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27 June 2013

Arne Wick
Reserved Water Rights Compact Commission
P.O. Box 201601
Helena, MT 59620-1601

Comments on proposed CSKT water compact

Dear Mr. Wick:

Montana Trout Unlimited appreciates the opportunity to comment at Chairman Tweeten's invitation on the proposed water compact between the State of Montana and the Confederated Salish and Kootenai Tribes. We are extremely disappointed the 2013 Montana Legislature failed to ratify this reasonable accord. Though the invitation from Chairman Tweeten primarily solicits questions, we thought it appropriate to share observations we have of the compact, the process that produced it and the unfortunate atmosphere surrounding discussion of the proposal.

General comments

Though we are disappointed several elements originally proposed by the State or the tribes were eventually dropped, Montana TU strongly supports the Compact that was reached between the State and Tribes. The accord resulted from a rigorous, good faith effort among the three sovereigns. We attended numerous public meetings and negotiation sessions. We communicated on a number of occasions with compact commission members, commission staff and the tribes. We found the negotiations to be transparent and provided for ample public involvement during all steps of the discussion. The product is balanced, and, importantly, it succeeds in achieving the common objective of reaching an agreement while protecting the legitimate rights of all existing water users. Critically, as devised, the Compact, if ratified and implemented would resolve the high degree of uncertainty currently surrounding water development on the Flathead Indian Reservation. In addition, it would reduce the complexity and expense of adjudication of water rights in Montana. Further, it would have resolved forever, the significant claims the tribes have to water off reservation as a result of the Stevens Treaty.

Having witnessed and/or spent much time engaging in development of previous compacts – including the Crow Tribal Water Compact and the compact resolving the reserved water rights of the U.S. Forest Service – we can attest that the resources, time, energy and attention to the public dedicated to development of the CSKT Compact were much more exhaustive. All three teams did a very good job representing their individual interests. It is important to note that the CSKT conceded far more than they probably could have, given what could reasonably have been their legitimate claims to water in Montana not only west of the Continental Divide, but also in the upper Missouri River basin.

The Compact

We support the proposal for on-reservation water rights. The proposals for establishing instream flow rights for the tribes on waters managed by the Flathead Indian Irrigation Project, non-project waters on reservation and headwater streams were eminently reasonable. They protected existing uses, protected headwater areas from future development – thereby benefitting existing users, and, predicated perfection of water rights on investment in conservation (FFIP waters) and statewide adjudication (non-FFIP reservation waters). Further, the proposal resolved the enormous uncertainty – and economic complications – of existing and future groundwater water rights. The proposal for the governing body for unitary management of on-reservation rights was adequately balanced and reasonable.

We are baffled why this proposal attracted so much derision and violent opposition. We are not unsympathetic to the legitimate concerns of existing water users. However, based on testimony we witnessed, media reports and alerts and website information from opponents, it appears some irrigators were worried they would not get water they currently use that they don't necessarily have a water right for, or that they bowed to fear mongering, or, at worse, that they are flat out prejudiced against the tribes. Certainly testimony and letters to the editors and news reporting indicate that some non-tribal irrigators and their supporters will never accept the legitimacy of the Hellgate Treaty, tribal sovereignty or case law related to tribal reserved water rights. But those are settled issues and not part of development of this compact. It is especially disappointing these issues found traction with some members of the Montana Legislature, a few who also seemed genuinely baffled by water law and the concept of tribal reserved water rights.

We are disappointed by the Compact's off-reservation proposals. But not disappointed for the same reasons some opponents cited, such as folks in the Bitterroot – including county commissioners – who cited unfounded concerns that the tribes would seize valid existing private water rights, or, as the deputy county attorney in Ravalli County stated publicly, that the Compact would somehow allow other Indian tribes to file claims for water rights in the valley, so watch out.

Our disappointment stems from:

1. Removal from the proposal of two basin closures in Lincoln County that would not have granted the tribes any water rights, but instead would have protected from future claims the interests of existing water right holders, including some folks who opposed the closures. We are curious why proposals that would actually benefit existing users in over-appropriated basins were dropped.
2. There was no explanation on why tribal claims for tributaries in the Kootenai and lower Clark Fork were also dropped – even though they would have been junior in priority to all existing water rights, and, much like the claim for the Kootenai and Clark Fork main stem, would have been subordinate to FERC licenses and operations at federal dams.
3. There was no explanation on why other proposals seemingly acceptable for all three parties, such as flow protections for tributaries in the Swan River drainage were dropped in the final compact. Again, these elements would have had no effect on existing users.
4. We proposed that the instream flow water right for the co-managed right at Milltown include an enforceable flow of 1,300 CFS. It was based on the fact that FWP's instream flow reservation claim for the Clark Fork at Bonner was 600 cfs, and, the Murphy Right for instream flows at Bonner to protect fisheries on the Blackfoot is 700 cfs. Basically, we proposed a flow that reflects what the professionals in FWP long ago deemed the minimum necessary to protect the fishery in the two rivers. However, the negotiated amount was only 1,200 cfs, with only 500 for the Clark Fork (with a very junior priority date of 1905). If a co-managed fishery right was the priority at Milltown, 1,300 cfs should have been the minimum agreed to by the parties in the Compact. But for some reason they settled on a lower, unscientific flow. Still, for the sake of consensus, we didn't oppose the proposed flow.

It appears most of these items, and others, were dropped simply at the insistence of legislators and others who didn't appear to use objective legal or technical reasoning, but instead they resorted to ideological or political rationales.

The Process

Given the complexity and scale of the proposed compact, public engagement required step-wise dialogue with the public. Unfortunately, the sincere efforts of the Compact Commission and the tribal and federal teams to accomplish this were constantly confounded by near mob rule and ideological posturing. Amplifying this point is the fact that at public meetings in the last two years, the same people would get up meeting after meeting and give speeches about the same points – many of them irrelevant or not founded in fact, including some posed by local legislators. It also appeared that many critics were not reading the documents. Yet the negotiating

team, and Compact Commission, patiently lent an ear no matter how off the wall the comments were.

To be fair, the compact is complicated and at times staff and negotiating team members could have been more colloquial in their explanations and in the materials they presented. However, to many opponents, it wouldn't have mattered. No matter what was said or demonstrated, or how long the public review period was, to them the compact would still be the product of some sort of conspiracy. At times, the public exchange was painful to watch.

Montana TU greatly appreciates the effort and the patience demonstrated by the negotiating teams. It is a shame the Montana Legislature – led by many legislators in the western part of the state – don't understand, or care about, the implications of not ratifying this Compact. They certainly were afforded enough opportunity, if indeed they took the opportunity to listen objectively.

The result of their rejection is this: Though the Montana Legislature has delegated to the Montana Reserved Water Rights Compact Commission the authority to negotiate reserved water right compacts on behalf of the State, the 2013 Legislature still decided to nix the CSKT accord with little debate. The 2013 Legislature now has the distinction of being the first Legislature in the history of these types of negotiations in Montana to ever nix a water compact negotiated by the very people it assigned to the job, which happened to include members of its own body. The uncertainty and future expenses now facing the state, existing water right holders, the tribes and future water development in the Flathead because of the legislative rejection of the compact – developed over many years with plenty of opportunity for public review, especially if some legislators had been doing their job monitoring the process on behalf of their constituents -- is considerable and potentially very harmful. It is very disappointing.

Again, thanks for the opportunity to provide our thoughts.

Sincerely,

A handwritten signature in black ink that reads "Bruce Farling". The signature is written in a cursive, slightly slanted style.

Bruce Farling
Executive Director