# TEN THINGS LEGISLATORS MUST READ BEFORE THEY CONSIDER THE CSKT WATER COMPACT

The Water Compact for the Confederated Salish and Kootenai Tribes (CSKT) is one of the most important votes that legislators will be faced with in 2015. The compact documents and bill exclude crucial and important documents that are a necessary component for legislators to complete their due diligence analysis, or to help them navigate beyond the politics associated with this controversial issue. This short document explains ten things that will help provide perspective to legislators ahead of any pending vote on the water compact.

In 2013, the CSKT Compact bill submitted for consideration was shrunk down to a very small font to make it appear smaller than it really is, although this Compact bill in reduced font was still 130 pages. Noticeably missing in it were many important details and other information that would have been necessary for legislators to make an informed decision.

The following list presents ten items that are necessary to understand fully any CSKT Compact bill submitted to the legislature. Decision-making in the absence of this vital context will lead to potentially devastating consequences for the state of Montana and its citizens.

1. **The History of the Reservation and Applicable Laws**

2. **The Compact Commission Enabling Legislation (MCA 85-2-701)**

3. **The Abstracts of Water Right (Appendices 5-38)**

4. **The Unitary Management Ordinance UMO, now called the Law of Administration (Appendix 4)**

5. **The Tribe's Federal Lawsuit**

6. **Quantification of federal reserved water rights included in other tribal compacts in the state of Montana**

7. **The Mutual Defense Clause of the Compact**

8. **The Crow Compact Lawsuit**

9. **The Flathead Joint Board of Control Resolution Against the Proposed Compact**

10. **Forest Service Compact / *U.S. v. New Mexico***

## 1. History of and Laws Applicable to the Flathead Indian Reservation

The history of the Flathead Indian Reservation and applicable laws form the context for what the proper reserved water rights claim of the CSKT should be. These include articles of the Treaty of Hellgate, the Flathead Allotment Act and 1908 Amendment, the 1909 opening of the Flathead Reservation, the 1908 Winters Doctrine, the 1934 Indian Reorganization Act.

a. The Treaty of Hellgate contains several important provisions that define the reservation land and rights of the United States. The Treaty of Hellgate is also known as a "Steven's treaty" because it was negotiated by territorial governor Isaac Stevens.

- Article I states: *The said confederated tribes of Indians 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.* Article I of the Treaty ceded all right, title to and interest in 12 million acres of *aboriginal lands* to the United States. Article II of the Treaty created the Flathead Indian Reservation out of these ceded lands.

- Article III states: *The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; and also the right of taking fish out of usual and accustomed places, in common with the citizens of the territory.* Article III is being interpreted by the Tribes and the Compact Commission to give the CSKT extensive instream flow claims on lands off the reservation, which gives the Federal government/CSKT control of essentially all the water in western Montana. But the substance of Article III does not convey a water right because a **right to "hunt and fish in common with the citizens of the territory" is not a water right.**

- Article VI of the treaty: Allowed for allotment of reservation land to Tribal members, and referenced the treaty with the Omaha's which allowed for the sale of surplus lands after allotment pursuant to the laws of the Congress and President of the United States.

b. The 1904 Flathead Allotment Act (FAA)and 1908 Amendment According to the terms of the treaty, the reservation was opened to settlement after lands were allotted to all tribal members under the 1904 Flathead Allotment Act. The 1908 Amendment to the Flathead Allotment Act provided after the Tribal allotments completed in 1904, surplus lands on the reservation were to be open to non-Indian settlement and sold for the benefit of the Tribe.

c. The Winters Doctrine. In 1908 the Supreme Court created the doctrine that when the federal government sets aside lands for Indian reservations, it impliedly reserved enough water to fulfill the purposes of the Indian Reservation. The purpose of the reservation is derived from the language of the Treaty. The CSKT claim that they, not the United States, reserved the Flathead Indian Reservation, which is contrary to history and law.

d. The 1909 Presidential Proclamation. The President of the United States opened the Flathead Indian Reservation to settlement by non-Indians, offering for sale surplus lands authorized by Article VI of the Treaty of Hellgate and the 1908 Amendments to the FAA.

e. The 1934 Indian Reorganization Act (IRA). The IRA ended the allotment policy and consolidated Tribal ownership of remaining unallotted lands, but mandated that all lands open to settlement and purchased by non-Indians were not affected by the IRA :"*Provided,*

*however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this act."*

- This means that the CSKT claims of ownership of the water and land within the Flathead Irrigation Project are invalid, being without legal merit.

**f.** Indian Claims Commission: The tribes were already paid by the United States Court of Claims and the Indian Claims Commission for the off-reservation lands constituting their aboriginal territory and for the lands opened to settlement under the 1904 Flathead Allotment Act.

- In 1966, the Indian Claims Commission awarded the tribe $4,431,622 for off reservation lands ceded by the tribe to the United States and in 1971 the United States Court of Claims awarded the CSKT $22,631,549 for the value of reservation land opened to settlement.
- Having been paid for the lands ceded and on-reservation lands open to settlement makes the Tribes claims for water ownership on these lands invalid.

## 2. The Compact Commission Enabling Legislation (MCA 85-2-701)

The intent of the legislature when establishing the Compact Commission was clearly stated in the compact commission enabling legislation: *"… it is further intended that the state of Montana proceed under the provisions of this part in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state."*

- On their website, the Compact Commission acknowledges it is supposed to quantify, or determine of the size of a federal reserved water right by 1) reaching an understanding with the federal agency holding the water right about the purpose for which the specific federal reserve was created, and 2) determining how much water is necessary to satisfy the purpose of the reserve. The commission has failed to provide this information to the public or to legislators.
- The Compact Commission has not provided a specific quantification of the amount of water awarded to the tribe for their federal reserved water right. The actual "award" is buried in the Abstracts of Water Right found in the appendices to the Compact, and totals millions of acre feet of water more than all the water awarded to every Tribe in Montana combined.

## 3. The Abstracts of Water Right (Appendices 5-36)

The compact references the water abstracts in the appendices, which consist of more than 1,000 pages. **Article III B. on Page 14** of the compact says "*Abstracts of water right appended to this Compact are a substantive element of this Compact. The language of the abstracts, including all informational remarks, shall control in the event of any inconsistency between the Compact and the abstracts of water right*"

- Because the Abstracts are the substantive and controlling legal documents of the CSKT compact, it is impossible to understand the compact without reviewing and understanding them.
- No other Tribal Compact in Montana was accompanied by Abstracts of Water Right because the other Tribal Compacts specify the amount and limit of the volume of the Tribe's federal reserved water right up front in the text of the Compact. The Compact Commission has publicly stated that *"if you want to know how much water is awarded to and the parameters of the tribe's water rights, you must look at the abstracts."*
- The compact effectively gives the Federal Government control of the waters of western Montana, both on and off the Flathead Reservation and this is reflected in the Abstracts of Water Right. The *owner of the water right listed on the abstracts is the "United States of America, Department of Interior, Bureau of Indian Affairs, in trust for the CSKT"*.

## 4. The Unitary Management Ordinance UMO, or Law of Administration (Appendix 4)

Article I (4) on page 6 of the UMO states: *Upon the Effective Date of the Compact, this Ordinance shall govern all water rights, whether derived from tribal, state or federal law, and shall control all aspects of water use, including all permitting of new uses, changes of existing uses, enforcement of water right calls and all aspects of enforcement within the exterior boundaries of the Flathead Indian Reservation. Any provision of Title 85, MCA that is inconsistent with this Law of Administration is not applicable within the Reservation.*

- The Compact Commission describes the UMO as the "Grand Bargain", where the Compact Commission *agreed to do this extraordinary thing, frankly, with respect to agreeing to subject or to remove non-Indian rights on the reservation from the jurisdiction and control of the state, and place that somewhere else at the tribe's request."* (notes of 8/2/12 Compact Commission meeting, Helena, MT)
- If the compact is approved with the UMO included, 28,000 Montana citizens living within the external boundaries of the reservation will no longer be protected by state water law or state courts. Their right to due process of law will also be violated. The UMO violates the equal protection clauses of the Montana (Article II Section 4) and the United States Constitutions (Fourteenth Amendment) and effectuates a taking under Article 5 of the U.S. Constitution.

## 5. The Tribe's Federal Lawsuit

In February 2014, the CSKT filed an aggressive lawsuit claiming to own all the land within its external boundaries and asked a Federal District Court to declare that they own all of the water. This suit was filed to push the state into accepting the CSKT compact that essentially has the same objective as the lawsuit. The Mountain States Legal Foundation is representing some of the individuals named in the lawsuit states:

*"In their lawsuit, the Tribes claim all water and land within the boundaries of the Reservation, and thus challenge the validity of the original homesteaders' patents—*

*signed by the President—and seek to acquire those lands and their water rights. In addition, the Tribes challenge a federal law assigning primary responsibility for adjudicating and administrating water rights to State and not federal courts—the McCarran Amendment of 1952.*

*"Our clients' land was open for entry for 105 years, and in private hands for much of that time," said William Perry Pendley, president of MSLF. "The water rights appurtenant to those lands were owned fully by our clients and their predecessors for decades. We will vigorously defend those rights."*

- Twenty-three thousand or more people own private land on the reservation. If this lawsuit or the compact prevail, the land patents and water rights of these state citizens will be null and void.
- The United States is "considering" joining the tribe in their lawsuit (ref. top of page 2), and if they are successful, land ownership and water rights throughout Montana and the west will be undermined.

## 6. Quantification of water rights included in other tribal compacts in Montana

The other six Montana tribal compacts specify and place limits on the amount of water awarded to the tribe up front in the text of each Compact. The CSKT compact does not.

- Without specific quantification and limits, it is impossible for a legislator to know or to understand how much water being awarded to the CSKT and how it might impact other water users, the environment, land values, or the economy. This would be like writing a blank check to the federal government and tribe without understanding what is being conceded.
- In contrast to state and federal law, the compact commission has publicly stated that "*if the CSKT's federal reserved water rights were quantified, they would likely exceed the available supply of water*" (Jay Weiner, October 2011). Without being provided the specific volume of water awarded to the CSKT, how can a legislator be sure that he/she is not agreeing to give the CSKT "more water than exists", or in this case all the water in Western Montana?

## 7. The Mutual Defense Clause of the Compact

Article VIII D page 68 of the compact states: "*The Parties agree to defend the Compact after its Effective Date from all challenges and attacks and in all proceedings pursuant to Article VII.B and C.*"

- Upon ratification of the compact, the mutual defense clause of the compact means that anyone who is harmed by the compact and seeks redress will be fighting the State, Tribe and the United States in court, essentially making it cost prohibitive and impossible for citizens to challenge any aspect of the compact.

## 8. The Crow Compact Lawsuit

Tribal members who own land that was allotted to Indians through the various allotment acts of the federal government have valuable water rights to those lands which are not part of the water right of the Tribal Government and are managed separately by the Secretary of Interior. Non-Indian owners of lands that were purchase from the original Indian allottees also have valuable water rights, called Walton Rights.

- The Crow Compact Lawsuit claims that the federal government waived the allottee water rights as part of the passage of the Crow Water Compact, and that their due process rights were violated.
- There are thousands of individual Indian allottees on the Flathead Indian Reservation that also have water rights separate from the Tribal government. These individual Indian water rights have not been identified or protected in the CSKT Compact.
- Will the passage of the CSKT Compact lead to a similar lawsuit by individual Indian allottees on the Flathead Indian Reservation?
- The extensive non-Indian Walton Rights have similarly not been protected in this Compact nor identified by the Compact Commission.

## 9. The Flathead Joint Board of Control Resolution Against the Proposed Compact

The proposed compact effectuates a taking of water rights belonging to irrigators within the Flathead Irrigation Project, transferring the title of these water rights to the CSKT. The Tribe then "allows" the irrigators to receive less than one third of its historical beneficial use. The taking is shown in the Abstract of Water Right contained in Appendices 10, 11, and 12. Instead of a valid water right secured by state law, irrigator's water rights are replaced by a "delivery entitlement" to water. This title transfer of the water right will do irreparable harm to agriculture, and the compact's adaptive management program will continue to ratchet down the meager amount of water set aside for irrigation in this compact. In other words, irrigation water is an ongoing target for future reductions of water. The duly elected governmental representatives of the Flathead Irrigation Project, the Flathead Joint Board of Control (FJBC), passed a resolution on December 30, 2014 which states, in part:

> *NOW THEREFORE, BE IT RESOLVED: The FJBC, comprised of the Flathead, Mission and Jocko Valley Irrigation Districts, representing the irrigated acreage owned in fee and which comprises approximately 110,000 acres, or 90% of the acreage contained within the FIP, strongly opposes passage by the 2015 Montana Legislature of the proposed CKST Water Compact as drafted, and recommends that irrigator's water rights be adjudicated by the Montana Water Court in a general stream adjudication process*

- The plan to take irrigator water rights remains in the 2015 Compact. Both the Tribes and Chris Tweeten, Chairman of the Compact Commission have stated in the recent "negotiation sessions" that "not a drop of water in the Abstracts would change." The Abstracts of Water Right demonstrate the title transfer of irrigator water to the CSKT.

- A State district court judge ruled in February 2013 that the original water use agreement, now incorporated into the new proposed compact, is an unconstitutional taking without compensation, violating Article 5 of the U.S. Constitution.
- The compact does not protect historical uses of irrigator water, and by giving the tribe water rights to every drop of water in the irrigation project, irrigators will be denied their valuable property rights.

## 10. Forest Service Compact / United States v. New Mexico:

The Forest Service Compact improperly expanded the federal reserved right doctrine because it ignored settled case law related to the intent and purpose of a federal reservation and its associated reserved water right. In *United States v. New Mexico*, the U.S. Supreme Court limited forest service claims only to the purpose of the reservation of land: to provide water for downstream users and for production of timber.

- The US Forest Service currently has 34 open claims that have been filed for water throughout the state of Montana. This is because the Forest Service Compact ratified in 2010 allows them to continue to file claims forever into the future. Instead of defining a limited scope of water claims, establishing finality, and limiting the claims of the forest service to the purpose of a forest land reservation, the compact allows the federal government a blank check in the form of future water claims.