

"Draft"

2-16-15

Draft Letter to Governor Bullock

SENATE JUDICIARY

Exhibit No. 28
Date: 2/16/15
Bill No. S B 262

Dear Governor Bullock,

Thank you for your response to the Flathead County Commissioner's letter regarding our concerns about the proposed CSKT Compact. Unfortunately, your response and the attached legal memorandum by your chief legal counsel still leave our questions, as well as our concerns, unanswered. We believe that you may have misunderstood the questions, intent, and concerns expressed by our letter.

In your letter, you cited three (3) "significant changes" that were made to the Compact during the limited re-opening of negotiations in 2014. However the substance of these changes is insignificant and does not allay our concerns as indicated below:

(1) a 'water delivery entitlement' cannot replace a water right and does not address our underlying concern that the Compact transfers the bare legal title of irrigator water rights and much of western Montana's water to the CSKT;

(2) the new technical team created by the Compact will essentially eliminate the duly elected representatives of the Flathead Irrigation Project, the Flathead Joint Board of Control, because it takes over the day to day operation and management of the project, and

(3) the entire administration program proposed in the compact violates Article IX of the Montana Constitution, in that a constitutional function of the State cannot be delegated to a Tribal government and, that the state cannot make a law that treats citizens of the state differently than other citizens.

In addition, you state that "these changes respond directly to questions raised during the 2013 legislative session and through discussions with stakeholders". However, these cosmetic changes to the Compact reflect neither, and the stakeholders of western Montana were in fact excluded from any meaningful discussions with the Compact Commission.

While we appreciate your legal counsel's effort in responding to our questions, we are disappointed that the arguments used to respond to the legitimate questions we raised are the same arguments used by the Compact Commission over the last two years. Because the Compact Commission's arguments were unpersuasive and led to our questions to you in our first letter, the repetition of the same arguments moves us no closer to resolution.

- (1) Off-Reservation Water Rights. The language of Article III of the Treaty of Hellgate grants the Tribes an access right to "take fish...in common with the citizens of the territory". Such an access right has never been held by the United States Supreme Court to convey a water right in any of the legal cases cited by your counsel.¹ Whether or not such water right exists should not be resolved in the forum of a Compact, but should be addressed by the United States Supreme

¹ U.S. v. Winans, 198 U.S. 371 (1905); Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979)

Court which ruled in both of the aforementioned cases invoked to justify the claim for off-reservation water rights.

- (2) Off-Reservation Water Rights are Not Supported by the Treaty of Hellgate. Again, the Stevens Treaty language did not create a water right out of an access right to fish and such a right is not supported by the Treaty of Hellgate or in case law. First and foremost, the Compact Commission is required to determine the federal reserved water rights of the Tribes, those that derive from a federal reservation of land. The Compact Commission is attempting to expand the doctrine of federal reserved water rights to include "tribal reserved water rights" off the federal reservation, a legally established doctrine that does not exist. Second, Article I of the Treaty of Hellgate ceded 'all right, title, and interest to' the lands so ceded to the United States. In Article II, the Flathead Reservation was explicitly reserved out of those ceded lands by the CSKT to the United States. Finally, the Compact claims a water right for the lower Clark Fork River that is outside of the boundaries of the judicially determined ceded or aboriginal lands, in territory ceded by three other Tribes. Montana, as a state, cannot reinterpret a Treaty to create water rights where none has been reserved or implied; these are matters that should be resolved in a proper legal forum, especially when such a determination will have broad legal precedent across the western United States.
- (3) Excessive Water Award. That the Flathead Reservation has more water than other reservations in Montana is irrelevant to the quantification of the federal reserved right necessary to fulfill the purpose of the Flathead Reservation. The Compact Commission failed in its primary duty to determine the purpose of the Flathead Reservation and the volume of water necessary to meet those purposes. It is easy to criticize other calculations when a number has not been quantified by the Compact Commission. What is baffling is that every other tribal compact in Montana quantifies the purpose of the reservation and the water right necessary to fulfill that purpose, including instream flows, but this Compact does not. Importantly, until the State of Montana quantifies the federal reserved water right it is impossible to determine the adverse impact of the Compact on other Montana water users. The reality of this Compact is that it doesn't provide a volume of water so that no one knows what the impact is on other water users in Montana.
- (4) Dire Consequences for Flathead County. It should be obvious to Mr. Huff that the Compact's claim for all of Flathead Lake, and instream flows off the reservation with a time immemorial priority date, and inability to quantify the volume of water awarded to the CSKT will have dire consequences to businesses, irrigation, and the economy of western Montana. Changes in the level of Flathead Lake, for example, will affect the amount of ground water development that will be allowed above the lake. The Compact is very clear that irrigation uses will not be protected off-reservation, resulting in 'calls' exercised by irrigators on cities, towns, housing developments, and individuals.
- (5) State Settlement Funds. The expenditure of state money on fixing a federal irrigation project is unwarranted, especially if federal funds for irrigation rehabilitation projects already exist and when the Compact itself results in a taking of water rights belonging to irrigators without compensation.

(6) Article IX of the Montana Constitution. The constitutionally required mandate that the State of Montana owns the water for its citizens, and that the state is responsible for water administration cannot be delegated to an Indian Tribe or to any foreign government.

Based on your response to our requests, which reflect the two-year running set of 'talking points' of the Compact Commission, we are disappointed to report that our serious doubts about and questions regarding the Compact remain.

We are convinced that the legal precedent the state is attempting to create in this Compact is inappropriately placed before the legislature, which has neither the authority nor the ability to alter the Montana Constitution, to create a new type of federal water right, to reinterpret a Treaty, nor to govern without the consent of the citizenry.

Sincerely yours,

A handwritten signature in cursive script that reads "Philip Mitchell".

Flathead County Commissioner

Enclosures