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THE BILLINGS OUTPOST

Water compact assailed

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During the recently adjourned legislative session, a “sleeper” issue that turned out to be one of the “Big Three” losses to the Republican majority was Senate Bill 262, the Confederated Salish and Kootenai Compact, or treaty, (CKST), which was sponsored by Sen. Chas Vincent, R-Kalispell.

Senate Bill 262 was killed in the House Judiciary Committee twice, but by using now famous rule-changing techniques liberal House Republicans joined the Democratic minority to form a majority coalition. When the treaty passed the House on a 53-47 vote, Gov. Steve Bullock and Sen. Vincent had a signing ceremony. Sen. Vincent had voted against the compact in the 2013 session.

An earlier Billings Outpost story covered the costs, uncertainties and constitutional issues surrounding the passage of the CSKT Water Compact. Now a fight is brewing as the compact/treaty heads to Congress for a ratification vote.

In an invitation-only meeting at Billings’ Lexington Inn on May 21, a collage of activists and political leaders came together to hear about, and be asked to join, an effort to derail the CKST water compact using the tools at their disposal. Robert Fanning, a gubernatorial candidate in 2012, introduced presenters, who included the team of Lawrence Kogan, a Washington, D.C., attorney; Quentien Rhodes, a Montana constitutional attorney; and Elaine Willman, a nationally recognized expert on Indian law and history.

State Rep. Clayton Fiscus, R-Billings, a career real estate agent, gave the legislative history of the water compact and stressed that two thirds of the water in Montana is sold with the land.

“Laches” is the legal argument that too much time has passed since an agreement to suddenly challenge issues contained in the agreement. The argument is that too many people have relied on the original interpretation for decision making.

Rep. Fiscus stated that the “laches” issue had not been raised in the House Judiciary Committee or on the House floor. The treaty supplanted by the new compact was written in 1855.

Robert Fanning opened with, “This is a critical meeting. It is critical for the survival of our country, a country that was founded on the concept of private property, a concept that 2 million of our sons died fighting to preserve.”

According to Fanning, “This (CSKT) has its roots in Agenda 21 but it is not the UN (United Nations) forcing it on us. It is our own people. The new treaty supersedes the old treaty, the Constitution, and property rights.” Speaking of funding the pushback, Fanning continued, “We have a negative right, the right to be left alone. This is not going to happen out of patriotic fervor. It will happen when we realize what this will do to us and to our children. We need half a million dollars for starters to make a fight of this. We are seeking individuals that recognize that if the rights of one are violated, the rights of all are violated.”

State constitutional issues

Quentien Rhodes covered possible state constitutional issues. He addressed the oaths of office taken by legislators to protect the U.S. and Montana constitutions. Article 9 Section 3 (3) of the Montana Constitution clearly states all of the water in Montana to be held for the beneficial use of the people of Montana. Rhodes claimed that under the new treaty just some of the water is held for the people of Montana, and this happened without amendment.

Article 9 Section 1 says in total: “All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.” But Rhodes says that SB 262 stripped many Montanans of their water rights without compensation.

The other constitutional issue of concern to Rhodes is that the measure needed to pass by a two-thirds majority to protect the people of Montana from liability for its consequences. SB 262 did not.

Not just talk anymore

Lawrence Kogan said that the process of picking the best avenue and team to ensure Congress gets an in-depth review of the treaty before a vote is taken is under way, with the ultimate goal of stopping Congress from ratifying the treaty. He cautions that this process is not completed yet.

He did say that new facts have been secured establishing the treaty was signed by "unclean hands," meaning that the treaty was entered into without conforming to various state, tribal and federal laws. He re-emphasized that the list of possible actions consists of only possibilities and theories that must be further researched before inclusion or rejection.

Issues being considered for inclusion include that SB 262 bill gives primacy to included descriptive water abstract assessments, including informational remarks, referenced in the bill's many appendices if the assessments contradict the wording of the compact. Kogan explained that the wording of the bill may have been compromised by use of a "cram down" method in which committee members had only five days to read the bill and legislators had only minutes to read the 1,400-page bill before full floor votes were taken. Legislators were denied the opportunity to review and understand, so the legitimacy of the law may be in question, he said.

Another issue being investigated is whether the legislation relied on studies, reviews and assessments of the National Oceanic and Atmospheric Administration and the U.S. Bureau of Reclamation and Fish and Wildlife Service. According to Kogan, to comply with the National Information Quality Act, those studies, reviews and assessments must undergo peer review to be considered valid.

Kogan stated that he cannot find the normal certification language in the assessments so the peer review requirement applicable to "highly influential scientific assessments" has not been satisfied, which may be a fatal flaw on the part of the Legislature.

And there is the matter of the federal government's failure to comply with the National Environmental Policy Act. None of the Department of the Interior agencies involved in the CSKT Water Compact/Treaty - i.e., the Bureaus of Reclamation and Indian Affairs and the Fish and Wildlife Service - had performed an environmental assessment of the treaty's alteration of water flows to even know whether a more robust environmental impact assessment was required.

Lawrence said, "If a private party had made a proposal engendering the same or similar changes, you could bet that environmental NGOs would have publicly demanded such a NEPA review."

Kogan is also concerned that in non-criminal matters non-tribal members must give permission to be under tribal jurisdiction and the treaty appears to provide the CKST government the legal means to assert such jurisdiction.

“Clearly many downstream users did not give such permission,” Kogan said. “Actually, the CKST water compact replaces private property rights, established water rights, and constitutional rights with aboriginal rights.”

When asked how he felt now that at least a partial course had been charted, Bob Fanning replied, “I hope that decades after my passing I am remembered as the guy that stood up for his rights and inspired others to get off the couch and be counted.”

Champ Edmunds, a former legislator, congressional candidate and now candidate for state auditor, asked during the original meeting, “During the 2013 legislative session it was claimed the water compact was worth \$3 billion to the tribes. Won’t the other tribes want to do the same thing?”

Larry Kogan replied, “Bingo.”