

**REVIEW AND ANALYSIS OF THE
GOVERNOR'S REPORT ON THE PROPOSED CSKT COMPACT**

**Submitted to the
Water Policy Interim Committee**

By

CONCERNED CITIZENS OF WESTERN MONTANA

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EXECUTIVE SUMMARY

This document is a review and analysis of the Governor's Report on the Proposed Compact with the Confederated Salish and Kootenai Tribes, and is submitted to the Water Policy Interim Committee by Concerned Citizens of Western Montana. The analysis leads to the following findings:

- Technical studies underpinning the Compact and briefly mentioned in the Governor's Report are not well developed and exist only at the planning level. This materially impacts significant assumptions and components of the Compact, including the proposed irrigator water use agreement, instream flow requirements, and on-reservation water administration. The lack of substantive technical studies and data underpinning the Compact means that it is impossible to understand the whether the Compact is beneficial for or detrimental to Montana.
- The Governor's report does not reflect the assumptions, elements, provisions, requirements, or components of the actual Compact document, is unresponsive to questions raised by the legislature and citizenry, and does not advance further knowledge about the Compact essential to decision-making.
- No legal or constitutional analysis of the Compact was completed before its submission to the legislature and the Governor's report does not provide this information.
- The Governor's report contains numerous misstatements and errors by omission that call into question the veracity of the report and integrity of the Compact work product.
- Assessments of the private property, environmental, and regulatory implications of the Compact were required and not completed.

Recommendations are provided.

Review and Analysis of the Governor's Report on the Proposed Confederated Salish and Kootenai Tribes Compact

This document is a review and analysis of the Governor's Report on the Proposed Confederated Salish and Kootenai Tribes (CSKT) Compact (Report) and is submitted to the Water Policy Interim Committee (WPIC) by *Concerned Citizens of Western Montana*. Because substantial questions remain about the Compact that were not resolved by the Report, it is our hope that the WPIC review will provide ample time for the Compact Commission to respond to the Committee's and public's questions and consider modifying the proposed CSKT Compact so it can garner the necessary legislative and public support for its ratification.

The Governor's letter vetoing Senate Bill 265 and directing the completion of this Report expressed disappointment that

"...the Legislature failed—for the first time in the 34-year history of the Commission—to adopt a state-tribal compact negotiated in good faith. The proposed water compact is the culmination of years of negotiation, legal, and technical work, and public involvement. Despite the importance of this compact to the economic future of western Montana, the compact was never allowed a vote on the floor of the Senate or the House...instead the Legislature proposes to extend the deadline for the suspension of the adjudication of tribal water rights, presumably to allow for further negotiations of the CSKT claims..."¹

While we acknowledge that the parties have been negotiating for many years, unfortunately that negotiation resulted in unproven and questionable economic benefits to western Montana, and incomplete legal, regulatory, and technical work. The Compact did not get to the floor of the Senate or House because there was insufficient information for legislators to responsibly evaluate and assess the proposed CSKT compact.

Like many other citizens, we were hopeful that the Governor's directive to produce a Report would enable the Compact Commission to truly address and incorporate the thousands of comments that were sent to the Commission regarding the Compact, and to use those comments to recommend changes to the Compact so that it could receive broad public and legislative support. However, we find the Report to be unresponsive to the concerns raised in the 2013 legislative session such that the Compact is no closer to receiving broad public or legislative support than it was at the end of the 2013 legislative session.

For this reason, we have prepared this letter Report that we hope will compel the WPIC to recommend the Commission continue work on the proposed CSKT Compact by conducting the necessary studies that would ensure the completion of the required legal, regulatory, and technical work required to achieve a fair and equitable settlement of the federal reserved water rights of the CSKT.

¹ Letter from Governor Steve Bullock to Secretary of State Linda McCulloch, May 3, 2013.

Our response is presented in several sections:

- Historical Perspective on CSKT Compact Negotiations: Status of Compact Studies, **pages 2-6**
- The Governor’s Report does not Reflect the Language in the Compact Documents, **pages 6-8**
- The Report Contains Numerous Misstatements, **pages 8-11**
- Errors by Omission, **pages 11-15**
- Environmental, Economic, and Regulatory Review Required pages **15-18**

We conclude with a series of recommendations that we hope the WPIC will find useful.

Historical Perspective on CSKT Compact Negotiations

Before addressing the shortcomings of the Report of the Compact Commission, we present the following information demonstrating that the bulk of the technical and analytical work in the ‘years of negotiation’ happened only within the last three years, and further, that as of late 2011, significant technical, regulatory, and economic research had not been completed. Recall that the Compact Commission began its public educational meetings in the spring of 2012 and only provided a final Compact for the public’s review in February 2013.²

Water Management. First, the negotiating position of the CSKT has remained unchanged since 2001 particularly with regard to its claim for sole management of all state-based and federal water rights on the Flathead Indian Reservation. A “unitary water management ordinance” was proposed in 2000, 2003, 2007, and 2010 to significant public consternation and comment.³ Indeed, the State of Montana has rejected the Tribes’ unitary management proposal since 2000, and as recently as January 2010 that

“The State does not agree that the land ownership and water supply patterns on the Reservation are qualitatively different than the complexities faced in other water compact negotiations that the State has successfully concluded. Consequently the state does not agree that the dual sovereign management system adopted in all of our prior tribal-state compacts (where the tribe, through its water resources department and pursuant to its own

² The Compact documents kept changing during the public meeting period and as late as February 2013 significant errors involving millions of acre feet of water were still being corrected.

³ Letter from Gene and Vonda Schock to the Montana Reserved Water Rights Compact Commission dated January 23, 2002, stating in part “I am against making any kind of agreement with the Tribes to Administer any water rights of any kind; 2003 Flathead Joint Board of Control newsletter saying such administration is contrary to state law; Letter from Bill, Allan and Grace Slack, Secretarial water rights holders and Flathead Project Water Users, to the Reserved Water Rights Compact Commission, April 30, 2008, stating in part, “the proposed Unitary Management of state-filed water rights is a transparent attempt by a small representation of reserved water rights holders, the Confederated Tribes, to gain control of the resource contrary to established law and order”; CSKT, “Briefing Paper: Water Settlement Proposal”, July 27, 2010, asserting the Tribes’ right to manage all water on the Flathead Indian Reservation; 2010 Missoulian article “Liquid Assets”, asserting ownership and control over all reservation water.

water code, administers tribal water sources and the State, through DNRC and pursuant to Montana law, administers state law-based water rights, disputes between the two systems to be resolved by reference to a Compact Board) is unworkable on the Reservation... Some of the features of the Tribes' discussion paper appear to the state to describe a dual rather than a unitary management system.”⁴

The Compact Commission required that key issues of water administration such as dispute resolution, and future uses be addressed, and proposed that the same system that had been used for other compacts be employed in the CSKT compact. From the same letter, the State remarks:

“The Tribes discussion paper also sets out for the first time the possibility of the Tribes having the discretion to allocate water to either non-consumptive or consumptive uses without resort to the state-tribal unitary management board....In our prior compacts with the other tribes in Montana, we have addressed this situation by agreeing that each tribe would develop its own water code to administer uses of its tribal water right, but that such code would have provisions to ensure that tribal development authorized would be reviewed by the tribal water resources authority to ensure that such development does not harm existing water uses. The State is generally empowered through these compacts to conduct a technical review of the proposed new use as well. If there is a conflict between the answer arrived at by the tribal water resources department and the State, then such disputes are to be resolved by the compact board created in each of our prior compacts.”

In the current proposed CSKT Compact, the state-tribal compact board employed in every other compact in Montana is replaced by a politically-appointed, unitary management board easily controlled by the Tribes and unaccountable to the Montana legislature and citizens.⁵ The board is to administer all water on the reservation pursuant to a new Tribally-developed unitary management ordinance. This is in direct contradiction to the 2008 instruction given to the Compact Commission by then Water Division Director John Tubbs, whose guidelines for negotiation included that the State maintain state water administration and that the Compact follow the guidelines of the Montana Water Use Act (MCA 85-2-402).⁶

⁴ January 19, 2010 Letter from Commission Chair Tweeten to Bud Moran, Tribal Chair, and Duane Mecham, Federal Negotiation Team, “Montana’s Response to the CSKT Unitary Management Discussion Paper of December 29, 2009”

⁵ Article I of the Unitary Management Ordinance states: *This Ordinance shall govern all water rights, whether derived from tribal, state or federal law, and shall control all aspects of water use, including all permitting of new uses, changes of existing uses, enforcement of water right calls and all aspects of enforcement within the exterior boundaries of the Flathead Indian Reservation. Any provision of Title 85, MCA [State water law] that is inconsistent with this Law of Administration is not applicable within the Reservation.*

⁶ Memorandum to Susan Cottingham and Jay Weiner from John Tubbs, 2/21/2008. The Tubbs letter also noted that federal reserved water rights accrue only to on-reservation lands. It is not clear from either the McCarren Amendment or the authorizing legislation for the RWRCC authorized negotiation of any administration system where the Tribes assume regulatory authority over non-members.

In 2010 or 2011, the Compact Commission changed its mind and decided to accept the proposed Tribal Unitary Management Ordinance and began the process of ‘justifying’ it through the use of the 1996 *Ciotti* decision⁷. In its 2012 public presentations the Compact Commission insisted that because of *Ciotti*, there was a regulatory vacuum on the reservation that required the use of the Tribes’ unitary management ordinance. This is in contrast to the direct language of the *Ciotti* decision which stated that “until the Tribes quantify their federal reserved water rights, the state is prohibited from issuing new permits or changes of use”.

Off-Reservation Treaty Rights/Stevens Treaty. The CSKT have consistently stated that the nature of off-reservation aboriginal treaty rights secured by the Treaty of Hellgate conveys access to usual and accustomed places and a portion of the harvest. Importantly, the Treaty of Hellgate states that these rights to take fish are held in common with the citizens of the Territory. From the Tribes’ 2007 negotiation proposal:

The tribes have retained their pre-treaty aboriginal rights to hunt fish and gather off the Flathead Reservation. Destruction of those rights, and the attendant habitat, constitutes the basis for monetary compensation to the tribes⁸... [the] Stevens Treaty attribute is express perpetuation of tribal aboriginal hunting fishing and gathering rights on and off reservation. Tribes expressly reserved the right to continue their hunting, fishing, and gathering needs off of the reservation in their aboriginal territory. This treaty language is indistinguishable from the treaty language that has secured to other tribes the right to a federally protected salmonid allocation both on and off of their Reservations.⁹

The CSKT have also made a distinction between the off-reservation aboriginal treaty rights to take fish and on-reservation federal reserved water rights.¹⁰ Indeed, in his 2003 essay Tribal Attorney John Carter explicitly stated that neither the McCarren Amendment, the Montana Constitution, or the Winters Doctrine recognize off-reservation aboriginal treaty rights to water.¹¹ Since the Montana General Stream Adjudication is a McCarren Amendment proceeding, off-reservation treaty rights to water—if they exist—are not within the jurisdiction of the Montana Water Court.¹²

Technical Studies. The technical studies undertaken by the CSKT were to be the basis of ‘sound scientifically based’ water administration and on-reservation instream flows. Our research reveals that

⁷ Matter of Beneficial Water Use Permit Numbers 66459 76L, *Ciotti* 64988-G76L, 278 Mont.50,58 923 P2d 1075, 1079 (Mont. 1996)

⁸ Compensation by the United States

⁹ Briefing paper: Water Rights Settlement Proposal, July 27, 2010. Submitted by the Confederated Salish and Kootenai Tribes

¹⁰ The Montana Reserved Water Rights Compact Commission is the only entity to claim these rights are federal reserved water rights in an attempt to add these to the Compact discussion.

¹¹ Carter, John, 2003. *Essay: Indian Aboriginal and Reserved Water Rights, An Opportunity Lost*, 64 Mont. L. Rev.377

¹² Bilodeau, K., 2012, *The Elusive Implied Right for Fish: Do Off-Reservation Instream Flow Rights Exist to Support a Treaty Right to Fish?* 48 Idaho L. Review 515 (2012)

the State considered the level of detail undertaken by such studies sufficient only for planning purposes and not useful for even day to day or year to year water management decisions. For example, a 2010 letter to the CSKT from the Compact Commission confirms the preliminary level of such studies:

The Commission agrees that the best use of the model is to facilitate planning, and we believe it is a very useful tool for that purpose. That said, it is important to bear in mind some of the model's inherent limitations. Although there is a strong database of existing flow records in the Jocko and Mission valleys, development of the model nevertheless required estimates upon estimates. For example, the model is heavily reliant upon the 2009 canal seepage study...these estimates nevertheless carry some statistical uncertainty and apply only to a single irrigation season. To take these somewhat uncertain estimates and extend them to multiple irrigation seasons over the full length of the canals (which themselves have wide variability) leads to even wider uncertainty. In a similar vein, the estimate that 95% of delivery system and on-farm inefficiencies make their way to the next downstream node appears to be appropriate for the Jocko area, but given the vast amount of wetlands in the Mission area, we expected lower returns on the Mission (or, conversely, higher returns on the Jocko). These estimates should be revisited at such time that estimates of water use by irrigation-affected wetlands, riparian areas, and ground water become available.¹³(emphasis added)

Since similar studies for the other irrigation districts were completed in late 2011 using the same model, it is not at all clear that technical studies have progressed to a level of detail beyond the planning stages. Such studies are critically important to evaluation of the impacts of the planned reallocation of irrigation water proposed in the CSKT Compact.¹⁴ At this stage the preliminary models are used in the Compact to theorize that irrigation rehabilitation projects will yield more water for instream flow without substantiation.

A final matter in the arena of technical studies is the proposed increase of instream flows for fishery purposes on the reservation. As background, the Tribes already have established an instream flow for fisheries on the reservation of 270,000 acre feet, instituted in 1985 pursuant to extensive fishery-based studies.¹⁵ The Tribes 2010 negotiation proposal stated that increased instream flows would be “scientifically evaluated”. However, the increased instream flows proposed in the Compact and detailed in the Abstracts are based on the concept of a “robust river”, not fishery needs.¹⁶ Further, while the Department of the Interior has indicated these increased instream flows are ‘negotiable’, it is requiring

¹³ Memorandum from Bill Shultz to Clayton Matt, October 25, 2010, “Review of Hydross Model Jocko and Mission Baseline Condition”

¹⁴ Proposed Irrigation Water Use Agreement, December 2012.

¹⁵ Memorandum from Lynda Saul, Hydrologist to Marcia Rundle, Legal Counsel CSKT, “Summary of 1986 RFP for an Instream Flow Study on the Flathead Indian Reservation”, March 24, 1988; and Memorandum from Larry Fasbender, Director to Susan Cottingham, Research Specialist, “CSKT RFPs and Tribal Contacts Related to Reserved Water Rights” May 20, 1988

¹⁶ Personal communication from John Carter, CSKT Tribal Attorney to Senator Verdell Jackson, March 2013, and Seth Makepeace, Tribal Hydrologist, Minutes of the Clark Fork River Task Force Meeting of October 2011.

that an environmental investigation of these flows be completed by the 2015 irrigation season with no plans to implement them before then. A federal reserved water right does exist for fishery purposes, but not for a 'robust river' concept. A robust river, which equates with full-time, bank-full flood conditions would have significant negative effects on fish survival, stream bank and stream bed erosion, and the stability of irrigation project infrastructure leading to increased costs necessary to rehabilitate the irrigation project.

Based on this brief review of the history of negotiations, we conclude that most of the technical studies were only recently undertaken and exist now only in *preliminary* form. While the Tribes have maintained their position on a unitary water management system, its form has not substantially changed since 2003.¹⁷ The Compact Commission initially rejected the unitary management proposal but did not require any substantial changes to it before accepting the new system as part of the Compact in 2012, and did not conduct any regulatory analysis of the plan. The Compact Commission proposed that off-reservation treaty rights conveyed a water right, called them 'federal reserved water rights', and proposed their inclusion in the CSKT Compact.¹⁸

The Report does not Accurately Reflect the Compact Documents

As a first observation, the Report's major findings and conclusions cannot be substantiated by or linked to actual language in the Compact documents. Specific examples include funding for irrigation project rehabilitation, the ownership of water, and water administration.

- The Report contains several definitive statements that the Compact will provide money for irrigation rehabilitation, and failure to approve the Compact will result in those monies being lost to the irrigation project. However, the Compact itself, particularly the water use agreement, states that the Tribes "may" use some of their money for irrigation project rehabilitation and the State's \$55 million contribution "could" be used for project rehabilitation. The Water Use Agreement states that if those monies are not needed for the irrigation project, in the case of its decommissioning, the funds would be used for project removal and landscaping.¹⁹ The Report touts this state and federal money as the most significant economic

¹⁷ The CSKT were reorganized under the 1934 Indian Reorganization Act (48 Stat. 984 - 25 U.S.C. § 461 et seq), also known as the Wheeler-Howard Act. Under this act, all Tribal ordinances must be reviewed and approved by the Secretary of the Interior. The proposed Unitary Management Ordinance has not yet been presented to or approved by the Secretary of the Interior.

¹⁸ See Table of Responses to Attorney Swaney, August 2013; Jay Wiener, Discussion Document on Aboriginal Treaty Rights Proposal, June 7, 2011, available in DNRC files, Helena. In the Governor's report, the Commission considers these aboriginal rights to be 'federally-derived'

¹⁹ There is a significant question as to whether any state funds should be allocated to rehabilitate a federal irrigation project where the federal government owns the facilities and is responsible for and oversees its operation and maintenance. In addition, a portion of the power revenues from Kerr Dam are to be used in perpetuity for the operation, maintenance, and rehabilitation of the irrigation works. See, Repayment Contract between the United States and the Flathead Irrigation District, 1949, Act of May 25, 1948 P.L. 554)

boon to western Montana, but fails to acknowledge that those funds are not tied to specific projects, will not be audited, and have no performance standards associated with them.

- The Report states that ‘ownership of water’ would not be changed in the Compact (p. 4 item 3) but fails to acknowledge that a federal reserved water right is actually owned by the federal government on behalf of the Tribes.²⁰ Yet the definition of a federal reserved water right is that the United States owns the water on behalf of the CSKT, and the Tribes’ expansive off and on-reservation claims will be owned or co-owned by Tribes. The Report’s Table 2 also shows that off-reservation water rights are owned by the Tribes, and the 1000+ pages of Abstracts in the Compact documents show that all the water awarded to the Tribe is owned by the United States in trust for the CSKT. Finally, the irrigator water use agreement transfers ownership of state-based water rights to the CSKT, stating the Compact ‘assigns’ those water rights to the Tribes.
- The Report does not adequately describe the ‘consensual agreement’ provisions contained in the actual Compact documents.²¹ Such consensual agreements invite violation of the “final settlement of water rights” purported in the Compact , the proposed “unitary management system”, and the proposed Unitary Management Ordinance by creating an ‘extra-legal’ avenue through which specific arrangements can be offered through negotiation regarding water use. These non-transparent consensual agreements are to be entered into outside the Unitary Management Board, the Water Use Agreement, and the unitary water management ordinance.
- The Report states that the Unitary Management Ordinance (UMO) is a ‘joint tribal-state’ entity but the UMO definitively relegates the State to an advisory role and states that the provisions of Montana water law that are inconsistent with the UMO no longer apply within the exterior boundaries of the reservation.²² The Report makes it appear that this ‘joint’ state-tribal entity is the same as what exists in other tribal Compacts in Montana when that is clearly not the case, and minimizes the significant regulatory differences between the proposed Tribal ordinance and state law. The Report fails to consider that the UMO does not comply with the equal protection clauses of the Montana and United States Constitution and is inconsistent with the legislature’s intent to protect the constitutional rights of and protections for its citizens. Because of the ‘consensual agreement’ provisions, arbitrary application of the UMO is guaranteed.
- The Report fails to adequately describe the “mutual defense clause” contained in Article VII of the irrigator water use agreement and Article VII of the Compact and the conditions under which it will be employed. This clause requires that the State of Montana, the Tribes, and the United States defend the Compact against all legal challenges, which will make it financially and practically impossible for any citizen to gain relief from the Compact’s provisions. It raises the clear case that Montana will have to litigate against its own citizens who take an action against the State for relinquishing individual property rights, property takings, and protection under the laws of the State.

²⁰ MacIntyre, Donald E., 1987, “Quantification of Indian Reserved Water Rights in Montana: State el rel. Greely in the Footsteps of San Carlos Apache Tribe” 8, Pub. Land L. Rev 33 1987. The Tribes have consistently stated that *all* the water on the reservation is owned by the United States in trust for the CSKT.

²¹ February 13, 2013 Compact G (call protection) sections 3 a-f, pages 26-27

²² Article I, Unitary Management Ordinance

- Quantification of federal reserved water rights. The Report again fails to reflect the Compact documents and claims that the federal reserved water rights of the Tribes have been quantified without providing a verifiable volume of water. The Report mentions that the quantification includes (a) the Flathead Irrigation Project water—belonging to someone else; (b) individual and trust land present and future uses, and (c) “Flathead system Compact water” that includes 90,000 acre feet from Hungry Horse reservoir. The Report’s reference to 229,000 acre feet of “Flathead System Compact Water” is the only specific reference to a federal reserved water right to an amount of water ‘necessary to fulfill the purposes of the reservation’.²³ The quantification is so broad as to include all of Flathead Lake²⁴, including the water impounded behind Kerr Dam which raised the elevation of the lake by ten (10) feet.²⁵ The Compact fails to explicitly quantify the non-consumptive instream flow volumes on the reservation, including the existing 270,000 acre feet of instream flow within the BIA irrigation project.

These are but a few of the *many* examples that can be cited which demonstrate that the Report is an inaccurate representation of what actually is stated in the Compact documents.²⁶ For these reasons, we believe that the Governor’s Report is unresponsive to the significant concerns raised by the public about these issues and misleads the public into thinking that all outstanding issues have been resolved.

The Report Contains Numerous Misstatements

In addition to the Report’s lack of direct connection to the language of the Compact documents, the Report contains numerous misstatements. Chief among these are the misstatement of the Montana Supreme Court’s ruling on the McNeil decision, the consistent misinterpretation of the term ‘federal reserved water rights’, and the parsing of the McCarren Amendment to make it sound as if the resolution of off-reservation treaty claims are properly within the jurisdiction of the Montana Water Court. These are discussed briefly below.

- McNeil Decision. Judge C.B. McNeil issued a finding in a case brought against the Flathead Joint Board of Control by the Western Montana Water Users Association that the proposed Unitary Water Management Ordinance constituted an ‘unconstitutional taking of property rights

²³ In 2010, the Tribes stated that they were seeking 128,000 acre feet for 91,000 acres of practicably irrigable acreage, backstopped by 90,000 acre feet of Hungry Horse Reservoir water which provides some margin for future Tribal water uses. The Report fails to include in this value the 270,000 acre feet of water currently used for instream flow that carries a time immemorial priority date. The rest of the claims presented in the abstracts of the Compact documents cannot be tied to a purpose or use to fulfill the purposes of the reservation, and should not be included in its federal reserved water rights claim, especially the off-reservation claims.

²⁴ The Tribes own the bed and the banks of only the southern one-third of the lake; Flathead Lake is still considered a navigable waterway of the United States (*Namen* case, 380 F.Supp. 452 (D.Mont.1974))

²⁵ The volume of water contained in the upper 9 feet of the reservoir is earmarked for irrigation and hydropower purposes

²⁶ Other examples where the Report does not reflect the Compact documents include the failure to quantify the federal reserved water right, the closure of basins, the relinquishment of irrigator water rights, water administration provisions, and dispute resolution

without compensation'.²⁷ The Report states incorrectly on page 10 that the Montana Supreme Court overturned this particular finding of the McNeil decision. However, close examination of the Montana Supreme Court ruling reveals that the Supreme Court only stated that because the issue of constitutionality was not presented for argument at the District Court level it was inappropriate for McNeil to issue that finding. This does not 'overturn' the finding, it leaves it in place for further argument. The Compact Commission takes great pleasure in stating that the unconstitutionality of the Water Use Agreement was overturned but fails to report that the water use agreement actually does transfer the ownership of irrigation water rights to the Tribes without compensation.

- McCarren Amendment. The Report parses the language of the McCarren Amendment (43 U.S.C. § 666) to make it appear that the resolution of off-reservation aboriginal treaty rights is allowed in a federal reserved water rights proceeding and can be decided by the Montana Water Court. The McCarren Amendment waives the sovereign immunity of the United States for the purpose of adjudicating federal reserved water rights of the United States as long as the State's proceeding is a 'comprehensive, unified proceeding', inclusive of all water rights. However, the McCarren Amendment does not recognize aboriginal treaty rights,²⁸ and has not waived the sovereign immunity of the United States for the purpose of resolving aboriginal treaty rights. The Report incorrectly suggests that 'unified proceeding' provision of the McCarren Amendment gives the Compact Commission the authority and jurisdiction to resolve off-reservation non-federal reserved water rights.
- Federal Reserved Water Rights. The Report incorrectly states that there is no distinction between federal reserved water rights applying to reservation lands and aboriginal treaty rights applying to off-reservation aboriginal areas that were ceded to the United States in exchange for payments and a federal reservation. The Report cites as evidence the *Greely* case (219 Mont 76) which found that *aboriginal water rights exist on the Flathead Indian Reservation to support the Treaty's reservation of the exclusive right to fish on the Flathead Indian Reservation*.²⁹ The Report goes on to state, incorrectly, that the aboriginal land ceded to the United States was a reservation of land which implied a reservation of water rights.³⁰ This is not consistent with the doctrine of federal reserved water rights established in the Winters Decision or with the provisions of the Treaty of Hellgate in which the Tribes ceded their aboriginal territory in exchange for a reservation of land known as the Flathead Indian Reservation. The Montana Water Court has jurisdiction to hear federal reserved water rights claims on reservation and could award a time immemorial priority date based on the Treaty language for instream flows on the reservation.³¹ Nothing in the McCarren Amendment, Winters Doctrine, or Montana statute allows the Compact Commission or Montana Water Court to resolve off-reservation

²⁷ DA 13-0154

²⁸ Ibid note 11

²⁹ State ex. Rel Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation 219 Mont. 76, 90, 712 P2d 763 (1985)

³⁰ Article I of the Treaty of Hellgate ceded the Tribes' aboriginal lands, and all rights, title, and claims thereto to the United States. The Indian Claims Commission resolved payment and other outstanding issues regarding the treaty.

³¹ Ibid note 29; Treaty of Hellgate, Article III

treaty rights.³² Finally, it is not at all settled law that “a right to take fish...in common with the citizens of the territory” conveys a water right.³³ The Report seems to acknowledge this by indirectly using ‘soft’ words (“may”, “can”, “possibly”) to describe what it sees as “strong precedent” or “settled law”.

- Compact Commission Authority. The Report again parses the language of the Hellgate Treaty, MCA 85-2-701, the McCarren Amendment, the Winters Doctrine, and Montana’s legislative intent to claim it has the authority to resolve off-reservation treaty rights. On page 4 of the Report, the Commission parses the language of MCA 85-701 saying it has the authority to negotiate for the “equitable division and apportionment of the waters of the State” but on page 21 contains the rest of the language of Montana Code stating “...between the state and its people and the several Indian tribes claiming reserved water rights within the state”. “Reserved” refers to federal reserved water rights, not treaty rights. Language of the McCarren Amendment is parsed to claim that ‘unified proceedings’ meant that all water rights could be resolved instead of the reality that the McCarren Amendment allowed the waiver of federal sovereign immunity to hear federal water rights as long as it was in the context of comprehensive proceedings such as state-wide general stream adjudication. Montana’s legislative intent stated in statute is to resolve the reserved water rights belonging to the federal government. Again, nothing in the McCarren Amendment, the Montana Constitution, or the Winters Doctrine recognizes off-reservation aboriginal treaty rights.³⁴
- Constitutionality of the Unitary Management Ordinance. While avoiding the issue of equal protection, the removal of 23,000 state citizens from the protection of the Constitution and laws of the State of Montana, and Montana’s constitutional and statutory authority and duty to manage the waters of the State, the Compact Commission states that the legislature would be ‘exercising its constitutional authority’ to manage the waters of the state by agreeing to turn those functions over to the Unitary Management Board which would be under the control of CSKT. This is the equivalent of the State contracting or turning over its constitutional responsibilities—and its citizens-- to a foreign government, or turning over inherent state functions to the federal government. State citizens are within their absolute right to litigate against the state for abrogating its constitutional authority, and the certain prospect of such litigation is one likely reason for the ‘mutual defense’ clause of the Compact.
- Water Use Agreement . While minimizing the finding of the unconstitutional taking provisions of the proposed irrigator water use agreement, the Report admits that the water use agreement will ‘assign’ non-Indian, state based water rights to the CSKT in exchange for a one-size fits-all allocation of water to irrigators who will have the ‘right to receive’ water from the CSKT. We question whether the Compact Commission has authority to ‘assign’ water rights that a court of law is actually authorized to resolve. The Report’s reasoning for this water use agreement is that it will resolve conflicting claims to water, that the federal irrigation project was built only for Indians and so therefore the water belongs to the Tribes, and that if all the

³² Ibid note 11

³³ Ibid note 12

³⁴ Ibid note 11

water in the irrigation project does not have the same priority date, the project would have to be managed in priority. Each of these reasons has no basis in fact or in law.³⁵

Again, these examples are just a few of the many misstatements in the Report on the CSKT Compact. That the major legal, factual and regulatory elements of the Compact are carefully worded to convey an impression that is contrary to the Compact language, to existing statutes, the Montana Constitution and laws, demonstrates the deep flaws inherent in a Compact that have not been thoroughly vetted nor have received the proper independent scrutiny. The Report does a disservice to Montanans keenly interested in resolving the federal reserved water rights of the CSKT. It is worth noting that these misstatements reflect a consistent pattern of the Compact Commission to exaggerate, underplay, misstate, or misrepresent important aspects of the Compact not only during its public hearings and meeting venues but now also in this Report.

Errors by Omission

One of the enduring characteristics of the Governor's Report on the proposed CSKT Compact is its omission of key language, facts, or legal statements which lead to conclusions that are contrary to the true meaning if those omissions had in fact been included in the original statement. Taken at face value, these omissions tend to *justify* a certain position, instead of materially *support* it.

Off-Reservation Water Claims for Instream Flow

An example of this error by omission involves the attempted justification of the inclusion of off-reservation water claims in a federal reserved water rights proceeding. On page 6 of the Governor's report, the Commission attempts to answer this question and omits key information. The Compact Commission's answer is included below with the omissions included and highlighted.

Report Question 8. "What is the legal basis of the Tribes' claims to water"?

The Treaty of Hellgate established the Flathead Indian Reservation on July 16, 1855. Through the same document, the Tribes ceded to the United States *all their right, title, and interest in*

³⁵ The Flathead Irrigation Project was not built solely for the Tribes but instead was intended to serve all irrigable lands including those who settled on the open Flathead Indian Reservation, see 34 Stat. 444; the CSKT do not own the water rights of the irrigators in the Flathead Irrigation Project (see letter to James Steele, CSKT Chair, from the Solicitor, Department of the Interior, denying the Tribes request to control the Flathead Irrigation Project, December 2007) ; federal irrigation projects have never been built or operated in priority and are governed by federal code (25 CFR Part 171) even within the context of water rights adjudication (see Big Horn case 753 P.2d 76, 83-86 (Wyo.1988) and its progeny). For further information on the Flathead Project, see Appendix to the Flathead Irrigation Project Completion Report, by Deward Walker, 1948, otherwise known as the Walker Report.

and to the country occupied or claimed by them³⁶ more than 20 million acres of aboriginal homeland (*emphasis added*).

The Commission omitted the words “*their right, title, and interest in and to the country occupied or claimed by them*”, making it appear as though the Tribes just ceded the land and not the rights, title, and interest in and associated with that land. An instream flow claim or right on this land is not valid, as the Tribes ceded their rights, title, and interest in those lands.

In addition to creating the Flathead Indian Reservation, the Treaty reserved to the Tribes “the exclusive right of taking fish in all the streams running through or bordering said reservation...as also the right of taking fish at all usual and accustomed places, in common with the 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 on open and unclaimed land³⁷.

The report omitted the words “the”, and “and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries and pasturing their horses and cattle on open and unclaimed land.”

Inside the reservation, the Tribes have the exclusive right of taking fish; outside the reservation, they can take fish in common with the citizens of the Territory at their usual and accustomed places and can erect temporary buildings for curing, and share the privilege (not the right) of hunting also in common with the citizens of the Territory on open and unclaimed lands. This clearly implies a grant of access to usual and accustomed places, erecting temporary structures for curing fish that were taken, and grant of the privilege of hunting, and that these grants of access and privilege of hunting applied to open and unclaimed land. The lands which were so ceded become the ‘open and unclaimed lands’. This no more grants a water right or instream flow claim to the Tribes than it does to the citizens of the Territory’.

Using the *Winans*³⁸ case out of context with the Treaty of Hellgate, which *ceded right, title, and interest in lands off-reservation*, the Commission cites an on-reservation-specific case (*Greely*³⁹) to claim that the ceded lands off the reservation were somehow “reserved” by the United States for the CSKT:

Treaties represent a grant of right from the Tribes to the United States, the Tribes reserve all rights not explicitly granted and reservations of land by the federal government carry implied reservations of water to fulfill the purposes of the reservation.

³⁶ Article I, Treaty of Hellgate, 12 Stat. 975

³⁷ Article III, Treaty of Hellgate, 12 Stat. 975

³⁸ 198 U.S. at 381

³⁹ State ex. Rel Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation 219 Mont. 76, 90, 712 P2d 763 (1985)

The lands of the Flathead Indian Reservation were specifically reserved for the CSKT and it is this reserved land that carries an implied reservation of water to fulfill the purposes of the reservation. Lands that were ‘ceded’, including all right, title and interest in, are not ‘reserved lands’ with an implied reservation of water rights. The implied reservation of water to fulfill the purposes of the Flathead Indian Reservation is based upon the purposes outlined for those reserved lands in the Hellgate Treaty, and the Winters Doctrine---federal reserved water rights—which is the sole legal basis for the Tribes’ claims to water on the Flathead Indian Reservation.⁴⁰

The Compact Commission was established by the state legislature as a means of negotiating federal reserved water claims pursuant to general stream adjudication. That those rights may be heard in State courts is a function of the McCarren Amendment, which provided for the waiver of the sovereign immunity of the United States for the sole purpose of resolving the federal reserved water rights of federal reservations, including Indian Reservations.

On the Compact Commission’s Authority to Negotiate Off-Reservation Water Claims

Without explicitly stating so, the Commission attempts, through omission, to equate “off reservation water claims in ceded aboriginal territory”—aka aboriginal water rights-- with “on-reservation federal reserved water rights.” This is an attempt to justify why the Commission included off-reservation water claims to the lands-- whose rights, title, and interests therein were ceded to the United States--in a proceeding involving federal reserved water rights which apply only to the reserved land.

9. Does the Commission have authority to negotiate an agreement that covers both “reserved” and “aboriginal” rights?

This question raised by the public was whether the Compact Commission has authority to negotiate off-reservation aboriginal claims, not whether it had authority to negotiation on reservation claims for both federal reserved water rights and aboriginal claims.

The Commission argues that

It has authority to negotiate all of the Tribes’ water rights that derive from federal law.

and cites two cases which apply specifically to reservation land. In *Greely*, the issue at hand was on-reservation water rights to take fish, which were derived from the treaty, and on-reservation federal reserved water rights. In *Stultz*⁴¹, the case at hand was on-reservation hunting. Recall that the on-reservation fishing and hunting was reserved exclusively to the CSKT by the Treaty of Hellgate.

The Commission further takes the *Greely* case out of context when it says that

The Montana Supreme Court has confirmed that there is no distinction between “reserved” and “aboriginal” rights in this context.

⁴⁰ *Winters v. United States* 207 U.S. 564 (1908)

⁴¹ *The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 312 Mont 420 59 P3rd 920 (2002)

The correct context of *Greely* is for on-reservation water rights only. Again, by omitting this clear language and context of *Greely*, the Commission implies that it has all the authority it needs to negotiate off-reservation aboriginal water claims on lands that the Tribes ceded all rights, title, and interest to the United States.

The Commission goes on to claim that the legislative intent of MCA 85-2-701 was to direct the Commission to resolve all federal reserved water claims through “unified proceedings”, omitting the McCarren Amendment⁴² from which the language of ‘unified proceedings’ is derived. In accordance with the McCarren Amendment, federal reserved water rights claim can be resolved in state courts so long as it is a part of a unified proceeding, where all claimants are party to the proceedings. In other words, the federal government’s water claims can be heard so long as all water claimants are being considered as part of general stream adjudication.

In *Greely*, there was no distinction made between on-reservation federal reserved water rights and on-reservation aboriginal water rights. The Compact Commission has the authority therefore to negotiate on-reservation aboriginal and federal reserved water rights as part of the compact’s proceedings within the context of Montana’s general stream adjudication. To suggest *Greely’s* application to off-reservation aboriginal claims on lands whose claims, title, and rights were ceded to the United States was only made possible through omitting key language that would constrain the justification for the Commission’s actions.

There are several other places in the Governor’s report that attempt to justify the elements of the proposed CSKT Compact through errors of omission. By selectively citing case law or statutes, and language within such case law or statutes, the Governor’s report fails to support its own assertions. Other areas in which the Commission erred by omission include:

- The unitary water management ordinance (Report p 11-12). The claim is that this is a joint state-tribal administration system but fails to mention that there is no state representation on the water board, that different rules apply, and that the state only has an advisory position on the unitary management board.
- The ‘assignment’ of irrigator water claims to the CSKT in the water use agreement (Report, p. 10). Article III of the Water Use Agreement requires the relinquishment of water rights to the CSKT. How does the ‘assignment’ of irrigator water claims to the CSKT, in the context of Article III of the Water Use Agreement, *not* require an individual holder of a water right to convey it to the Tribes?
- The Water Use Agreement. The claim is that this water use agreement protects irrigators (Report, p 10,11). However, the report fails to mention that the amount of water allocated to irrigators, 1.4. acre feet per acre, is the minimum amount of water necessary to grow pasture according to the DNRC.⁴³ It is insufficient to support other crops grown in the Flathead Project.

⁴² 43 U.S.C. 666

⁴³ Legislative Environmental Policy Office, August 23, 2013, FAQ Combined Appropriation Rules, Table, “Example Showing General Water Use Requirements the Department Would Use When Determining the Amount of Water Use Under the Proposed Rule”

- Management of the Flathead Project. The Report states that the Flathead Indian Irrigation Project would have to be managed in priority without the compact (*Report* p. 6) The federal irrigation project was not built to deliver water in priority and long-standing federal law does not require it to be managed in priority (25 C.F.R. Part 171)
- The duties of the water board (*Report* p. 12-13). The Report claims that the water board will “fulfill the role the DNRC plays outside the reservation,” but fails to mention that water board members are appointed (not employees with responsibilities) and that they implement an entirely new water administration system with, as of yet, no rules through which to administer the water.
- Unitary Management (*Report* p 12-13). The claim is that a uniform system of management would eliminate duplication of effort, but the Compact creates a different set of management rules within the irrigation project through the water use agreement and suggests a ‘consensual agreement’ mechanism for irrigated lands within and outside of the federal project.
- Why environmental, economic, and private property studies were not completed (*Report* p 37). The Report claims that in no other compact were these studies required, but fails to acknowledge completely distinct nature of the CSKT Compact in comparison to the others, including geographic extent, the limitation on water use of irrigators, the voluminous claims, and the off-reservation components of the Compact. The report claims that such studies do not provide information necessary to the ratification of such a compact, but fails to acknowledge that there are impacts of the compact which must be known prior to its ratification. The Report does not acknowledge that this compact cannot be changed after its ratification.
- Hydrographs of stream flow (*Report* p. 15-16). The Report presents graphs of the proposed instream flow and hydropower flows in comparison to median daily discharge as if the median daily discharge is representative of all year types, failing to mention the significant reductions in stream flow resulting from drought years or adjustments required in flows for various hydrologic conditions.

These critical errors of omission compromise the validity of the Governor’s report and the integrity of the Compact itself.

Environmental, Economic, and Regulatory Impacts Analysis

The Report acknowledges in several areas that the CSKT water claims have the potential to cause significant environmental impacts to thousands of Montanans.⁴⁴ It does not specify what those impacts are but then goes on to say that the Compact resolves them. Regarding the need for and evaluation of environmental studies, the Compact Commission deliberately misled the public during the course of the last two years at first stating that “there would be no environmental impacts”, then stating that “the

⁴⁴ Report, page 3 “...because of their early priority date and large geographic scope, the Tribes’ water rights have the potential to negatively impact existing state-based water rights and future water availability throughout western Montana and possible well east of the Continental Divide.”

Commission had a categorical exclusion” (which it did not⁴⁵), then stating that approving the Compact did not constitute an ‘action’ which triggered MEPA. The Governor’s Report concludes by presenting a false choice between “a negotiated settlement” or “conducting environmental studies”:

“Approaching the issue from the legal perspective, an economic or environmental study is not necessary to demonstrate that a negotiated settlement that establishes with certain and for all time the Tribes’ legal rights to water within the State is preferable to years or decades of litigation costs and legal uncertainty”⁴⁶

Negotiation of any agreement does not negate the need for adequate economic, environmental, or regulatory review, particularly with a Compact of the scope, magnitude and size of the proposed CSKT Compact which will impact eleven Montana Counties and more than 360,000 people. We are unable to ascertain the benefits or the impacts of this Compact because the Commission has refused to consider such studies as necessary, hiding behind other Compacts which do not contain any of the elements of the CSKT Compact.⁴⁷ Without this information it is impossible for the legislature to responsibly consider approval of this Compact, forcing it to act blindly when its duty is to protect the citizens of Montana.

Our research indicates that analysis of the proposed CSKT Compact is required before the legislature will have sufficient information to properly evaluate the wisdom of passing it. The analysis requirements are specified in three State statutes as follows:

- Private Property Assessment Act (MCA 2-10-105). The Attorney General has a checklist for use by agencies to assess whether the action they are recommending has private property takings implications. If it does, an analysis is required under MCA 2-10-105. It is not possible to simply say “private property is protected” under this compact without doing the requisite analysis and agencies are required to conduct such analysis for actions such as recommending policies, permit conditions or denials, or administrative rules (MCA 2-10 §101-112). The analysis applies to actions that if adopted and enforced would constitute a deprivation of private property in violation of the United States of Montana Constitutions.
- Economic Review of New Regulations (MCA 2-4-405). The Montana legislature is required to conduct an economic review of new regulations prior to enacting them. If ratified by the legislature, the UMO will become state law and regulations will need to be developed. The development of such regulations would have to comply substantially with state law (MCA 2-4-305), would need to be consistent with the intent of the legislature to protect the Constitutional rights of and protections for its citizens (MCA 2-4-403).

⁴⁵ Results of Public Information Request, *Concerned Citizens of Western Montana* to DNRC and MTDEQ, January 2013.

⁴⁶ See Report, page 37.

⁴⁷ For example, the Compact states that 11,000 acre feet of the 90,000 acre feet Hungry Horse allocation will be used to mitigate the water needs of more than 360,000 people and eleven western Montana counties—a physical impossibility.

- An analysis under the Montana Environmental Policy Act (MEPA)⁴⁸ is triggered when (a) an agency recommends that the legislature approve an action which has potential significant environmental effects, (b) when the actions have private property taking implications, (c) when the regulatory aspects of the recommended actions have the potential to interfere with the use of private property and (d) when the action has precedential implications.⁴⁹

Conducting such analyses will help to identify not only the scope of environmental, economic, and regulatory impacts, but will serve to guide the revision of the Compact to remove or mitigate such impediments to the Compact's approval. To not complete these analyses on a Compact of this magnitude before passing it would be a dereliction of duty on the part of the legislature, will lead to certain litigation, could make Montana financially liable for significant property takings, and would be a disservice to all Montanans including members of the CSKT.

Conclusions and Recommendations

The Report on the Proposed CSKT Compact fails to address and responsibly consider the numerous issues identified by the public and in the 2013 legislative session. Instead, the Report selectively answers certain questions not with factual statements, but with clever word-smithing, errors and omissions, and selective case law designed to deliver at best, a political answer to substantive questions raised by the public.

Such criticism and review does not mean that we would recommend litigation over negotiation.⁵⁰ Instead we sincerely hope that the WPIC will recommend that the necessary studies be completed to provide the citizens of Montana, the legislature, and the CSKT with the necessary information to fully consider this Compact. We also strongly recommend that the technical studies that underlie fundamental elements of the compact be completed, and not left at the "planning stage" level. We believe that if the Compact is as good as the Compact Commission says it is, then it should be able to stand up to environmental, economic, and regulatory scrutiny.

⁴⁸ MCA 75-1-102 3(a); See also *A Guide to the Montana Environmental Policy Act*, 2013, Legislative Environmental Policy Office, Helena, MT

⁴⁹ Precedential implications include the contracting of essential State functions to Tribes, which opens the door for the contracting of other state functions to tribal governments paid for by taxes levied on non-member state citizens; the removal of constitutional protections from state citizens (what's next?); the awarding of off-reservation water rights to a tribe in a McCarren Amendment proceeding; the extra-legal determination that treaty rights to take fish in common with the citizens of the territory convey an actual water right; the awarding of tribal jurisdiction over non-Indians in contravention of existing case law. The form of language in the Compact supposedly prohibiting the establishment of precedent is insufficient to do so. Precedent set by this compact will have multi-tribal and multi-state implications.

⁵⁰ However, if the legislature does not ratify the proposed CSKT Compact we believe that the general stream adjudication and the Montana Water Court is a suitable venue in which all rights can be protected, including those reserved rights of the CSKT.

Barring such studies, the only recommendation we could make would be to “pare down” the proposed CSKT Compact to reflect in substance and approach the other Tribal Compacts completed in Montana.⁵¹ Such a revision of the Compact would follow general guidelines such as determining the purpose of the reservation and its future uses, resolving only federal reserved water rights on the reservation, maintaining the dual-sovereign water administration structure, and establishing a Compact Board to resolve disputes prior to the use of litigation.

⁵¹ One such comparative alternative was prepared by several legislators and Concerned Citizens. See attached.