

**List of Questions for Proposed  
Legal/Constitutional, Economic, Environmental  
Analysis of the Proposed CSKT Compact**

**Legal/Constitutional Analysis**

1. What is the purpose of the Flathead Indian reservation?
2. Are the proceedings involving the sale of Kerr Dam and associated water rights to the CSKT likely to interfere with state-based water rights to the Flathead River and Flathead Lake?
3. Unitary Management Ordinance
  - a. Can the State of Montana delegate its constitutional responsibilities for water administration of its citizens to a foreign/sovereign government (Tribes, US)? UMO, 1-1-101
  - b. Does the State of Montana have the authority to remove its citizens out from under the protection of the laws and Constitution of Montana?
  - c. Does the Unitary Management Ordinance violate the equal protection clauses of the Montana and United States Constitution?
  - d. Does the Unitary Management Ordinance, and to-be-developed regulations for its implementation, comply with the legislature's intent to protect the constitutional rights of its citizens?
  - e. Does the Unitary Management Ordinance enable the taxation of Montana citizens by a Tribal government?
  - f. Does the land use ownership pattern on and demographics of the Flathead Indian Reservation convey a compelling need for an Indian tribe to have jurisdiction over state-based (and taxed) land and water rights?
  - g. Are there any judicial proceedings in which the construction or interpretation of the UMO is or could be at issue?
  - h. What are the "consensual agreements" in the Unitary Management Ordinance?
    - i. How will they be implemented
    - ii. How are they transparent
    - iii. Do they create an 'extra-legal' avenue to avoid the provisions of the Unitary Management Ordinance?
  - i. What is the court of competent jurisdiction, how will it be determined, are there standards?
  - j. Does the mutual defense clause constrain the right to or otherwise prevent the citizen to file suit or seek remedy or redress?
    - i. Under what conditions would the mutual defense clause be exercised?
  - k. Can other tribes whose compacts have been ratified by the state or are not ratified yet re-open their Compacts to seek jurisdiction over non-members if this compact is passed?
  - l. What power does the state have in decisions of the Unitary Management Board, especially where those decisions conflict with state law?

4. Off-reservation instream flow claims on ceded aboriginal lands
  - a. Are off-reservation claims to water “federal reserved water rights” within the context of Winters case and the McCarran Amendment?
    - i. Do federal reserved water rights exist absent a reservation of land by the federal government?
    - ii. Is the resolution of Tribal reserved water rights in a Compact part of federal reserved water rights proceeding?
    - iii. Have off-reservation claims to water ever been included in a federal reserved water rights proceeding?
    - iv. What are the precedential implications of including off-reservation water claims in a federal reserved water rights proceeding?
      1. For Montana Indian Reservations
      2. For other states
    - v. Can other Montana Tribes whose Compacts have been or have not been ratified by the State reopen their Compacts to seek water for off-reservation rights granted by treaty?
  - b. Does the inclusion of off-reservation water claims in the proposed Compact comply with the intent and requirements of the McCarran Amendment, the Montana General Stream Adjudication, and the jurisdiction of the Montana Water Court?
  - c. Does a “right to take fish...in common with the citizens of the territory” convey an instream flow right to either the Tribe or Montana citizens?
    - i. Does the use of off-reservation instream flow to maintain habitat or flow change the purpose of the Treaty to “take fish” in common with the citizens of the Territory?
    - ii. Does the right to hunt maintain habitat or imply a water right to maintain
5. The Compact
  - a. Does Montana have the legal and constitutional authority to review and alter a Compact after its ratification?
    - i. What provisions would be required in the Compact language to authorize such a review?
  - b. Off-reservation, does an Indian Tribe or the federal government have any legal authority to manage, administer, “call”. or develop water resources?
    - i. Does the DNRC have the authority to issue water rights to the federal government outside of its finalized Compact, and without an analysis of the preclusion of future growth or private property assessment act evaluation?
  - c. Is there a distinction between the ownership of water and the ownership of a water right?
    - i. If a federal reserved water right is owned by the federal government, does Montana still own the water?
    - ii. If Montana owns the water, who has the right to administer water rights, including federal reserved water rights?

### **Socioeconomic and Private Property Analysis**

6. Compact, Water Use Agreement, Unitary Management Ordinance, Off-Reservation Water Claims
  - a. Have any of the compact components been ruled or are (possibility) likely to be ruled by a State or Federal court as a deprivation of private property in violation of the United States or Montana Constitution or laws?

- i. Owner of fee land with property rights on it transferred over to the tribe
- b. Is there risk of economic liability to Montana of payment for property takings resulting from the implementation of the Compact? What is the risk and range of dollars involved?
  - i. If there is a risk, who is liable for payment? MT, CSKT, or Feds? What is the liability of the United States to Montana citizens or the State for property takings?
- c. What are the adverse economic effects of off-reservation claims for water, or the potential sale or lease of water by the CSKT, including basin closures, preclusion of future development, or private property takings?
  - i. Is there enough information available in the record to make such a determination at this point?
- d. What are the adverse economic impacts of off-reservation “calls” for water by the Tribes?
  - i. Under what conditions can the Tribes make a call for water, and who has the burden of proof for making that call?
  - ii. Can the Tribes make a call for water if they plan to sell or lease water downstream either in-state or out of state, and what would be the adverse economic impacts of this action?
- e. Could the entire Compact, or provisions of the Compact, be invalidated for failure to adhere to the analysis required under the Private Property Assessment Act, violations of the Montana Constitution or statutes, takings, environmental laws, rules of federal reserved water rights proceedings, economic impacts or any other reason?
- f. What are the economic impacts to Montana citizens of resolving water disputes in a ‘court of competent jurisdiction’?
- g. Is there any guarantee that the UMO will not be dominated by or operate under the control of tribal law?

## **Environmental Analysis**

### 7. Water Use Agreement

- a. What are the physical and economic impacts of a change of use from irrigation to instream flow on shallow ground water levels and water wells?
  - i. How are wetlands be maintained?
- b. What is a ‘robust river’ standard? What is the standard for instream flows and how does that apply to water abstracts. Is standard focused on fish survival, habitat maintenance,
  - i. Are standards limited to fish survival, etc to flows necessary
  - ii. What are the impacts of a ‘robust river’ (page compact) standard for fish survival, stream bank stability, erosion, and integrity of irrigation structures? Increasing quadrupling instream flow in compact
- c. What are the growth inducing or socioeconomic growth inhibiting impacts of the on-reservation “robust river” standard for instream flow (economic)
- d. Is there enough information available to definitively determine the ‘water savings’ components of irrigation rehabilitation?
- e. Is there a process to ensure that extra duty water will be received by those who apply for it?
  - i. Does or will the time period for this application for extra duty water (5 years) risk the economic viability of his/her agricultural operation?
  - ii. Could there be an added charge for this water?

8. Off-reservation instream flow claims

- a. What are the growth inducing or growth inhibiting impacts of the off-reservation instream flow claims?
  - i. Is there enough information to assess this question, including the aspects of basin closure, call results?
  - ii. How many times in 20 years will an irrigator be called on its water rights?

9. Compact

- a. What precedential components of the proposed Compact would commit the state to future actions with significant impacts or a decision in principle about such future actions?
- b. What are the growth inducing or growth inhibiting impacts of the proposed Compact?
- c. Does the proposed Compact or any part thereof restrict the use of private property, or impose undue governmental regulation that would prohibit the use and enjoyment of private property?
- d. Are there alternatives to the proposed CSKT Compact that were not considered which would minimize or eliminate impacts to the human environment?