

January 8, 2014
Revised, March 19, 2014

MEMORANDUM

TO: Environmental Quality Council

FROM: Representatives: Ballance, J. Bennett, Blasdel, Cuffe, Doane, Edmunds, Ehli, Fiscus, Flynn, Galt, Glimm, Greef, Hagstrom, Hansen, Howard, Ingraham, Jones, Kary, Kerns, Knudsen, Lang, Laszloffy, Lavin, Lenz, Miller, O'Neil, Randall, Redfield, Regier, Schwaderer, C. Smith, Wagoner, Warburton, White, Vance, Zolnikov
Senators: Boulanger, D. Brown, Buttrey, Fielder, Jackson, Lewis, Moore, Priest, Sonju, J. Taylor, Thomas, Walker, Webb, Wittich

SUBJECT: Request for MEPA Analysis of the Proposed Water Compact with the Confederated Salish and Kootenai Tribes (CSKT)

As legislators responsible for the review, approval and ultimate passage of any water compact negotiated by the Montana Reserved Water Rights Compact Commission (RWRCC), we are writing to request that the Environmental Quality Council order and supervise a review of the proposed CSKT Compact under the Montana Environmental Policy Act (MEPA). Without such analysis, the Montana Legislature does not have the necessary information to properly consider the impacts of the proposed Compact or make an informed decision as to whether it is a fair and equitable settlement as directed by MCA 85-2-701.

The proposed CSKT Compact differs from every other Compact negotiated by the RWRCC in several important respects:

- The proposed Compact includes off-reservation, non-federal reserved water rights claims to streams and rivers across eleven counties in western Montana hence impacting property rights and future growth in these counties;
- The proposed Compact transfers large quantities of private fee land and water rights out of private ownership to the federal government;
- The proposed Compact increases on-reservation instream flows by up to 400% without the demonstration of fishery need, evaluation of the impacts of increased flow on stream bank and stream channel stability, or evaluation of the impacts to shallow ground water of removing water from irrigation canals and leaving it instream;
- The proposed Compact contemplates irrigation efficiency improvements without evaluation of the impact to ground water recharge and wells;
- The proposed Compact consumes all of the 'legally available' water in the basin without the necessary quantification of the federal reserved water right based on the purpose of the Flathead Indian Reservation in a manner consistent with the McCarren Amendment;
- The proposed Compact contains over 1,000 pages of Water Abstracts, not submitted with the 130-page proposed Compact bill (H.B. 629), that make it difficult—if not impossible—for legislators to fully understand and articulate the region-wide impacts of the Compact. These Abstracts were not analyzed and cannot be used to assess when and how often private property rights will be impacted;

- The proposed Compact imposes a new Tribal regulatory scheme on 28,000 Montana citizens residing within the exterior boundaries of the reservation, 23,000 who are non-members.

In addition, because the proposed Compact was submitted to the legislature late in the session, it did not undergo the required legal, fiscal, and constitutional review customary for bills of this magnitude involving significant state resources. If ratified by the State, Congress, and the Tribes in its current form, the proposed Compact will be a legal document that cannot be amended by the State of Montana at a later time.

The Montana Reserved Water Rights Compact Commission (Commission), defined as an ‘agency’ under MEPA, is required to conduct an environmental analysis upon taking an **action**, which is defined as:

...a proposal by an agency to authorize, recommend, or implement an action to serve an identified need or solve a recognized problem. (Emphasis added)¹

The Commission is recommending to the legislature that it approve the proposed CSKT Compact whose components result in irretrievable actions that significantly affect the quality of the human and natural environment, preclude future opportunities, and restrict the use and enjoyment of private property free of undue government regulation.

Prior to the submission of the proposed Compact to the 2013 legislature, the Commission did not conduct an environmental analysis, claiming it had received a “Categorical Exclusion”(CE) because (a) it was settling litigation, and (b) the Compact was not an “action” and did not trigger an environmental analysis. However, a review of Commission and agency records indicates that the “settling litigation” CE applies only to federal agencies and that under MEPA, a Categorical Exclusion for the Compact could result only after agency rulemaking or a programmatic review. Under MEPA,

a Categorical Exclusion is defined as a level of environmental review for agency actions that do not individually, collectively, or cumulatively cause significant impacts to the human environment, as determined by rulemaking or programmatic review, and for which an EA or EIS is not required. The rulemaking or programmatic review must also identify the circumstances that could cause an otherwise excluded action to potentially have significant environmental impacts and provide a procedure whereby these situations would be discovered and appropriately analyzed.

Neither the Compact Commission nor the Department of Natural Resources and Conservation (DNRC) conducted a rulemaking procedure or a programmatic review of the Compact that would qualify it for a Categorical Exclusion before recommending it to the legislature for consideration².

MEPA also requires an analysis of an agency action when it has private property takings implications and /or when the action will potentially restrict the use of private property. The proposed Compact has both private property takings implications and regulatory restrictions on the use of private property throughout the impacted areas. Although the *Private Property Assessment Act* (MCA 2-10-105) and the *Economic Review of New Regulations* (MCA 2-4-405) are also applicable to the review of the proposed Compact, such analyses could be conducted within the framework of a MEPA review. Finally, MEPA is invoked for state actions that have precedential implications³.

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

² MCA 75-1-102 Section 3 5(a)

³ MCA 75-1-201 Section 2-3-104 IV(f)

From our review of the proposed Compact documents, we conclude that an Environmental Impact Statement analysis under MEPA is necessary and required. Without such an analysis, legislators will be once again faced with making a permanent, long-term decision involving state resources and significantly affecting the economy and environment of Montana without sufficient information. Proceeding blindly into agreeing to this Compact would be a disservice to all Montanans, including the members of the CSKT.

We strongly urge the EQC consider that a detailed environmental impact analysis of the proposed CSKT Compact under MEPA is required so that proper analysis of the environmental and economic impacts associated with the Montana Reserved Water Right Compact Commission's proposed CSKT Compact can be known prior to its consideration in either a special session or the 2015 legislative session.

EQC Oversight of MEPA Study

Because the Compact Commission has emphatically denied the need for an environmental analysis, and *because the DNRC and the Governor's office were heavily involved in the negotiation of the proposed CSKT Compact, we request the analysis be overseen and directed independently by the Environmental Quality Council, outside the authority of the DNRC and the Governor's budget office.* It is imperative to the citizens of Montana to assure the legislature receives clear, credible, unbiased information to ensure we make a responsible, informed decision.

The EQC would exercise its oversight authority by:

- Determining the level of environmental review, including the possibility that a full Environmental Impact Study would be needed because of the significance of potential impacts on the human environment;
- Determining the scope of review
- Identifying the major issues
- Identifying the affected environment and impacts
- Identification of the regulatory restrictions
- Identification of the potential legal issues

We believe that the EQC could employ the use of the Montana Bureau of Mines and Geology, selected divisions within the DNRC, and independent environmental and economic firms to provide the necessary studies that would guide the legislature's consideration of the proposed CSKT Compact.

Proposed Funding

Funding for the MEPA review of the proposed CSKT Compact could be derived from the \$55 million dollar state contribution fund set aside in 2013 for the CSKT Compact.⁴

⁴ The Governor's Report on the CSKT Compact prepared by the Compact Commission admitted that environmental studies would need to be completed for most, if not all of the Compact's components. However no funds were identified to conduct these studies in this supposed 'final' agreement making certain future appropriations will be necessary.