

A4 THURSDAY
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OPINION

Water is clear, but compact isn't

A massive PR campaign is flooding over Western Montana in support of a proposed water-rights compact between the Confederated Salish and Kootenai Tribes, the state of Montana and the United States.

The latest wave of information came from the governor's office last week in response to a letter sent by the Flathead County Board of Commissioners in opposition to the water compact.

Gov. Steve Bullock told the commissioners — politely — that “many of [their] concerns are rooted in significant misunderstandings about the Compact” and he sent the commissioners a memorandum from his chief legal counsel, Andrew Huff, detailing the state's argument that the water compact is a “fair compromise.”

Huff wrote that he doesn't believe the county's opposition to the compact is well-founded, but it seems to us that he does nothing to reassure the county.

Take, for instance, the county's concern that the proposed compact is the only compact in Montana to include off-reservation water rights. Huff agrees that the commissioners are correct, but simply tries to make it seem like the tribes are doing everyone a favor “by agreeing to cede the vast majority of its off-reservation water rights claims.”

According to Huff, these claims cover about half the state, “and would, if pressed by CSKT, result in significant disruption to the statewide water adjudication proceedings.”

It is this threat of tribal claims on water from here to Butte that

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has the state worried, and deservedly so, but it should be noted that just because the tribes have made claims to water rights doesn't mean a water court would agree with them.

The argument hinges entirely on the Hellgate Treaty of 1855 that created the Flathead Reservation. Huff and other compact supporters argue that because Article III of the treaty establishes for the Indians a “right of taking fish” outside of the reservation, they therefore somehow have the right to control water rights in 11 counties.

But hold on. The actual language of the treaty says the Flathead Nation has “the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory...” That's the crucial language on which the entire water compact is based, and it gives us considerable heartburn. If the right to take fish is held “in common with” the rest of the citizens of Montana, then it cannot be construed to give the Salish and Kootenai special rights. This is just simple logic.

Well, say the lawyers working for the water compact commission, the tribes need to exercise other rights in order to be able to ensure themselves the right to take fish, and therefore this compact will guarantee them control over the water and thus the fish.

But Article I of the Hellgate Treaty obviates that argument. By signing the treaty, “The said confederated tribes of Indians hereby cede, relinquish and convey to the

United States all their right, title and interest in and to the country occupied or claimed by them” except for on the Flathead Reservation itself.

Legally, in other words, the whole effort to gain control of water rights off the reservation should have no validity whatsoever except by ignoring the very document that these rights are supposedly obtained from.

Yet the state, without regard to the best interest of its own citizens, is arguing that because the Hellgate Treaty grants “off-reservation fishing rights” to the tribes it therefore necessarily also grants the tribes a right to control the state's water in order to guarantee the quality of its tribal fishing.

That, in short, is why thousands of Montanans are outraged. As a state of fisher men and women, we know full well that the right to take fish does not guarantee a right to catch fish.

We also have enough common sense to know when something is fishy, and the state's eagerness to turn over to the tribes essential control over massive quantities of water without getting anything in return is puzzling at best.

We've already expressed our own reservations about the water compact, from both a procedural and substantive point of view, and cautioned legislators not to approve the proposal unless they know exactly what's in the compact and that it won't hurt Montanans now or in the future.

Gov. Bullock and counselor Huff's arguments notwithstanding we don't think that test has yet been met.

1/30/15
DAILY INTER LAKE

Water compact is fatally flawed

By GARY SAUREY

Let's review where we are with respect to the recently concluded negotiations by the Reserved Water Rights Compact Commission. On Jan. 12 the commission voted and ratified the latest draft, which had been hastily published for public review only the middle of the previous week.

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In fact, many of the appendices, which are crucial to the final makeup of the compact, are still under revision. As a result, the public has not had time to adequately review nor comment on the final draft, nor has it had any assurance that any comments made will be addressed by the commission. This is a parody of the public participation process, and could only be corrected by delaying any action to allow for adequate review and comment by the public before any vote. Unfortunately, the commission chose to rush forward and cram this down our throats.

Now, let's see whether the commission has fulfilled its duty to represent the state of Montana and its citizens in these negotiations with the Confederated Salish and Kootenai Tribes and the U.S. government, negotiating on behalf of the tribes.

This unelected commission was empowered by the Legislature to "conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state" (MCA 85-2-701). Note the word "reserved" and the word "water." Nothing in the law speaks of rights to fish, and by allowing the tribes and the U.S. to bring in negotiations about aboriginal rights, and accept the premise that those can somehow be characterized as a water right, the commission has failed miserably in its duty to represent the state and its citizens in these negotiations.

This has allowed the tribes to expand the scope of the areas under negotiation much beyond the reservation, and to use the fear of protracted litigation and the tactic of giving up that which it did not have in the first place in return for vastly expanded "reserved" on-reservation water rights as well as unprecedented off-reservation water rights. By continuing to assert aboriginal

not be based upon they have been good neighbors," "it was theirs in the first place," "it's good for fish," or "water rights attorneys will be getting rich if this compact does not pass" but rather, whether or not the compact results in an "equitable division and apportionment of waters between the state and its people and the... tribes." I submit that the commission has failed miserably in this endeavor.

The tribes have been allowed to cherry-pick the provisions of the Hellgate Treaty that are favorable to their expansive view of their claimable water rights, while ignoring the clear language in other parts. The tribes' ancestors unquestionably sold all rights, title and interest in their ancestral lands for good and sufficient consideration, period. They kept some right to fish off-reservation "in common" with the rest of us. We all have experienced seller's remorse from time to time, but it is unfair and unwise to allow them a "do-over." To do so tramples the rights of the rest of the citizens of Montana.

The Legislature in MCA 85-2-101(6) stated that it was its intent "that the state, to the fullest extent possible, retain and exercise its authority to regulate water use and provide forums for the protection of water rights, including federal non-Indian and Indian water rights, and resolve issues concerning its authority over water rights and permits." The commission negotiated away, in favor of the tribes, this authority by creation of a unitary management scheme within the compact. Again, they failed miserably, and violated legislative intent clearly expressed in the enabling legislation.

Finally, any negotiation should result in a final quantification of the reserved water rights, not the incomprehensible inflated abstracts currently contained in the compact. The only way the public can reasonably assess the future effect on ourselves and our posterity is with the finality of reasonably quantified abstracts.

There are many other flaws that have been pointed out by others, including Verdell Jackson, Bob Storer, and Commissioner Phil Mitchell to name a few, and I thank them for their diligence. This train wreck is now on its way to the Legislature for approval. I call upon all legislators to reject it outright. To do otherwise would be a violation of their oath of office to uphold the Constitution and laws of the state of Montana for which the voters will hold them accountable.

This has been going on for more than a decade, and it is time to move on. If that involves litigation, then so be it. We citizens should not fear litigation, but embrace it as preferable to submitting ourselves to the whims of the overreaching bureaucrats, as they trample on our rights in pursuit of their vision of the "greater good." At least there is due process and an opportunity to be heard, which has been lacking so far.

The compact process and result is so flawed, and the issues so wide ranging, that I do not believe it can be salvaged by negotiation, and must ultimately be ruled upon by the Supreme Court.

Saurey is a Whitefish/North Fork landowner and provisional water rights holder.

Hell Gate Treaty Forbids Off-Reservation Water Rights Contained in CSKT Water Compact

The claim of the Confederated Salish Kootenai Tribes (CSKT) for off reservation water rights on rivers in the CSKT Compact is based on the 1855 Hell Gate Treaty, Article III: “The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.”

Note that the statement “right to take fish in common with the citizens of the Territory” is **not a water right**; otherwise Montana citizens could get a water right to protect their favorite place to fish. The Indian right is in common with the citizens of the Territory. These subsistence rights which show up in some treaties are given only to tribes known to be peaceful. A subsistence life style was common among both Indians and the citizens of the territory 159 years ago, but now government programs and fast food restaurants take the place of self sufficiency. Article III also gives Indians the right in common with citizens of the United States to travel upon all public highways and provides the right of public convenience roads being built on the reservation. Article III is a doctrine of public use of land on and off the reservation and **cannot** be legitimately stretched to include a stream flow water rights for the CSKT. The Hell Gate Treaty is very specific and easy to understand and does not mention water or water right.

Article I of the treaty also makes it very clear that the CSKT **cannot** be granted off Reservation water rights based on the right to hunt and fish on their aboriginal land: the CSKT “hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them...” Note that the words cede, relinquish and convey and the words right, title, and interest were all used to make sure everyone understood that aboriginal rights were given up.

Article II established the Reservation: “reserved from the lands above ceded, for the use and occupation of the said confederated tribes...”

Article IV through VII pays CSKT for the cession: “In consideration of the above cession, the United States agree to pay to the Confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty...” Cash payments were required and basic infrastructure such as a school, blacksmith shop, saw mill, and a flouring mill were to be built and maintained for a period of 20 years, about \$21 million cash. The Federal Government paid CSKT for ceding their aboriginal land!

Article VIII states: “The confederated tribes of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.” Off Reservation CSKT stream water rights are a blatant violation of article VIII. Irrigated land that is subject to a water call by the CSKT (ordered to stop using water) is greatly depreciated in value because of the uncertainty. Irrigators are few in number, but they are the people who grow our food and make up the major part of our economy in western Montana.

Off-reservation stream water rights by CSKT are forbidden by the Hell Gate treaty and **do not** meet the definition of a federal reserved water right which by law is restricted to reservation land. No off reservation water rights on stream flows have been previously awarded in a compact or in case law in Montana or any other state. In addition, the minimum flows **are not based** on a “survival of fish standard” and the water rights have a time immemorial priority date which is senior to everyone including the State of Montana. How could anyone who has taken an oath to uphold the US and Montana Constitutions support giving a political tribal council of a sovereign nation authority over rivers that affect 330,000 people in 11 counties in Western Montana?

Senator Verdell Jackson, Kalispell