

Note: Reference this letter from Jon Metropoulos, Helena attorney, to the Montana Legislature concerning a possible unintended consequence of the CSKT water compact and the off reservation claims included in it. I apologize, but I don't have the original copy of this letter sent to senators during the 2015 legislative session..

Senators:

By now you have received an email or two regarding the “access issue” from on and off reservation Montanans represented by me and others opposed to the CSKT Compact. I have been informed that a proponent of the Compact has claimed this issue is unrelated to the Compact and that the Compact neither “recognizes nor expands” a right of access, because a decision from 1905 recognized such a right in a different Tribe, albeit with similar Treaty language.

This email responds to that argument. This email represents the view of the individuals and groups listed in the last paragraph.

The proponents argument is flatly wrong.

There are a number of reasons why:

1. The Compact assumes the CSKT's Treaty language granting fishing rights, and therefore access, remains valid (which is not necessarily correct; see below at 7). But it also does more. The fact is the Compact **does** recognize the CSKT claim to this right and **does** expand it, both in the people who may exercise it and geographically, because it leaves the places of access and fishing (and constructing buildings for curing fish) undefined.
1. Take a look at Article V, C. 2 of the Compact, p. 49, lines 17 through 20 of SB 262. It explicitly protects this right. Then turn to Article IV, B. 1, “Persons Entitled To Use the Tribal Water Right.” (p. 26 of SB 262, lines 29 through 30) It says “[t]he Tribal Water Right may be used by the Tribes, **their members, Allottees, or their lessees or assigns.**” The treaty language does not give this right to the Tribes “Allottees, lessees, or assigns,” but the Compact does. Thus, it is an expansion of the people who may exercise this right. It also expands the potential area and places this right can be asserted for unpermitted access across private land by leaving those places completely undefined. Anywhere the CSKT have water rights for the purpose of fishing and preserving a fishery, therefore, is fair game. As you know, under the Compact this is essentially all of western Montana.
2. The Compact gives the CSKT water rights, on and off reservation, specifically for fishing. And, as noted above, it not only protects the right of access but leaves it undefined. Thus, everywhere the CSKT own or co-own an in stream right for fishing is presumptively an area where the right of access could be exercised. Look at Article III of the Compact, pages 10 to 26 of SB 262. Any place in those 16 pages where the water right is for fishing would be subject to this right of access. In particular, see Article III, D, beginning on page 16, line 8. In that section and related appendices, continuing to page

22 are set out off-reservation in stream flow rights for fishing for the Kootenai River, Kootenai River Tributaries, the Swan River, the Lower Clark Fork River, the Upper Clark Fork River, all forks of the Flathead River, Rock Creek and tributaries, the Blackfoot basin, including tribes, Flint creek and tribes the Bitterroot and tribes, and Placid Creek. It is simply inadmissible to say that the Compact does not relate to this claimed right. By memorializing, forever, a water right for the purposes of fishing, the Compact ipso facto provides the proof that a right of access to those water bodies may be exercised, unpermitted, across private land. Millions of acres of it.

3. The right to access does not equal a water right. The decisions, as all parties have recognized, say only they may have a right of access, not a water right. But the ComCom decided, what the heck, we'll give them a water right for fishing ALL OVER western Montana, again conceding the factual and legal foundation for the right to fish and, therefore, conceding access to fish all over western Montana. The right of access is plainly related to this Compact, in fact it is the basis of the Compact off reservation.
4. As noted, the Compact explicitly recognizes and expands this right of access. Just as the Compact Commission could have negotiated over whether the right to fish (and access) encompasses a water right, the Compact Commission could have negotiated the access issue but failed to, instead conceding, as noted above, access all across western Montana. Access issues, as this Legislature well knows, are highly contentious. Why access pursuant to the law of Montana is not adequate is never addressed, but should have been.
5. The Compact Commission is THE SOURCE of and the cause of this issue: its personnel, according to the Tribes, urged them to assert off reservation claims! This issue, even if the right to fish remains alive (see below at 7), has the breadth and the close connection to the Compact that it does because the ComCom personnel urged this on the Tribes, refused to explore legal defenses which might cut off the right of access, and transformed a POSSIBLE access right into an absolute water right for the purposes of fishing covering western Montana. Who were they negotiating for?
6. Whatever the outcome of the access issue, it is directly, plainly implicated by the Compact, and the proponents of the Compact have utterly failed to be candid with Montana and explain the relationship between this right of access and the water rights for fishing the Compact concedes throughout western Montana. In fact, the refusal to candidly admit the relationship between the right of access and these conceded water rights for fishing indicates proponents either don't get it or don't want to implicitly admit their lack of candor all these years. They must explain, candidly to Montana, that by conceding water rights for fishing the Compact does, in fact, provide the basis for the exercise of this claimed right of access all over western Montana. Proponents should explain why it is a good idea for western Montanan's to have this burden on their land and why the Compact should help establish it.
7. Finally, proponents should also explain why the Compact Commission, it appears, did not examine **whether** the right of access has, legally, been ended or limited by acts of Congress, as evidenced by previous litigations of the CSKT versus the U.S. subsequent to

1855. There have been many acts of congress adversely impacting Hellgate Treaty rights. The CSKT have sued the U.S. many times for these breaches, raising the possibility they are legally blocked from asserting these rights now. The Compact Commission should explain, fully and persuasively, why it did not pursue this course of action which may have lifted this cloud from the property of hundreds of thousands of Montanans.

I write you this response on behalf of the Rocky Mountain Stockgrowers Association, Dixon Melons (Harley Hettick), Doubleshoe Ranch (Bill Slack), the Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts (FJBC), Western Montana Water Users (WMWUA) and Citizens for Balanced Use (CBU). Thank you for your time.

Respectfully,

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