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To: Dr. Catherine Vandemoer
Chair, Montana Land and Water Alliance, Inc.

From: Jay F. Stein, James C. Brockmann, and Seth R. Fullerton

Re: CSKT Compact Analysis

Date: February 3, 2015

Facts:

The Confederated Salish and Kootenai Tribes ("Tribes") are seeking to enter into a compact ("CSKT Compact") with the State of Montana to settle water rights claims advanced by the United States on behalf of the Tribes in the Montana general stream adjudication styled *United States v. Abell*, No. CIV-79-33-M (filed April 5, 1979). The draft CSKT Compact of January 12, 2015,¹ is analyzed in this memorandum, together with "The CSKT Compact 'Boiled Down'" memorandum from the Compact Commission, and the U.S.D.A. -Forest Service- Montana Compact.²

The CSKT Compact states that it "is entered into by and among the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the State of Montana, and the United

¹ The Compact of January 12, 2015, contains no substantive revisions to the November 8, 2014, draft. The proposed water administration system, volume of water allocated to the Flathead Irrigation Project, and volume of instream flows remain the same.

² There have been numerous revisions to the CSKT Compact. The nine Appendices remain incomplete.

States of America to settle all existing claims to water of or on behalf of the Confederated Salish and Kootenai Tribes...”. The tribal claims are principally for instream flows for which the Tribes claim an aboriginal priority. The issues discussed in this memorandum derive from the presence of non-federal water right holders within the Flathead Indian Reservation who exercise rights obtained under state law within the Flathead Irrigation Project, and who are adversely affected by the CSKT Compact.

The CSKT Compact has two principal effects. The proposed compact transfers the administration of the public waters of the State of Montana on the Flathead Reservation, including rights obtained under State law in the Flathead Irrigation Project, from the executive branch of government to a board created by the Compact. Second, the CSKT Compact transfers ownership of non-federal water rights to the Tribes and reduces the historical duty of water used by irrigators within the Flathead Irrigation Project to provide for instream flows to satisfy tribal claims.

Question:

Can anything be negotiated in a compact? Can Montana give the Tribes administrative jurisdiction over water rights when Art. IX of the Montana Constitution requires otherwise?

Conclusion:

Because a compact is a law of the State, and requires ratification by the State legislature, the legislature cannot enact unconstitutional results. The CSKT Compact is unconstitutional in two respects.

- First, the transfer of administrative authority over public waters in the State of Montana to a board created by the CSKT Compact is contrary to Art. IX of the Montana Constitution, and is unconstitutional.³
- Second, the CSKT 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 flows within the Reservation.

Discussion:

A compact is both a creature of state and federal law. Ratification by the Montana legislature makes a compact a state law; ratification by the United States Congress makes the compact a federal law. The CSKT Compact is undergoing a ratification process in the Montana Legislature. If ratification should occur, the compact will become a law of the State of Montana. As such, it must comply with the provisions of the Montana Constitution enacted in 1973 which recognized the validity of prior rights and a state system for administering them. The legislature has no power or authority to enact legislation that varies the provisions or the substance of the Montana Constitution. Such acts are unconstitutional.

Unconstitutional Delegation

At the Montana Constitutional Convention in 1972, the new Constitution and water statutes were drafted simultaneously. Art. IX of the Constitution confirmed and recognized the pre-1973

³ The Compact Commission's memorandum "The CSKT Compact 'Boiled Down'" does not dispute that jurisdiction over water rights administration on the Reservation will be transferred to the Water Management Board: "Proposed Water Management Board (WMB) will have jurisdiction only ON the Reservation – NO jurisdiction...off the Reservation." *Id.* at p.3. However, the Compact provides that the WMB does have jurisdiction to lease the off-reservation water delivered from Hungry Horse Reservoir, Flathead Lake, and off-reservation flows in the South Fork of the Flathead River.

water rights and mandated that the Montana 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.” This provided for the administration of water rights in Montana, *i.e.*, acquisition of water rights, transfers of existing rights, and the enforcement of priority calls to protect senior priorities. Accordingly, the legislature created a system of statewide adjudication of all of the pre-1973 rights, recognizing that they had been developed by diversion and application to beneficial use pursuant to the territorial and the pre-1973 common law doctrine of prior appropriation. The Montana Water Act of July 1, 1973, also established a new permit system for initiating and perfecting new appropriations of water and for making changes in the purpose or place of use of existing water rights. These measures were to be undertaken pursuant to state law and under the jurisdiction of the executive branch of government.

As a general proposition, a state cannot enter into a compact that is in contravention of the state constitution. In *Interstate Compacts-State Constitutions as Limitations on States’ Power to Ratify Federally Approved Compacts*, 26 Indiana Law Journal 451 (1951), the author of the Note stated that “[s]ince 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.” The Note cited *Montana ex rel. Hiare v Rice*, 204 U.S. 291 (1906); *Rhode Island v Massachusetts*, 12 Pet. 657 (U.S. 1838). *But see West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951).

Administration is provided in Article IV. I of the CSKT Compact. Article IV.I.1 establishes the Flathead Reservation Water Management Board (“WMB”) which “shall be the exclusive regulating body on the Reservation for the issuance of Appropriation Rights and authorizations for Changes in Use of Appropriation Rights and Existing Uses, and for the

administration and enforcement of all Appropriation Rights and Existing Uses.”⁴ It includes two members appointed by the Governor, two by the Tribal Council, and one by those four board members.⁵ The Compact Commission’s Memorandum “The CSKT Compact ‘Boiled Down’” defends this jurisdictional shift because it “fills regulatory void that currently exists on the Reservation and keeps the State at the table for future development on the Reservation”. *Id.* at 3.⁶

The jurisdiction of the WMB is set forth at Article IV.I.4.a. It includes “exclusive jurisdiction over the issuance of all new Appropriation Rights on the Reservation. The process for the consideration, issuance or denial of all Appropriation Rights is set forth in the Law of Administration.”⁷ Under Article IV.I.4.c., the WMB shall have the jurisdiction to enforce the terms of this Compact...” Under Article IV.I.4.b., the Board has exclusive jurisdiction “over the issuance of authorizations for Changes in Uses of all water rights on the Reservation.” Procedure is according to the Law of Administration. Under Article IV.I.1 the WMB has exclusive jurisdiction to resolve any controversy over the meaning and interpretation of the Compact on the Reservation, and any controversy over the right to the use of water as between the Parties or

⁴ “Appropriation Rights” and “Change in Use” are defined terms in Article II which pertains to administrative functions applied to water rights.

⁵ **Establishment of Board.** There is hereby established the Flathead Reservation Water Management Board. Upon the Effective Date, the Board shall be the exclusive regulatory body on the Reservation for the issuance of Appropriation Rights and authorizations for Changes in Use of Appropriation Rights and Existing Uses, and for the administration and enforcement of all Appropriation Rights and Existing Uses.

⁶ In *Ciotti v. Dept. of Natural Resources*, 923 P.2nd 1073 (1996), the Montana Supreme Court held that the State Engineer’s jurisdiction is to grant new appropriations was stayed pending reading adjudication of the tribal rights.

⁷ “Law of Administration” means the body of laws enacted by both the State and the Tribes to provide for the administration of surface and Groundwater within the Reservation as well as those waters that appertain to the operation and maintenance of the FIIP that have been diverted or transported onto the Reservation for FIIP purposes, that are both materially consistent with the substantive provision of Appendix 4.

between or among holders of Appropriation Rights and Existing Uses on the Reservation....” The WMB has the power to “promulgate procedures.” *See* Article IV.I.5.a.

Article IV.I.5.b adopts the hearing process in the Law of Administration. Under Article IV.I.5.c., a Water Engineer is appointed as an administrator.

The CSKT Compact would negate Art. IX of the Montana Constitution within the Flathead Reservation, and essentially all of the provisions of the Water Code regarding water rights administration by transferring administrative authority out of the executive branch of the State of Montana to the WMB. All of the protection afforded some 23,000 non-Indian citizens living within the boundaries of the Flathead Reservation, and exercising vested irrigation rights within the Flathead Irrigation Project pursuant Art. IX of the Constitution would be negated if the compact proposals are ratified.⁸

This includes the abrogation of Montana’s Water Code to the irrigators in the Flathead Irrigation Project. The Montana Water Code provides that “pursuant to Article IX of the Montana Constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter.” *See* Mont. Code Ann. §85-2-101 (1). With respect to existing rights, the Montana Water Code provides that “pursuant to Article IX, section 3(1), of the Montana constitution, it is further the policy of this state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose.” *Id.* at

⁸ The U.S.D.A. –Forest Service-Montana Compact is not precedent for the CSKT Compact in this regard. While the subject of the Forest Service Compact is reserved rights for the National Forest System in Montana, the Compact is conditioned on provisions which are not the same as the CSKT Compact. For example, administration and dispute resolution is pursuant to “a court of competent jurisdiction,” not a Compact created board. Article III.B. “Discrete Administrative Use “ as defined in Article I(4) and Article II, section A.2 “shall not adversely affect a surface water right recognized under state law.” Article III.c.2 (c).

85-2-101 (4). The Montana Water Code provides that all appropriations of water must be based upon a permit by the Department of Natural Resources and Conservation. Mont. Code Ann. §85-2-302 (1) states: “[e]xcept as provided in 85-2-306 and 85-2-369, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the department.”

Accordingly, conflicts on two levels are created. Administration undertaken outside Art. IX creates a separate water code to be administered by the WMB rather than the Montana Department of Natural Resources and Conservation, with provisions that conflict with state law. In authorizing the WMB and the Law of Administration, the CSKT Compact conflicts with Article IX of the Montana Constitution, particularly its confirmation of existing rights, and is unconstitutional.

Takings

According to the 1938 Bureau of Indian Affairs report, the Flathead Irrigation Project consisted of 104,859 acres. The BIA computed a duty of water for that acreage of 4.7 acre-feet per acre, based on an available supply of 490,859 acre-feet of water. This is reduced by the CSKT Compact. Moreover, the irrigation rights are transferred to tribal ownership in Article III.c.1.a.⁹ The Flathead Irrigation Project’s total irrigation claim is reduced to 179,539 acre-feet over Project acreage of 128,241.73 acres--resulting in a duty of 1.4 acre-feet per acre. This is a taking as it contradicts Article IX, Section 3 of the Montanan Constitution which states that “[a]ll existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.”

⁹ That provision states: “the Tribes have the right to water that is suspended to the Flathead Irrigation Project to be used to such purposes in such volumes and flow rates and from such sources of supply as identified in the abstracts of the rights attached hereto....”

The principal objective of the CSKT Compact with respect to tribal rights is to provide instream flows within the Reservation. This is based on the Tribes' position that "ongoing water development under the State of Montana Appropriation System" has "substantially diminish[ed] Reservation riparian and aquatic habitat."¹⁰ With respect to "FIIP Instream Flows," the Tribes contend that the Flathead Irrigation Project is operated inefficiently and that its "construction, operation, and maintenance has severely degraded tribal reserves."¹¹ The reduction in supply to Flathead Project Irrigation is designed to "save" water from inefficient use and apply to instream flows.

There are two additional elements of the takings. First, because the conveyance loss is not accounted for, the actual amount applied on farm will actually be less than 1.4 acre feet per year.¹² Second, the hunting and fishing rights of the Reservation are to have associated aboriginal water rights for instream flows necessary to sustain the fisheries at a protected level. This Instream Flow Right obtains the first priority of use operationally and will also have a senior priority date to the irrigation uses, *i.e.*, an aboriginal priority date or time of immemorial priority date as opposed to the priority date of July 16, 1855, for the irrigation uses.

This would take the property rights of the irrigators without compensation, in violation of the Fifth Amendment of the Constitution of the United States and Article II, Section 9 of the Montana Constitution. Article II, Section 9 provides: "private property shall not be taken or

¹⁰ CSKT Settlement Briefing Paper, July 27, 2010, at 2-3.

¹¹ *Id.* at 6,7.

¹² The conveyance loss is not accounted for because the diversion allowance has been moved from the Farm Turnout to the River Diversion point without adding any more water to make up for the conveyance loss between the river diversion and the farm headgate.

damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.” In *Rausser v Toston Irrigation District*, 172 Mont. 530, 565 P.2d 632 (1977) the Montana Supreme Court held that where the government action results in a permanent or indefinite physical occupation of all or a portion of private real property or deprives the owner of all economically beneficial use of the property, the “or damaged” language should be considered. To constitute damage, the impact of government action on property must be direct, peculiar, and significant. For example, land that becomes waterlogged because of the effects on an adjacent government irrigation project on the ground water table is damaged and compensation is required.

Reduction in constitutionally confirmed beneficial use of existing rights meets this standard.

It would not be “a rational exercise of legislative authority” to ratify a settlement that would take real property rights of the citizens of Montana and negate the application of Art. IX of the Montana Constitution, as well as other water rights administration provisions of the Montana Water Use Act within the Flathead Irrigation Project. It would be unconstitutional.