

CSKT Compact - Facts Matter

Ten thousand water claims ready to be filed by the CSKT has been an effective threat for the proponents of the CSKT Compact which has passed the Senate. This threat and a list of things that the Compact does not do seem to be enough to convince a majority of the Senate to shred our constitution and give up state sovereignty. Other compacts provided water for the purposes of the reservations, but this compact breaches Montana's sovereignty. Giving control and management of the water in western Montana and on the Reservation to the CSKT and federal government and taking the state based water rights away from the Flathead Irrigation project irrigators shreds both the federal and state constitutions.

Eleven counties, 330,000 citizens will have their properties lowered in value because the CSKT Compact grants in stream water rights on the main rivers. Irrigators on tributaries think they are exempt but present water law allows a senior water right holder on a main river that has been ordered to stop using water because of low flow to go up tributaries and shut down water users until his source rises above the minimum flow. Irrigation wells over 100 gallons per minute can also be shut down. These minimum flows are based on a robust river standard, not on survival of fish. Everyone ends up being affected because water becomes scarce. Irrigators, the people who grow our food and provide the largest contribution to our economy, may go out of business. However, some of the irrigators off the Reservation may be able to lease water from the Tribe for \$40 an acre foot because the Compact gives the Tribe 229,000 acre feet of water out of Flathead Lake and the Flathead River which they may use for such purpose.

Off reservation water rights are a huge breach of Montana's sovereignty because the time immemorial water abstracts are made out to the federal government in trust to the CSKT tribe. They now control the water for their benefit rather than Montana controlling it for everyone's benefit as required by our Constitution. The federal government delegated control of non-navigable water to the states in the Desert Land Act of 1877 and they have been trying unsuccessfully for several years to get it back through via congress. The Compact gives control of water in western Montana to the federal government.

No off reservation water rights on stream flows have been previously awarded in a compact or in case law in Montana or any other state. The CSKT Compact would be the first and set a precedent for other tribes. The legal basis for this breach of state sovereignty is the Hell Gate Treaty which contains language by US Commissioner Stevens. The first Tribe to use the precedent could be the Blackfoot Tribe through their 1855 Judith River Treaty which is also a Stevens Treaty with similar language. The Blackfoot nation consisting of the Piegan, Blood, Blackfoot, and Gros Ventres tribes of Indians were granted the privilege of hunting, fishing, gathering fruits and other subsistence activities in a large area, about 8 million acres, in eastern Montana. The CSKT are not included. The hunting and fishing area starts at the Main Divide of Rocky Mountains and goes east to the Muscle Shell River. Helena is at the bottom of strip of land and Great Falls at the top. The Blackfoot Compact has not been finalized yet which will give them an opportunity to go after water in their traditional aboriginal area. Actually 4 Montana tribal compacts have not been fully approved.

Specifically, the legal basis for this breach of state sovereignty cited in the Compact via the Hell Gate Treaty is Article III which does not mention water or water rights: “The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory...” Note that the statement “right to take fish in common with the citizens of the Territory” is not a water right. A subsistence life style was common among both Indians and the citizens of the territory 159 years ago, but now government programs and fast food restaurants take the place of self-sufficiency. However, Judges have stretched the Treaty by ruling that there is an implied obligation in the treaty to provide for the survival of fish. This was done in 1970 by the state of Montana through the Department of Fish, wildlife and Parks with state water rights (called Murphy rights) which provide for minimum flows needed for fish for the whole state. Fish were protected and state sovereignty was left intact.

Also, Article I of the Treaty makes clear that the CSKT cannot be granted off Reservation water rights based on the right to hunt and fish on their aboriginal land: 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...” Note that the words cede, relinquish and convey and the words right, title, and interest

were all used to make sure everyone understood that all aboriginal rights were given up.

Article II established the Reservation: “reserved from the lands above ceded, for the use and occupation of the said confederated tribes...”

Article VIII of the Treaty actually forbids off reservations tribal rights: “The confederated tribes of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.” Control of water with time immemorial water rights greatly degrades property values because of the risk of not having adequate water.

There are several treaties that have the Stevens language in them giving Indians access to hunting and fishing on aboriginal land. None of the tribes have been given off reservation water rights in a Compact or in court. There is no precedent. The Nez Perce Tribe’s negotiation with the state of Idaho has been held up as a negotiation that resulted in off reservation water rights. However, unlike the CSKT Compact, the Nez Perce Tribe did not get water rights. Idaho was not willing to breach their sovereignty by giving control to the Nez Perce Tribe. Idaho’s Department of Water Resources maintained control by putting 200 minimum instream flow water rights in place for “springs and fountains” with a priority date of 2007 while protecting all present uses and some future uses.

It is unthinkable that the state of Montana with the CSKT Compact will lay the ground work for the federal government with the assistances of Indian tribes to breach the sovereignty of western states over the management of water and the protection of private property. Very disturbing is that the CSKT Compact is gaining momentum through the threat (extortion) of 10,000 claims being filed by the CSKT while the authority of the CSKT and the federal government is being hidden in the 1500 pages of the Compact. Also, the general public is being disarmed by millions of dollars from the CSKT to run a statewide media campaign and make special deals with many of the proponents of the Compact. In my 16 years in the legislature, I have never seen a violation of the balance of power in our state government like the actions of our Governor and Attorney General regarding

the Compact. Phone calls and threats to county commissioners and legislators violate their oath of office and the separation of powers as mandated by the federal and state constitutions. Veto authority is a powerful weapon to use on legislators. It is normally used sparingly, but last session over 70 vetoes were issued including the veto of my bill which would have given legislative authority to extend negotiations on the Compact. The Governor and Attorney General decided they were legislators and met with the Tribe to make the project irrigators happy on the Reservation since they had lost their state based water rights in the Compact to the Tribe. The irrigators were given a “water delivery entitlement” which was insignificant because the Tribe still had complete control of their water. Also, irrigators knew that their historic water delivery to irrigators has been cut by 70% and the water moved to instream flow. The Joint Board of Control for the irrigators voted 8 to 2 for a resolution opposing the Compact after negotiation was completed.

Since the legal basis for the off reservation water rights is the Hell Gate Treaty language, there would be no legal basis for the 10,000 claims if the CSKT Compact fails and vice versa. Also, the Montana Constitution states: “All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed” which would include water rights from territorial days when the records were kept locally. The thousands of claims did not work with the Nez Perce Tribe and they will not work with the CSKT. Also, House Bill 427 provides funds to protect these state based water rights from CSKT competing claims through the Office of Public Defender. Although giving up state sovereignty both off and on the Reservation is a major flaw in the Compact there are many other violations; so I will list a few of the big ones:

The purpose of the Reservation and the amount of water necessary to fulfill that purpose has not been provided as required to secured Federal Reserved Water Rights. Violates due process of citizens by blocking access to Montana Courts for resolution of water issues. Violates due process by including Kerr Dam and circumventing the Federal Energy Regulatory Commission. \$55 million of Montana taxpayer money given without financial accountability or transparency. Related to this money, in the Compact there is a statement: “In the event that the payments are not needed such as in the event the Flathead Irrigation Project is decommissioned, all invested funds shall be dispersed for the removal and

landscape rehabilitation.” It is unthinkable that the beautiful Flathead Irrigation Project would fail, and Montana would pay for its removal.

Verdell Jackson, former state Senator