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8 December 2012

Chris Tweeten, Chairman
Montana Reserved Water Rights Compact Commission
2705 Spurgin Road
Building C
Missoula, MT 59804

Re: comments on draft compact

Dear Chris:

Thanks for the opportunity to comment on the draft water compact for the Confederated Salish and Kootenai Tribes. These negotiations have been very complex, and we greatly appreciate the tireless efforts of all three negotiating teams. We especially appreciate the patience and professional demeanor displayed by all parties in their communications with the public. Primary spokespeople such as you, Clayton Matt, Rhonda Swaney, Seth Makepeace, John Carter and Jay Weiner have done an exemplary job explaining complicated and arcane principles to the public.

Montana Trout Unlimited supports the November 8, 2012, draft document, with one proposed modification for the Milltown water right that we explain below. With this draft, the negotiating teams have achieved the common objective of ensuring existing water users are not harmed. Though there are still some wrinkles to be ironed out in the pending water agreement affecting water users in the area of the Flathead Indian Irrigation Project, the draft agreement insulates all other legitimate water users from adverse impacts. It is important to note that though much of the focus of the agreement has been on protecting existing interests, not enough has focused on the significant benefits the agreement will have for tribal and nontribal interests. For instance:

- The agreement will result in significant investments in water use infrastructure on the reservation, benefitting both tribal and non tribal water users;

- The agreement produces legal certainty for those interested in future development requiring water in the Flathead region, including new irrigation, real estate development, hydroelectric generation and recreation;
- Implementation of the agreement will produce new and productive partnerships that will focus on the common objective of making water go farther for more uses – an important objective in the face of a shifting climate;
- A fully ratified agreement will prevent years of expensive litigation among private, government and tribal interests over water rights; and,
- Importantly, some of the instream flow measures in the agreement help the State of Montana meet its trust responsibilities to all Montanans for maintaining healthy fish and wildlife populations on and off reservation.

Those who believe this agreement is a one-sided affair favoring tribal interests are mistaken. In the spirit of cooperation and settling seemingly intractable disputes over water, the tribes, in our view, have relinquished significant, legitimate claims. Montana Trout Unlimited is disappointed that a number of elements from previous drafts, most put on the table by the State of Montana, have been dropped in order to accommodate public critics. These include:

- Enforceable hydrographs previously proposed for tributaries of the Swan, Kootenai and Clark Fork Rivers. The flows these proposals would have protected were very conservative, would have helped protect public fish, including listed bull trout, and included ample exemptions to accommodate significant development. They simply would not have been a burden to existing water users or stymied future development.
- Basin closures on O'Brien and Graves Creek in Lincoln County. We are baffled as to why local politicians and water users in Lincoln County did not understand the wide-ranging benefits of these State-proposed measures. Both streams are already over-appropriated and the proposed closures did not convey any rights or special authorization to the tribe. Importantly, the closures would have protected existing users, such as the City of Troy and irrigators in the Glen Lake area from new appropriators. The basin closures would potentially save existing users the expense of defending their water rights from new users. Locals who opposed the basin closures essentially argued against their own interests.

We are also disappointed that concepts we floated, but perhaps inadequately, were not considered. They included providing the tribes similar water right mechanisms enjoyed by FWP, such as the ability to purchase water rights on or off

the reservation from willing sellers so they could be converted to permanent instream flow rights, but still subject to objections under the prior appropriation doctrine. Another potential tool we suggested was creation of dual-purpose water rights that would allow consumptive rights to be shifted to instream flow rights temporarily without triggering an exhaustive change-of-use process during drought years, but mainly in basins that have voluntary drought management plans or where imperiled aquatic species are managed under a Candidate Conservation Agreement or Habitat Conservation Plan. We hope the State and Tribes are open to these and other suggestions as part of future water management administration.

We continue to be disappointed -- but respect the tribes' perspectives -- with the exemptions from call, including all water rights associated with non-irrigation uses, as well as all irrigated and non-irrigated groundwater sources that do not exceed 100 gpm. It is entirely conceivable that the cumulative effect of multiple wells each using up to 100 gpm for residential or industrial development could deplete key tributaries important for fish, including native bull trout or cutthroat trout.

On Reservation Proposals

The tribes' proposals for instream flow on reservation are well thought out and emulate successful approaches used elsewhere in Montana. Protection of headwater sources (the "natural nodes") will help ensure water continues to be available to existing downstream users, and it stems the threat of future appropriators complicating life for existing users. The instream flow proposals for streams in the FFIP (the "FIIP nodes") are especially well done because they largely require investments in the efficiency of irrigation infrastructure for freeing up conserved water for aquatic communities. Montana TU and its partners in cooperative projects have used this model across the state. Finally, the instream flow proposals for non-FFIP streams ("other instream flows") are very conservative, depending solely on water that could be available as a result of adjudication. Implementation of the instream flow proposals on the reservation reinforces the objective of not harming existing valid water rights. Further, maintaining the existing "interim instream flows" until the Compact water rights are enforceable is both fair and equitable, and consistent with *Joint Board of Control v. United States* (1988).

The dedication of 90,000 acre-feet of stored water from Hungry Horse Reservoir for the tribes, and the sideboards on where and how it will be marketed, also meets the objective of not harming existing water rights. This element, in fact, can benefit existing users by making available a pool of water not currently available for supplementing existing uses.

Though it has created undue heartburn with some folks on and off the reservation, the composition of the proposed Water Use Board, in our view, makes great sense. It balances the potential of both tribal and nontribal interests. Using the

district court to resolve unresolved perspectives on who should be the fifth member of the board provides confidence that the choice will be unbiased.

Regarding the bulk of the draft Unitary Administration and Management Ordinance, Montana Trout Unlimited respect the ability of the tribes and Joint Board to reach consensus on the specific tools and procedures that are best for managing water use on the reservation. We do believe, however, this could provide more expeditious and efficient administration and adjudication than is available under the current State of Montana water rights administration and adjudication systems.

Off Reservation Proposals

Montana Trout Unlimited supports the proposed instream flow rights for the tribes for the Swan, Kootenai and Clark Fork Rivers. But it should be noted that these rights, even with a time immemorial priority, provide little additional benefits from the current conditions for instream flows. Because these rights are subordinate to, among other things, FERC requirements, COE flood control constraints and ESA-directed biological opinions, the tribal rights are significantly constrained. Further, because the compliance points are so far downstream – and in the case of the Swan below the lake which is below key tributaries – the potential for a call will be remote.

We support the proposals for co-ownership of FWP recreational use water right claims, as well as stored water from Painted Rocks and Como Lake Reservoirs. The added value these proposals represent is not entirely clear, but it is possible this could bring to bear more resources for effective management.

Milltown Water Rights

Co-ownership of the Milltown water rights, and conversion from a hydro right to an instream flow right, is a very good idea. Montana Trout Unlimited recommends, as we have in the past, tweaking the proposal relative to the enforceable component of this right. A more appropriate discharge below the confluence of the Clark Fork and Blackfoot that triggers a call should be 1,300 CFS, with 700 CFS coming from the Blackfoot, and 600 from the Clark Fork. This is why:

- FWP's Murphy Right for the Blackfoot is 700 CFS. This is based on wetted perimeter data indicating an appropriate flow to maintain a good-quality fishery. FWP's 1985 water reservation request for the Clark Fork at Turah was 600 CFS, the wetted-P upper inflection point for maintaining a good-quality fishery in the Clark Fork. And so, the professionals with the most experience in managing fisheries in the Clark Fork and Blackfoot have determined empirically the most appropriate flows for maintaining the fishery. The negotiating teams should recognize this.

- It is important to note that the wetted-P method for determining flows for maintaining fisheries focuses primarily on a single habitat element – maintaining wetted riffle-areas for food production. Wetted-P measurements do not consider the value of underbank rearing areas, which are important for some species that use the Clark Fork and Blackfoot, as well as pools, which are crucial for security, overwinter habitat and thermal refuges in summer. Flows based on wetted-P are not ample for channel maintenance or for mobilizing sediment. Importantly, they do not ensure habitat complexity, nor do they necessarily provide for cool, well-oxygenated water, which can be in short supply in the Clark Fork in the summer. Further, these flows do not necessarily provide adequate temperature buffer to accommodate climate change, which USGS data in the Clark Fork watershed indicates is resulting in warmer summer temperatures, including more frequently levels that fall within the chronic and acute ranges that harm wild salmonids. In sum, 1,300 CFS at Bonner, with 700 CFS from the Blackfoot and 600 from the Clark Fork is really a minimal instream flow for maintaining a good quality fishery. Any enforceable flow level below this threshold intimates significant risk to the fishery.
- Montana Trout Unlimited’s proposed enforceable flow level can be accommodated with minimal risk to existing users upstream. Already the Blackfoot watershed has a voluntary drought system in place that includes an early warning mechanism and triggers for water user cooperation. The objective, when water is available, is to meet FWP’s Murphy Right at Bonner. Important to consider for the upper Clark Fork is this: No other river in Montana has the potential for significant investment in improved irrigation efficiency. The restoration plan for the upper Clark Fork overseen by Montana’s Natural Resource Damage Claim Program recommends investing more than \$20 million from the Clark Fork restoration fund in irrigation efficiency that frees up conserved water for instream flow enhancement. The potential for significant projects, such as dedicating stored water from the Warm Springs Creek drainage to instream flows, or, freeing up water through investment in scientifically based irrigation measures in the Little Blackfoot or Flint Creek basins is significant. Further, our suggestion provides incentive for creating an instream flow market among existing senior water right holders who will not be affected by a call at Milltown.
- The target we recommend at Milltown is currently met most years in most months when conditions in the basin can naturally yield these flows after senior water rights are satisfied. Further, the phase-in of when the tribes or FWP could call on the enforceable right at Milltown is of significant duration – 10 years after State of Montana ratification – that there will be time to develop, implement or refine drought plans for the Clark Fork and Blackfoot. A call, if it ever occurs, certainly will not occur anytime soon.

We recommend the draft Compact be amended to include our suggestion for the enforceable flow right at Milltown. Certainly under no circumstances should it be further reduced from that proposed in the current draft agreement.

Montana Trout Unlimited appreciates the State, federal government and tribes considering our observations and suggestions. As written, but preferably with the Milltown improvement we recommend, Montana TU will actively support the Compact should the 2013 Montana Legislature take it up.

Thanks for the opportunity to comment.

Sincerely,

Bruce Farling
Executive Director

cc. Confederated Salish and Kootenai Tribes
United States Department of Interior
Senator Jon Tester
Senator Max Baucus
Congressman-elect Steve Daines
Governor-elect Steve Bullock