

EXECUTIVE SUMMARY

LEGAL ANALYSIS OF THE CSKT COMPACT

October 30, 2018

During the public deliberations on the CSKT Compact from 2012-2015, the Montana Land and Water Alliance (MLWA) retained the services of attorneys Richard A. Simms, Jay F. Stein, and Jim Brockman to conduct a legal review of the CSKT Compact. Their biographies are attached. Specifically, we requested an analysis of the following key elements of the compact:

1. Who reserved the Flathead Indian Reservation, the United States or the Tribes
2. Whether Article 3 of the Treaty of Hellgate grants a water right to the CSKT off-reservation on aboriginal lands
3. The impact of the compact on the agricultural water resources, rights, and irrigators of the Flathead Irrigation Project
4. The legal validity of the “10,000 claims” filed by the Tribes and the United States in eastern Montana
5. Whether the state of Montana can delegate its constitutional responsibilities for administering water resources, and the provisions of the Montana Water Use Act, to a politically appointed board dominated by the federal government and Tribes acting under a new law created by the compact
6. Montana and U.S. Constitutional violations of the CSKT Compact
7. Whether the state negotiation process permits it to work outside the legally-established parameters of the Winters Doctrine and state law.

The attorneys produced seven papers and memoranda related to these inquiries. Each of these papers and relevant sections are referenced in this Executive Summary. The papers:

- October 29, 2014. The Montana Land and Water Alliance’s Response to the Water Policy Interim Committee’s Legal Analysis of the Questions Presented by Representative Nancy Ballance and Keith Regier.
- November 5, 2014. Letter to Attorney General Tim Fox Regarding Article IX of the Montana Constitution
- January 11, 2015. Letter to Legislator Regarding the Lack of Quantification in the Proposed CSKT Compact
- February 3, 2015. Letter to the Montana Land and Water Alliance Regarding Why it is not Possible to “do anything you want” in a Compact Negotiation
- February 11, 2015. Letter to Legislators Regarding No Ratification in Partial Response to Compact Commission’s Critique of January 15, 2015 Letter
- March 8, 2015. Letter to Legislators Regarding the 10,000 Claims Threat
- April 6, 2015. Memorandum on Constitutional Violations that will Result with Compact Ratification

1. Who reserved the Flathead Indian Reservation, the United States or the CSKT?

Context. The CSKT asserted that the Flathead Reservation was never part of the public domain and therefore the United States did not reserve the Flathead Reservation. Instead, the tribes assert that they reserved the Flathead Reservation themselves and that the Tribes have always owned “all of the water in, on and under the Flathead Reservation”. This assumption led directly to the Compact’s large claims of all surface and ground water on the reservation, and the assertion that the tribes reserved water rights under Article 3 of the Treaty of Hellgate off the reservation with a time immemorial priority date. This assertion also led to the creation of the Compact’s Unitary Management Ordinance which gave the Tribes control over all water on the reservation, whether the rights were based in state, tribal or federal law

Relevant Historical Facts¹

- In the early 1800’s the United States acquired western lands from various foreign powers. Western Montana became part of the public domain of the United States by the Treaty of June 15, 1846 with Great Britain, and all of Montana became part of Washington Territory on March 2, 1853. [p.2 ¶ 3]
- In 1855 the Treaty of Hellgate was negotiated by the President’s representative in which the CSKT “hereby cede, relinquish, and convey to the United States all their right, title and interest in and to the country occupied or claimed by them”. [p. 2 ¶ 1]
- On March 8, 1859 Congress ratified the Treaty of Hellgate, making the Treaty effective and establishing that the Flathead Reservation was reserved from the lands in the public domain by the will of the United States Congress. [p.2 ¶ 1]
- Prior to 1859, the Flathead Reservation did not exist, and the Tribes did not own “all the water in, on and under the Reservation” [p.2 ¶ 1 lines 10-11]

Legal Analysis²

- In analyzing Article III of the Yakima Treaty, which has the same language as Article 3 of the Treaty of Hellgate, the United States Supreme Court recognized that the Yakima believed they were retaining their historical right to fish but did not hold the Yakima “reserved their own reservation”. [p. 6 line 16- p.7 lines 1-7]
- Instead, the Supreme Court held that the United States reserved the Yakima Reservation upon the effective date of the Treaty in 1859: [p.7 lines 14-15]

“By the Constitution, as is now well established, the United States, having entire dominion and sovereignty, national and municipal, Federal and State, over the Territories, so long as they remain in territorial condition” (*Shively v. Bowlby*, 152 U.S. 1, 41 (1894)) [p. 7 lines 9-14]

“The extinguishment of Indian title, opening the land or settlement and preparing the way for future states, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as ‘taking fish at all usual and accustomed places.’” (*United States v. Winans*, 198 U.S. 371, 383 (1905)) [p.7-8, last ¶ through page 8]

- The United States, having rightfully acquired the Territories, is the only Government which can impose laws and Treaties on them. [p. 12 ¶ 4, lines 1-6]

¹ Paper of January 8, 2015 pp 1-2; 12. *Memorandum to Senate President Debby Barrett and Speaker of the House Austin Knudsen*

² Paper of March 18, 2015, pp 1-8 “*Threat of 10,000 Off-Reservation Instream Flow Claims*”

2. Does Article 3 of the Treaty of Hellgate grant a water right to the CSKT off-reservation on aboriginal lands ceded to the United States under Article 1?

Context. The Tribes assert that Article 3 of the Treaty of Hellgate, which deals with access and rights of way, generates instream flow water rights off reservation with a time immemorial priority date. This claimed water right was initially asserted in the CSKT ceded aboriginal territory in western Montana in the Compact. The tribes asserted that under Article 3, the Tribes themselves reserved their right to hunt, fish, and gather and further, that they ‘reserved’ the water to support those rights.

Relevant Historical Facts³

- Pursuant to Article IX, Section 3 of the Montana Constitution, “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 appropriate for beneficial uses as provided by law. Article IX of the Montana Constitution applies both on and off the Flathead Reservation [Nov. 5 paper p. 1-2]
- The language of Article 3 of the Treaty of Hellgate establishes two rights [March 18 paper lines 10-25]
 - An exclusive right of fishing within certain boundaries (the reservation)
 - A shared right secured in common with the citizens of the Territory that was not exclusive in the Indians but secured to them access to and passage over the land, the right of crossing it to the river, the right to occupy it to the extent and for the purpose mentioned
- The shared right in common with the citizens of the territory is the right of taking fish at all usual and accustomed paces, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering tools and berries, and pasturing their horses and cattle upon open and unclaimed land”
- The Article 3 access right remained just that from 1905 until 1974, when Judge Boldt addressed the impingement of greatly increased commercial fishing in Washington on the Tribes’ treaty right to fish. Judge Boldt added a second component to Article 3 which was a right to a harvestable quantity of fish. [March 18 paper p. 28 lines 3-17]

Legal Analysis⁴

- The *Winans* case, upon which Article 3 is interpreted was not a water rights case. It is about a servitude in the land that has nothing to do with federal reserved water rights [Mar 18 paper, p.1 lines 6-9]
- The right to a share of the harvestable fish “secures so as much as, but no more than, is necessary to provide the Indians with a livelihood, that is to say, a moderate living”. (*Washington et. al. v. Washington State Commercial Passenger Fishing Vessel Association et al*, 443 U.S 658 (1979)) [Mar 18 p. 21 lines 4-16]
- No water right has been deemed necessary to accompany the right of access and the limited right to harvest fish. [p. 23 lines 8-10]
- There is no legal justification for changing the nature of an Article 3 treaty right of access by expanding it to include a federal reserved water right that, historically, could not have been thought or intended to be part of the Article 3 right of access when the Supreme Court articulated its decision in *Winans* in 1905 [Mar 18 pp. 19-20]
- The purpose or legal utility of the CSKT reserved instream flow water right off the reservation is (1) to preclude the continued use of existing water rights perfected under state law through priority administration; (2) to prevent changes in use of existing water rights under state law; and (3) to preclude the development of new uses of public water under state law [Jan. 8 paper, p. 13, lines 12-22]
- The United States Supreme Court has not rewritten Article 3 of the Stevens Treaties to give control of the public water supply to the Tribes as the Compact has done. In *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), the court concluded: [Jan 8 paper, p 12 last ¶]

We hold that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states...

³ Paper of November 5, 2014. *Letter to Attorney General Tim Fox*

⁴ Paper of January 8, 2015, Letter; Paper of March 18, 2015 “*Threat of 10,000 Off-Reservation Instream Flow Claims*”

3. What is the impact of the Compact on the agricultural water resources, rights, and irrigators of the Flathead Irrigation and Power Project?

Context. The CSKT Compact transferred the bare legal title of 100% of project water in the Flathead Irrigation and Power Project from the United States held for project water users to the United States in trust for the CSKT alone, who own only 10% of project lands. The core provisions of the Compact effectuate the conversion of irrigation water to instream flow and result in the reduction of agricultural water use by 50% to 70% throughout the FIPP. The Tribes and the State of Montana replace federal project management and oversight with a compact-created Compact Implementation Technical Team (CITT) whose purpose is to oversee the conversion of irrigation water use to instream flow pursuant to the law of administration of the compact. The Tester bill, S. 3013, transferred the ownership of the United States project infrastructure to the CSKT.

Relevant Historical Facts⁵

- The Flathead Irrigation and Power Project was authorized by the 1908 Amendment to the 1904 Flathead Allotment Act as a project to serve Indians and non-Indians and to make the reservation productive.
- The 1908 Act contains a provision that provided for the transfer of the management and operation of the irrigation works to the owners of the lands served by the project when the project was repaid.
- By 1924, 80% of the lands served by the FIPP belonged to non-Indians
- In 2018, 90% of the lands served by the FIPP are owned by non-Indians.
- Project costs were fully repaid to the United States by the landowners in 2004
- The United States reserved and appropriated project water under the laws of the state of Montana in 1908
- The FIPP has maintained instream flow for Tribal fisheries within the project of 270,600 acre feet since 1985

Legal Analysis⁶

- The Compact reduced the historical duty of irrigation lands from 4.7 acre feet/acre to 1.4 acre feet per acre
- The CSKT Compact results in a permanent reduction in annual water supply for the FIPP by 423,200 acre feet [*p. 3 ¶1 lines 1-8*]
- The conversion of irrigation water to instream flow in the irrigation project without demonstrating a fisheries need for this water is designed to (1) provide a basis upon which to exercise tribal control over all of the water entering the reservation (2) to impose numerous conservation measures on the irrigation project irrigators and to convert the water thus saved to tribal instream flows (3) to make it possible to control the Secretarial water rights within the irrigation project, and (4) to make it possible to control all of the state-based, private diversion on the reservation outside of the irrigation project to minimize their use of water [*Jan 8 paper, p. 6 lines 17-26*]
- The transfer of irrigation water to instream flow, and the title to the water rights, will result in project water rights holders having an onerous “life estate” interest in their water rights which revert to the Tribes upon the death of the project water rights holders. [*Oct 29 paper p. 4 ¶2*]
- The United States Supreme Court has repeatedly held that federal reserved water rights are implied water rights that derive from the purposes for which the United States withdraws land from the public domain for a specific federal purpose. In the CSKT Compact the basic mechanism for generating reserved rights is the use of a computer model to hypothetically idealize the management, operation and efficiency of the FIPP in order to convert the water saved into instream flows at the expense of 2,500 farmers and ranchers who use Project waters. [*Jan 8 paper p. 13 ¶ 3 lines 1-12*]

⁵ Derived from MLWA historical research on the origin of the Flathead Irrigation and Power Project

⁶ Paper of January 8, 2015; Paper of October 29, 2014

4. What is the legal validity of the “10,000 claims” filed by the Tribes and the United States in Eastern Montana?

Context. The CSKT threatened to file 10,000 claims for water in eastern Montana if the Compact was not approved by the Montana legislature. Once the compact was passed, the CSKT filed these claims anyway. The claims in eastern Montana for instream flow were asserted by the Tribes to cover their “subsistence area”, which was based upon their interpretation of the Article 3 access right as conveying a water right to support the treaty right to fish. The same theory used to justify the off-reservation water rights in western Montana under Article 3 is the same theory promoted for the eastern Montana off-reservation tribal instream flow rights.

Relevant Historical Facts

- The U.S. Supreme Court in *Winans*, and other case law interpreting Article 3 of the Stevens treaties, restricts the Article 3 access right or land servitude to the lands ceded by the Tribe to the United States
- The CSKT lands ceded to the United States in Article 1 of the Treaty of Hellgate are geographically limited to lands only in western Montana. There are no CSKT ceded lands in eastern Montana
- The 1855 Judith River Treaty, to which the Flathead were signatory, prohibited the CSKT from establishing permanent homes east of the Rocky Mountains and allowed only temporary access to eastern Montana for hunting, fishing, and trade.
- The United States Supreme Court has not changed the conceptual nature of Article 3 of the Stevens Treaties to include either a federal or “Indian” reserved right to protect the fishery.

Legal Analysis⁷

- Notwithstanding that Tribal interests have been trying at every opportunity to expand the Article 3 “in common” treaty right, the United States Supreme Court has recognized that the ‘in common’ right is restricted to the ceded, non-reservation area under a given treaty, making the likelihood of success of any off-reservation in stream flow claims east of the continental divide in Montana highly unlikely. [*Mar 18 paper, pp. 27-28 last ¶*]
- Important to note in this regard is that much of the Compact’s Lower Clark Fork River off-reservation instream flow claims in western Montana lie outside of the ceded area of the Treaty of Hellgate
- The CSKT Compact is an effort to accomplish the transformation of the federal reserved water rights doctrine into an unquestionably expansive “Indian reserved water rights” doctrine. However, the 9th Circuit Court of Appeals and the United States Supreme Court have refused to do so. [*Mar 18, p. 28-29 all lines*]
- The Supreme Court’s view of the federal reserved water rights doctrine has caused the Court to be much more inclined to limit federal reserved water rights, given the Court’s recognition that the doctrine itself has the potential to take property without compensation. (See Brief for the State of New Mexico, Point I, pp. 10-18, *United States v. New Mexico* 438 U.S. 696 (1978); *Wyoming v. United States*, (1989)) [*p. 29 lines 6-11*]

⁷ Paper of March 18, 2015 pp 1-30

5. Can the state of Montana delegate its Article IX constitutional responsibilities for administering water resources, and the provisions of the Montana Water Use Act, to a politically appointed board dominated by the federal government and Tribes acting under a new law created by the compact?

Context. The CSKT Compact creates a new law of administration for water called the Unitary Management Ordinance to govern all water rights, whether derived from tribal, state, or federal law, and controls all aspects of water use, including permitting of new uses, changes of existing uses, enforcement of water rights, and all aspects of enforcement within the exterior boundaries of the Flathead Indian Reservation. The compact expressly negates Montana law and places 23,000 non-Indian residents living within the exterior boundaries of the Flathead Reservation under Tribal jurisdiction for their water rights. In agreeing to this proposal, the state of Montana effectively delegated its constitutional responsibilities under Article IX of the Montana Constitution to the CSKT.

Relevant Historical Facts

- The provisions of Article IX of the Montana Constitution apply interactively to the State of Montana and have statewide application:
 - Section 3(1) provides that “all existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed”. The existing water rights referred to in this section are all water rights perfected in Montana by diversion and application to beneficial use under the territorial and common law of prior appropriation in Montana prior to 1973
 - Section 3(3) states that all “surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for use of its people and are subject to appropriation for beneficial uses as provided by law”
 - Section 4 provides that “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”⁸
- The Section 4 mandate to provide for state administration of water rights required (1) the adjudication of all pre-1973 water rights recognized and confirmed in Section 3 of Article IX in order to make them subject to administration; (2) the creation of a statutory procedure for perfecting new (post-1973) rights and newly permitted water rights; (3) the creation of a statewide system of *inter sese* adjudication wherein all water rights are determined as between individual water rights owners and the state and among one another in order to make the United States on its own behalf and on behalf of Indians, subject to being named a party defendant in Montana’s state court water rights adjudication under the McCarran Amendment, and (4) the creation of a system of administration for all interdependent adjudicated water rights as among one another
 - All four of these statutory schemes mandated by Article IX have statewide application and Montana law does not carve out gaping geographical holes in its application

Legal Analysis⁹

- The Compact’s law of administration obliterates Article IX of the Montana Constitution and all the Montana law enacted pursuant thereto by the Montana legislature¹⁰ because it would: [*Nov 5 paper pp 2-3*]

⁸ The Compact Commission and Attorney General asserted that by passing the CSKT Compact, the legislature was “providing for the administration, control and regulation of water rights and creation of a system of records”

⁹ Paper of November 5, 2014, *Letter to Attorney General Fox from Richard A. Simms*; Memorandum of March 2015, *Constitutional Violations by Compact Ratification*

¹⁰ Pursuant to the Law of Administration, “any provision of Title 85 MCA that is inconsistent with this Law of Administration is not applicable within the Reservation

- Preclude the formal recognition of the individual water rights owned by both Tribal and non-Tribal irrigators in the Flathead, Mission, and Jocko irrigation districts on the Flathead Reservation, contrary to state and federal law
- Effectuate a taking of (a) real property rights of some 23,000 non-Indians residing within the boundaries of the Flathead Reservation; (b) the real property rights of the irrigators in the Flathead, Mission, and Jocko irrigation districts, and (c) the water rights appurtenant to their property within the boundaries of the Flathead Reservation, in violation of the Fifth Amendment of the United States Constitution
- Violate the equal protection clause of the United States Constitution
- Usurp the system of statewide adjudication, administration, and regulation of water rights in Montana currently in place as a result of the mandate of Article IX
- Vitiating the system of centralized records mandated by Article IX
- Give plenary control over the administration of all water rights within the Reservation, whether based on state, tribal, or federal law to a single entity whose water rights are adverse to all other water rights in Montana in the relevant water basin in the pending statewide adjudication in the Montana Water Court
- Usurp McCarran Amendment jurisdiction over the United States not only with respect to its own rights but also for its claims of rights for the CSKT in trust
- Negate the purpose of Article IX with respect to state control over the adjudication and administration of the interrelated and conflicting water rights *inter sese*
- Take away the ability to administer the water rights of the United States on its own behalf and the water rights of the United States on behalf of the SKT as against the water rights of all non-Indian citizens of Montana residing in the affected water basins; and
- Completely upend the object of Article IX of the Montana Constitution and numerous laws enacted by the Montana legislature pursuant to the mandate of Article IX.
- The Compact's Law of Administration violates Section 12 of Article V of the Montana Constitution by "creating a special or local act when a general act is, or can be made applicable" [*March 2015 paper p 1, lines 8-11*]

6. Montana and U.S. Constitutional violations of the CSKT Compact

Context. Citizens and legislators identified numerous violations of the Montana and U.S. Constitutions contained in the CSKT Compact before it was ratified by the Montana Legislature, ranging from the taking of property rights to the elimination of due process. The Montana legislature's ratification of the CSKT Compact in 2015 is tainted by its failure to achieve the 2/3 vote in both houses of the legislature required because a clause in the Compact gave the state of Montana immunity from costs, damages, and attorneys fees resulting from its actions in implementing the Compact.

Relevant Historical Facts

- The Montana and United States Constitution, and laws created thereto establish the law of the land and create statutory mandates for the protection of life, liberty, and property. They each function as integrated documents in and of themselves, with no provision severable from the other
- The Constitution of the State of Montana is “the written instrument agreed upon by the people of the state as the absolute rule of action and decision for all branches and officers of the government in respect to all of the points covered by it, which must control until it shall be changed the authority which established it, and in opposition to which any act or ordinance of any such department or officer is null and void.”

Legal Analysis¹¹

- The Compact's Unitary Management Ordinance or Law of Administration violates Article V (The Legislature), Section 12, of the Montana Constitution. [Mar 15 paper p. 1 lines 1-9]
 - Article V provides that “the legislature shall not pass a special or local act when a general act is or can be made applicable”. A local law is “one which operates over a particular locality instead of over the whole territory of the state”. A special law is “one relating to particular persons or things; one made for individual cases or for particular places or districts; one operating upon a selected class rather than upon the public generally”.
 - The Montana Water Use Act is legislatively applicable over the entire territory of the state. The Compact makes the Unitary Management Ordinance or Law of Administration a law of the State of Montana, thus being a legislative enactment of a local law eliminating the applicability of the Montana Water Use Act within the geographic area of the Flathead Reservation
- The Compact's establishment of a “court of competent jurisdiction”—a state or tribal court that otherwise has jurisdiction over the matter *so long as the parties to the dispute to be submitted to that court consent to its exercise of jurisdiction*—violates Article VII (the Judiciary), Sections 4(1) and 4(2) of the Montana Constitution [Mar 15 pp 2-3]
 - The State District courts would be a court of competent jurisdiction *only if the adverse parties in a given proceed “consent to the exercise of jurisdiction”*. This effectively removes the District Courts from the Flathead Indian Reservation
 - The Montana Supreme Court's process, which by the Constitution extends to all parts of the state, would be taken away, subverting the statewide process of the Supreme Court
- The Compact's Unitary Management Ordinance/Law of Administration violates Article IX (Environment and Natural Resources) and Article III (General Government) [Mar 15, pp 3-4]
 - Article IX of the Montana Constitution provides that the legislature shall provide for the administration control, and regulation of the water rights and shall establish a system of centralized records, in addition to the present system of local records”
 - Article III of the Montana Constitution prohibits a person or persons charged with the exercise of government power properly belonging to one branch from exercising any power properly belonging to another branch of government. By creating the Unitary Management Ordinance, the legislative branch invaded the judiciary branch.

¹¹ Paper of March 15, 2015, *Constitutional Violations of the CSKT Compact*

7. Does the state negotiation process permit it to work outside the legally-established parameters of the *Winters Doctrine* and state law?

Context. The CSKT Compact is completely different than every other tribal compact negotiated in the state of Montana, and any Indian water rights settlement negotiated or litigated in the United States. Upon questioning the difference between the CSKT Compact and others, the state, tribal, and federal negotiators' response was that "this is a negotiation and we can do anything we want in it". The Compact's provisions suggest that the compact negotiators reinterpreted the Treaty of Hellgate, particularly Article 3; created new water rights off the Flathead Reservation; and disabled state jurisdiction and constitutional authority for its citizens and water resources living within the exterior boundaries of the Flathead Reservation.

Relevant Historical Facts.

- The CSKT Compact states that it is "entered into by and among the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the State of Montana, and the United States. As such, the compact is both a creature of federal and state law. Ratification of the compact by the state makes it a state law; ratification by Congress makes it a federal law. [Feb 3, p 3, lines 1-3]
- Ratification of the compact by Congress makes it a federal law, and as such, it cannot vary from the provisions or substance of the United States Constitution or relevant federal law. [Feb 3 p. 3 lines 8-10]

Legal Analysis¹²

- Ratification of the CSKT Compact by the state legislature makes it a state law, and as such, the legislature cannot enact unconstitutional results.
 - The Compact's transfer of administrative authority over public waters in the State of Montana to a board created by the CSKT Compact is contrary to Article IX of the Montana Constitution, and is therefore unconstitutional [Feb 3 p 3 lines 1-3]
 - The Compact creates an unconstitutional takings of water rights historically applied to beneficial use by irrigators within the Flathead Irrigation Project by transferring the irrigation rights to the Tribes and reducing the delivery of water to irrigators to provide instream flow on the reservation [Feb 3 p 3 lines 4-7]
 - As a general proposition, a state cannot enter into a compact that is in contravention of the state constitution, and "since the totality of a state's power is derived from its own sovereignty, Congress cannot grant a state the power to act in contravention of the state constitution" (*Interstate Compacts-State Constitutions as Limitations on States' Power to Ratified Federally Approved Compacts*, 26 Indiana Law Journal 451 (1951)) [Feb 3 p. 4 lines 12-18]
- It is not a "rational exercise of legislative authority" to ratify a settlement that would take real property rights of the citizen of Montana and negate the application of Article IX of the Montana Constitution [Feb 3 p lines 12-15]

¹² Paper of February 3, 2015, *CSKT Compact Analysis*