To: Montana Reserved Water Rights Compact Commission

From: Jay Weiner

Re.: Kate Vandemoer comments

Date: January 7, 2013

In a document making the rounds dated December 26, 2012, a woman named Kate Vandemoer, who has worked for both the Wind River Tribes in Wyoming and the United States before going into private consulting work,[1] and who has been hired by Terry Backs' group, asserts five reasons why the proposed compact for the water rights of the Confederated Salish and Kootenai Tribes (Tribes or CSKT) should be rejected.[2] I have been asked to respond to her claims, all of which are baseless. In this memo, I refer to her document as "the Vandemoer Memo." It is attached to this memo for ease of reference.

The Vandemoer Memo and its five reasons for rejection of the Compact

Vandemoer claims that the proposed settlements should be rejected for the following reasons:

1) The Compact Commission has exceeded its authority;
2) The proposed Compact violates the Montana Constitution and State law;
3) Required environmental and economic impact analysis have not been completed;
4) The Tribes' rights have not been quantified and the Compact documents are not ready for legislative review; and
5) The Compact fails to consider future growth and undermines the family farm.

Each of these assertions, however, is predicated on a series of assumptions that either ignore or misconstrue Montana water law, and that disregard the nature of the compacting process established by the Montana Legislature to resolve federal reserved water rights claims outside the context of litigation. Started from such flawed premises, it is unsurprising that she consistently reaches erroneous conclusions. I will address each of these assertions in turn.

I. Short Answers

1) The Compact Commission has not exceeded its authority:
   a) Vandemoer's distinction between "reserved" and "aboriginal" water rights is false and the Compact Commission has the authority to negotiate over all of the CSKT's

[1] Vandemoer has pursuits outside the world of water as well. See: http://drkatesview.wordpress.com/.
[2] Vandemoer has also submitted a letter of questions and comments directly to the Commission, dated December 15, 2012, and received in our office on December 26, 2012. In substance, it largely covers the same ground as the Memo of December 26, 2012.

water rights that derive from federal law. See State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 219 Mont. 76, 712 P.2d 754 (1985);

b) Incorporating a Flathead Indian Irrigation Project (FIIP) Water Use Agreement into the proposed Compact does not violate the Montana Constitution, particularly since any such agreement would not "take" irrigator water rights but rather would protect them from the Tribes' exercise of their senior instream flow water rights. See Joint Bd. of Control v. United States, 832 F.2d 1127 (9th Cir.1987);

c) The proposed Water Management Board is not "tribally controlled" but is rather a joint state-tribal entity with an equal number of representatives (two) appointed by both the State and the Tribes, with a fifth member selected by those four appointees; and

d) Nothing in the proposed settlement "relinquishes" state law-based water rights, which shall be as they are finally decreed by the Montana Water Court.

2) The Proposed Compact Violates Neither the Montana Constitution Nor the Laws of the State:

a) The proposed Compact complies with and does not violate Article IX, Section 3(4) of the Montana Constitution in that it is a rational way for the Montana legislature to provide for the administration, control and regulation of water rights on the Flathead Indian Reservation in connection with a settlement of the Tribes' federal law-derived water rights. See State v. Shook, 313 Mont. 347, 67 P.3d 863 (2002);

b) The proposed Compact does not "take" any water rights as the entire prior appropriation system, which has been the law in Montana as far back as the territorial days, expressly contemplates that a senior water user is entitled to the last drop of his water right before a junior water user is entitled to the first drop of his. Instead, the proposed settlement ameliorates the harshness of this rule on users junior to the Tribes by incorporating significant restrictions on the exercise of the Tribes' senior water rights for the protection of those junior users;

c) Only water users that are not presently recorded in the DNRC water rights database, including those uses small domestic and stock uses developed after August 22, 1996 that are not valid water rights under Montana law because of the Montana Supreme Court's decisions in the line of cases that began with Matter of Beneficial Water Use Permit, 278 Mont. 50, 923 P.2d 1073 (1996), are required to register, which is in furtherance of the constitutional mandate to have a centralized system of water rights record keeping.

3) The Ratification of the Proposed Settlement By the Legislature and Congress Does Not Trigger the Montana Environmental Policy Act (MEPA) or the National Environmental Policy Act (NEPA):

a) MEPA applies to actions by state agencies not by the Montana legislature, see Northern Plains Res. Council v. Mont. Bd. of Land Comm'rs., 366 Mont. 399, 288 P.3d 169 (2012), so the ratification of the settlement by the legislature – as opposed to the implementation of the settlement, which may require action by state agencies, which could then be subject to MEPA – is not a MEPA triggering event (a vote by the Compact Commission to recommend taking the settlement to the Legislature for ratification has no independent force under State law and thus is also not a MEPA triggering event);
b) Similarly, congressional ratification of the settlement is not a federal action triggering NEPA, see, e.g., *Public Law* 111-291, Title IV, Sec 404 (124 Stat. at 3100), though the implementation of the settlement by federal agencies is likely to require environmental review under NEPA.

4) The Tribes' water rights are most certainty being quantified through the settlement – that's why all the water rights abstracts are appended to the proposed Compact.

5) The Compact Commission will only act to recommend taking the proposed Compact to the legislature when all its component parts are ready, which is why the Compact Commission postponed its scheduled vote of December 19, 2012, and has not yet set a new date to vote on whether to approve the proposed settlement to go to the Legislature.

6) The proposed Compact closes no basins to future appropriations and the quantification of the Tribes' rights in the proposed Compact provides for much more certainty and predictability in the future about how much water is available for future development than the current unquantified state of those senior water rights allows.

7) The Compact does not "undermine the family farm" but rather protects irrigators, whether served by the FIIP or otherwise, and all other existing water users from the consequences inherent in Montana law of the junior priority dates of their water rights.

II. Discussion.

A. The Compact Commission has not exceeded its authority.

Vandemoer claims that the Compact Commission has exceeded its authority in four ways: by recognizing in the proposed settlement water rights stemming from the Tribes' aboriginal rights to take fish in usual and accustomed locations; by proposing to incorporate the Water Use Agreement expected to be entered into among the Flathead Joint Board of Control, the Tribes and the United States concerning the allocation of water between the Tribes' instream flow water rights and Flathead Indian Irrigation Project (FIIP) uses; by proposing a unitary

administration approach for the regulation of all water rights on the Flathead Indian Reservation "that enables Tribal jurisdiction over non-members[;]" and by "fail[ing] to acknowledge the open status of the Flathead Indian Reservation…with the establishment of considerable amounts of private fee patent land." As discussed below, each of these claims is false.

1. Recognition of Aboriginal Rights.

Vandemoer claims that there is a legal distinction between "federal reserved water rights" and "Stevens Treaty" or aboriginal rights, and that the McCarran Amendment (43 U.S.C. § 666), which waived federal and tribal sovereign immunity to allow for the adjudication of federal and tribal water rights in Montana courts, "allows the Montana state court to adjudicate and the Compact Commission to negotiate only federal reserved water rights, not federal treaty or aboriginal rights." Vandemoer Memo at 3. She also asserts that aboriginal, treaty-based rights are not federal reserved water rights and are thus "outside the scope of the Compact Commission without legislative consent." Id. Beyond a couple out of context and general references to a pair of law review articles, Vandemoer cites no legal authority whatsoever for either her interpretation of the McCarran amendment or for the distinction she attempts to draw between "reserved" and "treaty" rights as it bears on the authority of the Compact Commission. Nor could she, as her entire line of argument is completely foreclosed by the Montana Supreme Court's 1985 decision in the case State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 219 Mont. 76, 712 P.2d 754 (1985). That case came about as a result of a lawsuit brought by the Montana Attorney General seeking clarification as to whether the Montana Constitution precluded the Montana courts from exercising jurisdiction over federal or Indian reserved water rights in Montana and whether the Montana Water Use Act, Title 85, Ch. 2, MCA, was facially adequate under the McCarran amendment to allow Montana courts to adjudicate those federal and Indian reserved water rights. Id. at 82, 712 P.2d at 758.

In ruling that the Montana Constitution did not preclude Montana courts from exercising jurisdiction over federal and Indian reserved water rights, id. at 89, 712 P.2d at 762, and that the Montana Water Use Act was in fact facially adequate to allow Montana courts to adjudicate those federal and Indian reserved water rights, id. at 95-96, 712 P.2d at 766, the Montana Supreme Court recognized that the term "reserved water rights" encompasses Indian water rights claims whose basis is aboriginal or otherwise.

> The date of priority of an Indian reserved water right depends upon the nature and purpose of the right. In many instances, the federal government's plan to convert nomadic Indians into farmers involved a new use of water. If the use for which the water was reserved is a use that did not exist prior to creation of the Indian reservation, the priority date is the date the reservation was created. *Arizona v. California* (1963), 373 U.S. 546, 600, 83 S.Ct. 1468, 1498, 10 L.Ed.2d 542, (irrigation held to be a new use with an 1865 priority date). A different rule applies to tribal uses that existed before creation of the

> reservation. Where the existence of a preexisting tribal use is confirmed by treaty, the courts characterize the priority date as "time immemorial." More than one priority date may apply to water rights reserved by the same tribe. The Klamath Indian Tribe's Treaty of 1864 recognized tribal agriculture, hunting, fishing and gathering. The Ninth Circuit Court of Appeals held that irrigation was a "new use" and had a priority date of 1864. The latter purposes were based on tribal uses that existed before creation of the reservation. Water reserved for hunting and fishing purposes had a priority date of "time immemorial." *Adair*, 723 F.2d at 1412-15. The Montana Water Use Act does not define priority date. Section 85-2-224(3)(d), MCA, directs the reserved right claimant to include "the priority date claimed" in its statement of claim to the Water Court. The Act permits the Water Court to apply federal law in determining a proper priority date for each Indian reserved water right.

State ex rel. Greely, 219 Mont. at 92, 712 P.2d at 764. The Montana Supreme Court also specifically recognized that the Water Use Act, at 85-2-702, MCA, charges the Compact Commission with reaching agreements on "the extent of the reserved water right of each tribe[,]" id. at 91, 712 P.2d at 763, and did not identify any flaw in this statutory scheme as it related to the McCarran compliance of the Water Use Act. In light of this case, Vandemoer's assertion that the Compact Commission has exceeded its statutory authority by recognizing in the proposed settlement water rights derived from the Tribes' reservation in the Hellgate Treaty of their right to take fish at usual and accustomed locations, is simply wrong.

2. Incorporation of a FIIP Water Use Agreement into the Proposed Settlement.

Vandemoer charges that the proposed incorporation of a FIIP Water Use Agreement into the proposed settlement as the primary mechanism for the protection of irrigators served by the FIIP "waive[s] the water rights of citizens, change[s] state water law, and waive[s] the state's authority to protect water rights" in violation of Article IX, Section 3 of the Montana Constitution. Vandemoer Memo at 3. This accusation is baseless for several reasons.

At an elementary level, Vandemoer's suggestion is wrong because Montana law can only be changed by the Montana legislature. The Compact Commission has no unilateral authority to change laws, and thus even were we to credit the erroneous claim that the incorporation of the FIIP WUA into the settlement were in violation of the Constitution, that violation could only occur when the legislature acts not when the Compact Commission proposes a settlement to the legislature for ratification. More importantly, the Compact Commission is of course respectful of the primacy of the Montana Constitution and has no intention of proposing a settlement that would fall afoul of its provisions.

More substantively, Vandemoer provides no legal authority to support her claim that the incorporation of a FIIP Water Use Agreement into the settlement would violate Article IX, Section 3 of the Montana Constitution. This failure is unsurprising, however, as she cannot do so because the claim is not true. In its entirety, Article IX, Section 3 reads as follows:

> **Water rights.** (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
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> (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.
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> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
>
> (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

It is not at all clear, and Vandemoer does not explain, how the incorporation of a FIIP Water Use Agreement, negotiated among the Tribes, the United States and the FJBC – which is the local governmental entity, under Title 85, Ch. 7, Part 16, MCA, that represents the three irrigation districts (also local governmental entities under Title 85, Ch. 7, Part 1, MCA) – into a proposed settled that must be voted on by the Montana legislature and signed by the Governor before it can become effective under State law, violates any part of Article IX, Section 3 of the Montana Constitution. If anything, the ratification by the Montana legislature of a settlement including a FIIP Water Use Agreement would be an act in furtherance of the constitutional obligation set forth in subsection (4) and not in violation of it.

In a footnote, Vandemoer alleges that "[t]he FIP [sic] agreement changes priority dates of project users, incorporates state water rights into the body of federal reserved water rights, allows the reduction of water to irrigated lands, and converts water uses to instream flows." Vandemoer Memo at n.4. In this view, apparently, the FIIP Water Use Agreement would be taking water away from irrigators and giving it to the Tribes to satisfy their instream flow water rights. But this mischaracterizes the state of the law, particularly as it was set forth by the Ninth Circuit Court of Appeals in a decision resolving a dispute between the FJBC and the Tribes in the mid-1980s. In that litigation, the FJBC asserted that as a matter of priority, FIIP water uses were on par with tribal instream flow claims. The Ninth Circuit soundly rejected this position, holding instead that "[t]he priority date of time immemorial [associated with the Tribes' instream flow water rights claims] obviously predates all competing rights asserted by the Joint Board for the

irrigators in this case." Joint Bd. of Control v. United States, 832 F.2d 1127, 1131 (9th Cir.1987). The Ninth Circuit went on to state that "[o]nly after fishery waters are protected does the BIA…have a duty to distribute fairly and equitably the *remaining* waters among irrigators of equal priority." Id. at 1132. In other words, under the prior appropriation doctrine that is the law in Montana, the Tribes would be entitled to the last drop of water to satisfy their instream flow rights before FIIP irrigators could receive the first drop of theirs. The inclusion of a FIIP Water Use Agreement as part of a negotiated settlement, however, is to ameliorate the harshness of the law and to ensure that there is a legally binding allocation of water between tribal instream flows and Project uses that keeps water available for project irrigators despite the junior priority date of the FIIP water rights. This is part of fulfilling one of the Compact Commission's core goals in these negotiations – the protection of existing water users.

3. Unitary Administration and the Unitary Management Ordinance.

Although she includes this in her section about the Compact Commission exceeding its authority, Vandemoer identifies no constitutional or statutory provisions that prohibit the State from agreeing to a unitary management system that contemplates regulation of all water rights on the Reservation by a single entity composed of State and tribal appointees. Nor could she, as no such prohibition exists. She does claim that the unitary management ordinance creates a "tribally-controlled board" and suggests that this raises jurisdictional questions as it relates to the exercise of tribal jurisdiction over non-members. Vandemoer Memo at 3-4. This misstates the nature of the proposed Water Management Board, which is simply not "tribally controlled" but rather is structured to be composed of two members appointed by the Tribal Council, two members appointed by the Governor, and a fifth member selected by the other four appointees. There is nothing in the law that precludes the State or the Tribes from consenting to such an arrangement in furtherance of the sovereignty each possesses.

It is also worth noting that one of the advantages the Compact Commission has seen in a unitary management approach is that it retains for the State a role in the development of new uses of water on the Flathead Indian Reservation. If the proposed settlement contemplated a dual administration approach then, consistent with all of our prior Indian compacts (which have all provided for dual administration), all future on-reservation development would be controlled by the Tribes under a tribal water code (the substance of which, unlike the Unitary Management Ordinance, the State would not have the opportunity to shape). It is also worth noting that the nature of the administration system (dual or unitary) is likely to be largely indifferent to irrigators who are exclusively served by the FIIP, as the Unitary Management Ordinance leaves day-to-day intra-FIIP water distribution and administration in the hands of the Cooperative Management Entity, which would also be the likely result (again consistent with our prior compacts, which leave administration of BIA projects to the United States) of dual administration.

4. The Open Status of the Flathead Indian Reservation.

Vandemoer claims that the proposed settlement "relinquishe[s] state water rights attached to legally-established private fee patent land…to the CSKT/Federal government" but cites only to Article III.C.1.c of the proposed Compact in support of this claim. Vandemoer Memo at 4. Article III.C.1.c of the proposed Compact is the provision recognizing the Tribes' right to "Flathead System Compact Water," which is water drawn from the mainstem of the Flathead River, backstopped by an allocation from the United States Bureau of Reclamation's Hungry Horse Dam. It is not at all clear how this right relates to Vandemoer's assertion. But in any event nothing in the proposed settlement "relinquishes" any state law-based water right. The proposed settlement is a quantification of the CSKT's water rights, which is what the Montana legislature has directed the Compact Commission to accomplish. 85-2-703, MCA. All claims to private water rights filed in the adjudication (including private claims filed asserting a personal right to water delivered by the FIIP) remain in the adjudication to be resolved by the Montana Water Court.

Vandemoer also states that "the Commission agreed to set up a water administration system that is based on the CSKT/U.S. control over the use of surface and ground water on the reservation as if no private land or established state water uses existed[.]" Vandemoer Memo at 4. As discussed above, this characterization of the proposed Unitary Management Ordinance and the nature of the proposed Water Management Board is false.

B. The Proposed Compact Violates Neither the Montana Constitution Nor the Laws of the State.

Under the general heading of violations of the Constitution and laws of Montana, Vandemoer makes three claims: that the proposed settlement violates Article IX, Section 3(4) of the Montana Constitution; that it facilitates the taking of private property rights; and that it fails to recognize and confirm existing uses of water. Vandemoer Memo at 4. Each of these assertions is without merit.

1. The Proposed Settlement Complies with Article IX, Section 3(4) of the Montana Constitution.

As quoted above, Article IX, Section 3(4) of the Montana Constitution provides that "[t]he legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records." Vandemoer claims that the proposed settlement "relinquishes" the State's duty to do those things and therefore violates the constitution. Vandemoer Memo at 4. But proposed settlement does no such thing. The constitution does not delineate *how* the State is to accomplish the constitutional objectives, and the legislature has broad latitude to enact laws that are "rationally tied to the

fulfillment of the unique obligations toward Indians" to which the State is bound under federal law. State v. Shook, 313 Mont. 347, 352-53; 67 P.3d 863, 867 (2002). Thus if the Montana legislature approves the settlement, including its unitary administration framework, it is acting in furtherance of its obligation to "provide for the administration, control, and regulation of water rights[,]" not in violation of it. Moreover, the proposed Unitary Management Ordinance, at Section 1-1-108, specifically requires the Water Management Board to have any water rights or change authorizations it approves to be entered in the DNRC water rights database, the "system of centralized records" established by the Montana legislature in fulfillment of its constitutional obligations.

2. The Proposed Settlement Facilitates No Taking of Property Rights.

Vandemoer states that the proposed settlement "results in a taking through inverse condemnation." Vandemoer Memo at 4. This assertion is predicated on the same misunderstanding of the relationship between the Tribes' instream flow water rights and those associated with the FIIP addressed in Section 1.A.2 of this memo. Essentially, Vandemoer's takings theory is that a junior water user's property right is being taken by the exercise of a senior water right. Were that the case, the entire prior appropriation doctrine would be unconstitutional. Indeed, the proposed settlement imposes conditions on the exercise of the Tribes' senior rights in favor of junior users. It protects the junior water right holder from the jeopardy of the Tribes' senior priority. It therefore is the precise opposite of a taking.

3. The Registration Requirements Are in Furtherance of the Recognition of Existing Uses of Water.

Vandemoer contends that, by requiring the registration of certain uses of water under the proposed Unitary Management Ordinance, the proposed settlement fails to recognize and confirm existing uses of water as provided for in Article IX, Section 3(1) of the Montana Constitution. This assertion is also wrong. There are only three categories of water use that are required to register under the proposed Unitary Management Ordinance, each of which is a category of use that is not presently included in the DNRC water rights database. These categories are: 1) those pre-1973 water rights that were exempted from the Adjudication's filing requirements by 85-2-222, MCA; 2) existing uses of the tribal water rights (which were not required to be filed in the Adjudication pursuant to the suspension provision of 85-2-217, MCA); and 3) those small domestic and stock uses meeting the exceptions to the permit requirements of the Montana Water Use Act, as set forth in 85-2-306, MCA, that were developed after August 22, 1996, that are not legally valid because of the Montana Supreme Court's decisions in Matter of Beneficial Water Use Permit, 278 Mont. 50, 923 P.2d 1073 (1996), Salish and Kootenai Tribes v. Clinch, 297 Mont. 448, 992 P.2d 244 (1999), and Salish and Kootenai Tribes v. Stults, 312 Mont. 420, 59 P.3d 1093 (2002), but that we are nevertheless protecting in the proposed settlement. See Proposed Unitary Management Ordinance, Sections 2-1-101 and 2-1-106. All

other existing uses do not need to register, as they are already recorded in the DNRC water rights database and will remain water rights as finally decreed by the Montana Water Court or permitted by the DNRC. Moreover, the registration requirement is in furtherance of the recognition and confirmation of these water uses, as if they are not documented they can be neither administered nor protected.

C. The Ratification of the Proposed Settlement by the Legislature and Congress Does Not Trigger the Montana Environmental Policy Act (MEPA) or the National Environmental Policy Act (NEPA).

Vandemoer claims that NEPA and/or MEPA must be complied with before the Montana legislature can ratify the proposed settlement. Vandemoer Memo at 4-5. This assertion is entirely unsupported in the law. MEPA applies to agency actions, not to exercises by the legislature of its sovereign authority. See 75-1-201, MCA; 75-1-220(5) and (8), MCA; Northern Plains Res. Council v. Mont. Bd. of Land Comm'rs., 366 Mont. 399, 404, 288 P.3d 169, 173 (2012)(MEPA "requires State agencies to review, through an EIS, major actions that significantly affect the quality of the human environment so that the agencies may make informed decisions")(emphasis added). As discussed above, it is the Montana legislature and not the Compact Commission whose approval of the proposed settlement enacts the settlement into State law. While the implementation of the settlement may require action by State agencies, such agency action being subject to MEPA compliance, the act of the ratification of the settlement by the Legislature is not such a MEPA-triggering event.

Nor does the ratification of the proposed settlement by Congress trigger the need for NEPA compliance. The proposed settlement resolves potential water rights litigation involving the United States, the Tribes, the State of Montana, and water users. Such settlements are not major federal actions affecting the environment that trigger the environmental analysis requirements of NEPA. Congress has recognized this fact in ratifying the tribal water rights compacts Montana has entered into with the Northern Cheyenne, Rocky Boys and Crow reservations. See, e.g., *Public Law* 111-291, Title IV, Sec 404 (124 Stat. at 3100); Public Law 106-163, Sec. 5 (113 Stat. at 1782); *Public Law* 102–374, Sec. 11(106 Stat. 1186, *et seq.*); Mont. Code Ann. 85-20-301, -601, -901. Again, though, implementation of the proposed settlement is likely to require environmental review pursuant to NEPA. Such review will be conducted as appropriate on specific individual projects contemplated by the proposed settlement, such as rehabilitation of FIIP structures.

D. The Tribes' Water Rights Are Quantified in the Settlement and the Compact Commission Will Only Act to Recommend Taking the Settlement to the Legislature After All of the Components of the Settlement Are Ready.

Vandemoer claims that the proposed settlement does not specify the quantity of water being recognized as belonging to the Tribes. Vandemoer Memo at 5-6. Again this assertion is untrue. Among the appendices to the proposed settlement are a lengthy series of proposed water rights abstracts, specifying with great particularity all of the water rights being quantified in the proposed settlement. Indeed, the quantification of the CSKT's water rights in the proposed settlement is accomplished with greater specificity than the Compact Commission has ever employed in prior Indian water rights settlements in Montana, which will greatly facilitate the review of the proposed settlement before the Montana Water Court, if and when that time comes.

Vandemoer also complains that "the Commission has never publicly confirmed the volume of water claimed." Vandemoer Memo at 6. It is not clear what she means by "publicly confirmed" as we have repeatedly identified the abstracts as the definitions of the parameters of the Tribes' rights. In addition, her use of the word "claimed" seems to belie a misunderstanding of the nature of our process, where we are not adjudicating the Tribes' rights but rather reaching a negotiated settlement to quantify them. In a footnote, she references a table also attached to her Memo that purports to tally up the number of acre-feet of water associated with the rights abstracted in the proposed settlement. See Vandemoer Memo at n. 15 and Appendix A. The difficulty with the straight-sum approach is that it fails to account for the fact that the same molecule of water may serve to help satisfy several of the Tribes' rights being quantified. For example, water that physically satisfies a portion of a Tribes' instream flow right in the Jocko drainage may also later satisfy a portion of the Tribes' instream flow right in the Flathead River as measured at the Perma gage, and may also be diverted and then returned after traveling through FIIP infrastructure on its journey from Point A to Point B.[3] This is part of why we have clearly delineated the conditions on the exercise of the Tribes' water rights and the protections for existing users in the proposed settlement, to ensure that irrespective of how much water the Tribes might have a legal right to in a given year, the effects on existing water users of the Tribes' exercise of those rights are carefully contained. It is surprising that a hydrologic consultant would misunderstand this basic principle of water measurement.

Vandemoer additionally charges that the Compact Commission is rushing an incomplete set of documents to the Montana legislature for approval. She points particularly to fact that the FIIP Water Use Agreement has not yet been approved. Vandemoer Memo at 6. But the Compact Commission postponed its scheduled vote of December 19, 2012, and has not yet set a new date to vote on whether to approve the proposed settlement to go to the Legislature precisely because the FIIP Water Use Agreement is not yet completed, and because the State, the Tribes and the United States continue to digest public comment that we have received and to determine what adjustments to the settlement need to be made in light of those comments. This is hardly rushing an "incomplete" set of documents to the Legislature.

[3] This no more doubles the volume associated with the Tribes' water rights than does sweeping out your kitchen and then your living room double the number of brooms you have.

E. Vandemoer's Claims that the Proposed Settlement "Fails to Consider Future Growth and Undermines the Family FARM [sic]" are False.

Vandemoer states that the size of the rights being quantified for the Tribes' off-reservation water rights may lead to basin closures and that the Compact Commission has failed to take this factor into account in these negotiations. Vandemoer Memo at 6. But she is incorrect. First of all, the proposed settlement closes no basins to future appropriations in western Montana. Moreover, the quantification of the Tribes' rights in the proposed settlement provides for much more certainty and predictability in the future about how much water is available for future development than the current unquantified state of those senior water rights allows. The only new off-reservation water rights being quantified for the Tribes in the settlement are for the mainstems of the Kootenai, Swan and Lower Clark Fork Rivers. This is a significantly small number of streams than the Tribes would likely assert claims to the in the Adjudication in the absence of a settlement. While there is of course uncertainty about whether the Tribes would ultimately be successful in proving up all such claims in the Adjudication, the pendency of those claims could pose much greater problems for the issuance of new water rights permits. See Matter of Beneficial Water Use Permit, 278 Mont. at 50. Second, the Compact Commission has very directly contemplated future development needs in the proposed settlement, specifically by bargaining for the Tribes to make available at least 11,000 acre-feet per year of water for off-reservation mitigation uses that would allow new development to occur despite the existence of very large hydropower water rights that constrain the DNRC's ability to issue new water rights permits in various western Montana drainages wholly independent of any water rights belonging to the CSKT.

Vandemoer's complaint about the settlement hurting "the family farm" suffers from the same misunderstanding of the state of the law that is discussed in Section I.A.2 of this Memo. It remains without merit. The constraints on the exercise of the Tribes' water rights set forth in the proposed settlement protect family farms, whether served by the FIIP or otherwise, from the consequences inherent in Montana law of the junior priority dates of their water rights. A large set of tribal instream flows with a time immemorial priority date quantified after years of costly litigation poses a much more direct threat to Montana's agricultural traditions than anything in the Compact.