

# The Flathead Water Compact: Ex Post Facto Law

Our Founders believed that the power to create ex post facto or retroactive laws was one of the hallmarks of tyranny. Such laws place the citizens at the mercy of the government, unable to know the consequences of their acts and constantly subject to the possibility of legislative vindictiveness.

The framers incorporated the ex post facto ban into the Constitution in two places, prohibiting both federal and state legislatures from passing retroactively applicable legislation.

The Flathead Water Compact is an ex post facto law that undermines land patents and water rights, as well more than 100 years of established water rights law. It also eliminates due process and equal protection under the state law for a large group of citizens by retroactively removing them from the protection the state their water needs.

## Western Montana water rights before and after the Flathead Water Compact

### Before

### After

FEDERAL RESERVED WATER RIGHTS	Western Montana	TRIBAL RESERVED WATER RIGHTS
<p>Under the Winters' Doctrine, Federal Reserved Water Rights are defined as being limited to the physical federal reservation of land, providing for a discrete amount of water necessary to fulfill the purpose of the reservation. Claims have a priority date of the date the reservation was created.</p> <p>There is enough water for everyone in western Montana, and to settle the water rights for the various federal reservations located in western Montana.</p>	<p>The Flathead Compact rejects the Winter's Doctrine (Federal Reserved Water Rights) and consists exclusively of <b>TIME IMMEMORIAL TRIBAL RESERVED WATER RIGHTS</b>, created out of thin air by the compacting parties at the behest of U.S. and tribal attorneys.</p> <p>By definition, these water rights will preclude all other uses of water, including water necessary for future development.</p>	<p>The Flathead compact awards to the US/CSKT Tribal Reserved Water rights for fisheries throughout western Montana, precluding other uses of up to 58 million acre feet of water.</p> <p>Although less than 2% of the water in the Clark Fork and Kootenai River basins is consumptively used, the compact effectively places existing non-Indian water rights, irrigators in particular, at risk of call, upending more than 100 years of water law.</p>
WATER RIGHTS AFFIRMED IN 1973	Within Reservation Boundaries	USERS OF TRIBAL WATER RIGHT
<p>All existing water rights were affirmed in the 1973 Montana Constitution, including Federal Reserved water rights as defined under the Winters Doctrine.</p> <p>Private Water Rights are subject to the prior appropriation system using the priority date that the water was put to beneficial use.</p>	<p>The Compact effectively removes all Flathead reservation water from the land, and gives it to the US / CSKT. Appurtenant water rights are no longer secured by land patents issued by the United States to Indian allottees and non-Indians more than 100 years ago.</p>	<p>The tribes were awarded all of the water flowing through, over and under the reservation, retroactively stripping non-Indians of their water rights ownership and relegating them to "USERS OF THE TRIBAL WATER RIGHT." Water users are now subject to tribal jurisdiction under Unitary Management and the Tribal Water Quality Ordinance.</p>
STATE BASED RIGHTS ADMINISTERED BY THE STATE	Within Reservation Boundaries	TRIBAL CONTROLLED ADMINISTRATION
<p>Montana Water Law applies to all state based water rights and are administered, adjudicated and protected by the state and its court system.</p> <p>Equal protection and due process under the law and the constitutions of the United States and Montana are afforded to all citizens.</p>	<p><b>THE GRAND BARGAIN:</b> Montana agreed to remove non-Indian water rights within reservation boundaries from the jurisdiction, protection and control of the state, and to place them under an unaccountable tribally controlled water board.</p>	<p>Because Montana ceded all water flowing through, over and under the reservation to the CSKT, a Unitary Management Board was created to protect the tribal water right by placing upon and enforcing punitive controls and restrictions on non-Indian uses of the tribal water right.</p>
IRRIGATION WATER	Within Reservation Boundaries	100% OF PROJECT WATER TO CSKT
<p>Irrigation water is delivered to property as per historic use. Irrigation lands have Secretarial, Walton and double triple duty water rights. Water is used beneficially for all whose lands require water for irrigation and stock purposes.</p>	<p>Notwithstanding the fact that 90% of the lands served by FIP are privately owned, the Compact gives 100% of project water to the CSKT, effectively turning the largest irrigation project in Montana into a fishery.</p>	<p>90% of Flathead Project water is designated for fish. Irrigators may use a small portion of the tribal water right. Existing contracts with federal government are retroactively negated, and historic water deliveries to irrigator properties are reduced by 20-70%.</p>