can the quantification of federal reserved water rights occur by private agreement?
 - ii. Is the Commission aware that the private agreement does not protect existing users—in fact, that it reduces water to all irrigation including state water users?
 1. What will the Commission do about the known inequities in this private agreement?
 - iii. How can the state legally incorporate this agreement into the Compact and then reject any liability for results that harm water users?
 - iv. If not a part of the agreement, why did the Commission agree to abandon the water rights of non-Tribal irrigators and non-irrigators by the 'grand bargain' agreeing to drop protections for irrigators in exchange for Tribal administration?
 - v. Will the FIIP die if the compact dies?
 - d. Regarding the Unitary Management Ordinance, or Law of Administration.
 - i. The UMO creates a new water management board or authority over water management on the reservation.
 1. What authority does the UMO have over the other existing water management agencies including the JBC and CME?
 2. What constitutional, legal, or legislative authority does the compact commission have to relinquish state sovereignty and constitutional and legal responsibilities to this board?
 - e. Regarding the quantification of off reservation Stevens Treaty Rights. We have heard much from the Commission about the Winters court case and the federal water reserved to fulfill the purpose of the reservation.

- i. Are Stevens Treaty water rights included in the Winters Doctrine?
 - ii. How are they different?
 - iii. Since Stevens Treaty water rights are associated with protecting rights to fishing, hunting and foraging at usual and accustomed places, are the Tribes and is the Commission satisfied that a single value for water flow instream represents the full scope of these rights?
- 2. These questions involve the purpose of the Compact Commission and the proposed compact**
 - a. We understand the Reserved Rights Compact Commission is attempting to do TWO things in the Compact: (1) determine the federal reserved water rights which on the reservation, and (2) determine the off-reservation Stevens Treaty water rights.
 - i. Is a 'federal reserved water right' as defined under the Winters Doctrine the same as a 'Stevens Treaty water right'? Do the words have the same legal meaning?
 - 1. What are the differences?
 - 2. Are off reservation Stevens Treaty water rights quantified in the same way as on-reservation federal reserved water rights?
 - 3. Has a Stevens Treaty water right ever been identified as a 'federal reserved water right' in any legal proceeding quantifying only federal reserved water rights as defined under the Winters Doctrine?
 - a. Is the goal of the Commission to set precedent for such a result?
 - ii. The language in the beginning of the Compact document identifies the two different rights, but by the end of the first few pages, assumes the two water rights are the same. By the end of the Compact document, both federal reserved water rights and Stevens Treaty water rights are referred to as one term, the 'Tribal Water Right'
 - 1. Shouldn't the Commission clarify this language so that the public and legislators understand what is being proposed?
- 3. These questions have to do with how much water is being claimed by the Compact and about specific claims.**
 - a. How much water is being claimed as a federal reserved water right on the Flathead Indian Reservation...including all uses and Flathead Lake?
 - i. How much irrigation water
 - 1. What is the application of only 1.4 acre feet per acre on FIIP project lands based upon?
 - 2. Does this volume of water equal the historic rate of application?
 - ii. How much instream flow
 - b. Please describe how much water is claimed by the Tribes in Flathead Lake and the relationship of that water right to Kerr Dam operations now. Will the Tribe acquire state-based water rights when it owns and operates Kerr Dam?
 - c. What criteria will the new Water Management entity use to make a call on irrigation water for an on-reservation instream flow?
 - d. How much Stevens Treaty water is being claimed in off-reservation water basins?

- i. The Tribes have claimed a Stevens Treaty instream flow right in the mainstem and several tributaries of the Bitterroot, a basin that is temporarily closed.
 - 1. What users will be curtailed to meet the Tribes Stevens Treaty stream flow right?
 - 2. Who will administer this call and take the field action?
- 4. **These questions concern the 1100 page document presented for public review.** We are concerned that throughout this process the “Compact” documents have been constantly changing which has prevented full public review and comment. For example, the Commission recently removed two (2) appendices dropping the page number down from 1,400 to 1,100 pages.
 - a. The volume of material—a stack of paper nearly a foot high—seems a lot for a 10 year negotiation process, which should have streamlined everything. There are no summary tables, for example. Some summaries were initially provided as “attachments”, but have since been removed from the DNRC website
 - i. Did the Commission run out of time, or is the stack of paper designed to divert attention from something else?
 - ii. Is this document ready for legislative review and approval? Why or Why not?
 - b. When are all the documents going to be final? When will the public see the final document?
 - c. Is this document (November 8, 2012 draft) the document the entire Commission will vote on December 19, or is that a different document?
 - d. What will be submitted to the Legislature?
 - e. Can the legislature amend / remove pieces of the compact, or is this an ‘all or nothing’ deal?
 - f. Can the legislature act on anything that is not complete?
- 5. **These questions are about the Federal role in the proposed compact.** The federal government reserved the lands comprising the Flathead Indian reservation in the 1855 Hellgate Treaty. The water associated with these lands comprises the federal reserved water right. The federal government also invited settlers into the Flathead valley through federal legislation opening the lands to settlement, and built a federal irrigation project for Indian and non-Indian residents.
 - a. The federal government both reserved and opened up the Flathead (CSKT) reservation lands, and built an irrigation project to serve Indians and non-Indians...creating the situation we have today.
 - i. Given the federal Bureau of Indian Affairs poor record for the completion, rehabilitation and repair of its irrigation projects, what is the federal government’s role in the rehabilitation and betterment of the FIIP?
 - ii. Has the federal government contributed water to the settlement? Consider the following:
 - 1. The US could provide all fish flows needed by the Tribes from Hungry Horse reservoir and not require reduction in water use from irrigation
 - 2. The US could provide most of the off reservation Stevens Treaty rights—securing this rights by connecting with existing federal reserved water rights, e.g., Glacier National Park; guaranteeing streamflows out of federal reservoirs

- 6. These questions apply to the impact of the CSKT off-reservation Stevens Treaty water rights on existing water uses.**
- a. Many of the basins cited in the Compact as having off reservation water rights are over-appropriated or nearly so. Some are already legislatively closed
 - i. Does the Commission know whether the exercise of a Tribal water right could tip any of the off reservation basins into 'closure', preventing new water uses?
 - ii. In a basin that is already closed, like the Bitterroot, what is the impact of Tribal water right on existing uses?
 - b. In the Compact, the Tribes are given authority to make a call on these water rights and have agreed to exercise that call only against irrigators.
 - i. What authority do the Tribes have to administer water off the reservation and specifically to make this call?
- 7. These questions concern the identification/quantification of the off-reservation Stevens Treaty rights.**
- a. We understand that the Stevens Treaty Water Rights are based on the Tribes' access to fish, hunt, and forage in its usual and accustomed places.
 - i. How were the instream flow needs of these places determined?
 - ii. Why were some basins originally included in the documents excluded for this pass? i.e. Yaak, Fisher, and 76l
 - iii. How were these locations chosen?
 - iv. Are there any financial arrangements between the Tribes and hydropower facilities near or at the proposed Tribal Stevens Treaty water right?
 - b. Since the Stevens Treaty water rights have to do with federal promises to the CSKT, shouldn't existing federal facilities and federal reserved water rights be used to satisfy the CSKT Stevens Treaty water rights?
- 8. These questions concern the relationship between irrigation return flow, wetlands, and late-season streamflow.**
- a. We understand that storage of irrigation water on agricultural lands, and the seepage and return flow, feeds many of the wetlands on the reservation and contributes to late season streamflow for fish.
 - i. Has there been any study of the impact of reduced irrigation water use on wetlands and late season streamflow?
 - ii. Has there been any study of the reduction of irrigated acreage on ground water recharge?
 - b. Can you describe how much water is involved in the wetland water right on reservation?
 - c. Which Tribal, state, and EPA- declared wetlands carry the time immemorial priority date?
- 9. On page 41 of the October 3 draft of the Compact, the United States reserves the right to change the terms of the compact, and once those changes are made, the state and Tribes have no say in the change.**
- a. Why does the federal government feel the need to be able to make changes beyond the scope of actual negotiation?

- b. What kind of changes could the federal government make to this compact?
 - c. Are there other examples from MT where the federal government has changed a compact, and what were those changes?
 - d. What effect might changes to the compact by the federal government have? E.G., funding, amount of water, water administration
- 10. The FIIP agreement will reduce the amount of water on irrigated lands, making them less productive.**
- e. Given that the soils vary in the FIIP project, and that diversion canals 'leak' water, please explain the process used to assign a 'one size fits all' water diversion to the FIIP of 1.4 acre feet per acre.
 - f. Has there been any evaluation of the increase in food prices, including meat, resulting from less productive agricultural lands?
 - g. Has there been any evaluation of the connection between wetlands and irrigation return flow, and if the irrigation water is reduced, whether the wetlands will dry up?
 - h. Is the reduction of water to irrigated lands an 'inverse condemnation'...that is, will it result in a lessening of the value of these lands?
 - i. When will the metering of diversions and wells begin? Who will pay for the meters?
 - j. Once the reduction in water to agricultural lands achieves the reduction in value, is it the Tribes' plan to purchase those lands at depressed prices?
 - i. Can the Montana Reserved Rights Compact Commission engage in an activity that directly or indirectly reduces water to irrigation lands?
- 11. The following questions are related to the on-reservation water rights ('federal reserved water rights') and the off-reservation water rights (Stevens Treaty water rights).**
- k. How much water is being asked for the on reservation, federal reserved water right? I don't have time to look through the compact documents, so can you estimate?
 - l. How much water is being asked for in the off-reservation Stevens Treaty rights?
 - i. Where is the location of the instream flows? (Kootenai, Clarks Fork, Bitterroot)
 - ii. What kind of studies were done to verify the amount of water requested? (fish needs, Tribal usual and accustomed places, habitat needs etc)
 - iii. Has the Compact commission analyzed how much water is actually available in those rivers?
 - iv. Since the federal government will hold those water rights, has there been an economic or environmental impact statement on the effect of exercising those rights on other users and the local economy?
 - v. Who will enforce those water rights?
- 12. The following questions relate to the Unitary Management Ordinance, aka "Law of Administration" which applies only to on-reservation federal reserved water rights**
- m. The Commission claims that existing water users will be protected. Yet the first thing the UMO does is to reduce the amount of water to irrigated lands.
 - i. How does this "protect existing users"?
 - ii. Can the Compact legally legitimize this questionable reduction?

- n. Does the UMO provide an effective way for on-reservation water users to dispute an action by the water management board?
 - o. The Compact creates a new water board responsible for the distribution and administration of water on the reservation.
 - i. Is the new arrangement more efficient?
 - ii. Please explain how the creation of a new water board on top the Flathead Joint Board of Control, and the cooperative management entity will improve water management on the reservation
- 13. Under the Compact, the Tribes have a right to "call" the water both on and off reservation, which means that it can require that its senior water right is exercised first before other water users. The following questions relate to the "call" on the water and to the Compact's section on "call protection"**
- a. Since the Tribes (and the united states) have agreed to only "call" irrigation water users using surface water or ground water in proximity to a stream, is the Compact inherently 'anti-agriculture/irrigation'?
 - b. Is there another goal to the Compact, in other words, to remove irrigated agriculture from the landscape?
 - c. Can the state of Montana legally support this discriminatory 'call'?
- 14. The following questions relate to Kerr Dam and the water in Flathead Lake**
- a. How much water does the Compact allocate to the Tribes in Flathead Lake?
 - b. What proportion of the total water available in Flathead Lake is this?
- 15. Why has the state chosen to ignore the fact that the federal government opened the reservation to settlement with the Flathead Allotment Act, paid the tribe for the land sold to settlers, and why do they assume the government would sell land to homesteaders with diminished water rights?**
- 16. What good faith effort has the state made to notify all impacted water rights holders about this pending compact? Public meeting notices are not adequate for such an important, far reaching and significant document. It would almost appear that this process has been kept under the radar intentionally.**