No Difference between the CSKT Compact and Recent Lawsuit Filed by Tribes

By: Catherine Vandemoer, Ph.D.

On February 27, 2014, the Confederated Salish and Kootenai Tribes (CSKT) filed a lawsuit in federal court claiming ownership of all water and all land on the Flathead Indian Reservation. By rewriting and selectively interpreting history, the CSKT actually claim that no one ever had the right to settle on the reservation, despite it being opened by Presidential Proclamation in 1908 to settlement under the Homestead and Reclamation laws. The Tribes simply say that none of this law applies to them.

As if this lawsuit wasn’t stunning enough, what is even more stunning is that the proposed CSKT Compact says the same thing as the lawsuit: the tribes own all the water, all the land, and state laws do not apply to the administration of water even for 23,000 citizens whose water rights are derived from state law. The lawsuit is a blatant attempt to scare people and legislators into signing on to the proposed CSKT Compact, but now all the cards are on the table: the CSKT want all the land and all the water and will use whatever means they can to get it—either the Compact or a lawsuit.

Concerned Citizens of Western Montana has been raising this alarm about the proposed CSKT Compact for more than a year—that the CSKT Compact asserts that the Tribes own all the water and all the land on the reservation. We have been accused by the Compact Commission and Compact proponents of spreading “misinformation”. As it turns out, the Compact Commission has not disclosed this vital information to the legislature or Montana citizens, misinforming the public that everyone keeps their water right and their land holdings in the Compact.

Let’s examine the facts.

Ownership of Land. In the proposed CSKT Compact, the definition of the reservation is found on page 8:

“The Flathead Indian Reservation is all land within the exterior boundaries of the Indian Reservation established under the July 16, 1855 Treaty of Hellgate (12 Stat. 975), notwithstanding the issuance of any patent, and including rights-of-way running through the Reservation.”

The key word in the definition is “notwithstanding”, which means “in spite of” or “regardless of.” This clearly conveys the idea that in spite of more than 100 years of settlement of the reservation by non-Indians, regardless of the fact that lands were purchased and became private property with land patents and appurtenant water rights, all the land within in the reservation boundaries is still in “reservation status.” Private property owners pay taxes to the state and the county on the lands they own, the lands in “reservation status” do not pay taxes. When was the Compact Commission going to disclose this?

The CSKT lawsuit is even more blatant on the subject of land ownership within the exterior boundaries of the reservation. At page 13 of the lawsuit, point number 45 says “no non-Indian could own land or claim water rights on the Flathead Indian Reservation”, and the lawsuit seeks to declare that all fee patent land on the reservation is null and void.

Ownership of Water. In the proposed CSKT Compact, the Tribes claim ownership of all the water that runs over, under or flows through the Flathead Indian Reservation. This is confirmed in at least three places in the proposed CSKT Compact. First, by tallying up the volume of water listed in the Abstracts as belonging to the Tribes, including all of Flathead Lake and instream flows for all of the Flathead River and tributaries, it is clear that the Tribes have physically claimed all the water on the reservation. Secondly, by requiring the irrigators of the Flathead irrigation project to relinquish their water rights to the CSKT in the Irrigator Water Use Agreement, they claim the rights to nearly one million acre feet of water historically and beneficially used by irrigators and appropriated under state law. That water is derived from Flathead Lake and stored behind Kerr Dam. The total claim of the Tribes then, includes all of the water available on and bordering the reservation. And this doesn’t even include what they have claimed off-reservation.
In the Tribes’ recent lawsuit, paragraph 39 states that “under the federal reserved water rights doctrine, the Tribes reserved all water on, under and flowing through the Flathead Indian Reservation. They forgot to mention that the federal reserved water rights doctrine reserves only that amount of water necessary to fulfill the purposes of the reservation, not all the water on the reservation.

The State is Irrelevant. In the proposed CSKT Compact, the Tribes claim they have the right to manage all water rights on the reservation, even those that are state-based water rights. This is contained in the proposed Compact as the “Unitary Management Ordinance”, where “any aspect of Montana’s water use act and water law that is inconsistent with the UMO is irrelevant to the administration of water on the reservation. Indeed, Compact Commission Chairman Chris Tweeten called this the “grand bargain”---where the Compact Commission agreed to remove 23,000 non-Indian citizens out from underneath the protection of the Constitution and laws of Montana at the request of the Tribes. These are not my words—these are recorded and transcribed words of the Compact Commission.

In the recent CSKT lawsuit, the Tribes seek to stop the Montana Water Court from exercising jurisdiction over the resolution of reserved water rights, and seek to stop the 20th District Court from hearing any matter involving water rights on the reservation. In short, they seek to circumvent the long-standing, legally-settled ways for State Courts to properly conduct general stream adjudication, where all water rights are heard in the State system. This hostility to state institutions is a long-standing characteristic of the CSKT.

In short then, the Compact gives you exactly what the lawsuit is proclaiming. By giving up under the lawsuit, Montana effectively gets the Compact. There is no choice but to reject the Compact and to vigorously challenge the Tribes’ outrageous and unfounded claims in Court.

We urge you to contact Attorney General Tim Fox and ask him to step up on behalf of all Montanans and fight this lawsuit. We urge you to contact Governor Steve Bullock—who has called this compact a ‘fair agreement’ to withdraw the Compact in its present form from legislative consideration. In view of the poor choices between litigation and this proposed CSKT Compact, it might be better to just let the Tribes go through the state adjudication like everyone else is. At least the rule of law might prevail.

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