

**PROPOSAL FOR ECONOMIC, ENVIRONMENTAL, LEGAL, AND REGULATORY STUDIES:
PROPOSED CONFEDERATED SALISH AND KOOTENAI COMPACT**

On January 9, 2014, Representatives Ballance and Regier presented to the EQC during the Public Comment period of the meeting, a letter signed by twenty-five legislators requesting the EQC order and supervise an economic and environmental analysis of the proposed Confederated Salish and Kootenai Tribes (CSKT) water Compact (CSKT Compact). Since that time, six more legislators have signed onto the request. Additionally, Ravalli County unanimously passed a resolution which was subsequently presented to MACO for consideration recognizing the need for further analysis of the CSKT Compact prior to further consideration of its ratification by the legislature.

This document describes the need for, basis of, and mechanism for conducting a preliminary environmental, economic, and regulatory analysis of the proposed CSKT Compact prior to its consideration by the 2015 Montana state legislature.

The proposed CSKT Compact differs significantly from every Tribal Compact negotiated in Montana in terms of its scope, complexity, potential private property takings, and creation of a new experimental program for water administration that removes state citizens from the protection of the Constitution and laws of the State of Montana.¹ The Compact also includes claims for off-reservation water rights that are not federal reserved water rights. The Compact Commission and the DNRC did not conduct environmental, economic, or regulatory studies of the Compact, and a legal and constitutional review of the Compact bill was not conducted prior to its submission to the 2013 legislative session.

In addition to the required legal and constitutional review of the Compact and Compact bill, three Montana statutes also apply to the proposed analysis. These are:

- Private Property Assessment Act 2-10-101 – 2-10-112 MCA
- Montana Environmental Policy Act 75-1-102 – 75-1-118 MCA
- Administrative Procedures Act 2-4-101 – 2-4-711 MCA

The proposed studies described in the following pages will develop information required for the legislature to answer the following questions:

- Are any of the compact components likely to be ruled by a State or Federal court as a deprivation of private property in violation of the United States or Montana Constitutions?²
- What is the economic exposure or liability of Montana for payment for property takings resulting from the implementation of the Compact?

¹ See, Memorandum to the EQC from Twenty-Five Legislators, January 8, 2014

² One component of the proposed Compact, the Irrigation Water Use Agreement, was ruled by the Montana Twentieth Judicial Court a property taking without compensation in February 2013. Other components of the Compact may have similar implications (February 15, 2013 DV-12-327).

- Are there any parts of the proposed Compact that should NOT be included in a final compact because of their private property, environmental, legal, or regulatory impacts?
- Could the entire compact, or provisions of the Compact, be invalidated for failure to adhere to provisions of Montana Code?

Because the proposed CSKT Compact cannot be revised once it is ratified by the legislature, it is imperative that the legislature know its potential impact so it may act to mitigate, modify, or amend the Compact prior to its ratification.³

Private Property Assessment Act 2-10-101 – 2-10-112 MCA

The Private Property Assessment Act applies to proposed agency actions (such as an administrative rule, policy, or permit condition or denial), pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana Constitutions. The proposed action is a recommendation for the legislature to adopt a Compact that has already been shown by the Montana Twentieth District Court to have taking or damaging implications to property rights across western Montana.⁴

Under 2-10-105 MCA, the state agency is required to prepare a taking or damaging impact assessment for each action having taking or damaging implications. Using the Attorney General’s guidelines and checklist, the preliminary review includes an analysis of at least the following:

1. The likelihood that a state or federal court would hold that the action is a taking or damaging;
2. Alternatives to the action that would fulfill the agency's statutory obligations and at the same time reduce the risk for a taking or damaging; and
3. The estimated cost of any financial compensation by the state agency to one or more persons that might be caused by the action and the source for payment of the compensation.

In the instant case, the Attorney General’s checklist and evaluation would be completed for four specific elements of the proposed Compact:

- The irrigation Water Use Agreement
- On-reservation instream flows
- Off-reservation instream flows
- The new water administration program known as the Unitary Management Ordinance

A sample checklist evaluation for one component of the Compact, the Irrigation Water Use Agreement, is attached as an example of the kind of review recommended.

³ After ratification of the Compact, any changes to the Compact can be made only if the Tribes, State and the United States agree.

⁴ Ibid note 2.

Under 2-10-112 (MCA), the state agency's adopted action is not valid unless it has been through this private property assessment (MCA 2-10-105), and a private property owner affected by the agency action may bring suit for a declaration of invalidity of the action. Without this analysis of the Compact, it is possible that the entire Compact or elements thereof could be invalidated and a private property owner who prevails in a suit would be awarded reasonable and necessary attorney fees and court costs.

Implementation of Study. It is proposed that this study be conducted by staff members of the Montana Department of Revenue, the Department of Natural Resources and Conservation, and the Montana Department of Environmental Quality. A report would be prepared for the Environmental Quality Council.

Estimated Cost of Study. \$50,000 (maximum)

Recommended Source of Funding. DNRC -Compact Commission

Montana Environmental Policy Act 75-1-102 75-1-108 MCA

The Montana Environmental Policy Act's Model Rules (III) requires state agencies use the natural and social sciences and the environmental arts in planning and in decision making, and prepare a detailed statement (an EIS) on each proposal for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment. A detailed EIS is required only if a preliminary Environmental Assessment (EA) indicates that the proposed legislation will have significant impacts.

The significance of impacts is determined by assessing the following six components:

1. severity, duration, geographic extent, and frequency of occurrence of the impact
2. the probability that the impact will occur if the proposed action occurs,
3. growth inducing or growth inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts,
4. the importance to the state and to society of each environmental resource or value that would be affected,
5. any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions;
6. potential conflict with local, state, or federal laws, requirements, or formal plans

This document proposes that an Environmental Assessment using the above criteria be applied to the following components of the proposed Compact:

- The impact of a change of use from irrigation to instream flow on shallow ground water levels and water wells
- The impact of a 'robust river' standard for instream flow on fish survival, stream bank stability, erosion, and irrigation structures

- The growth inducing or growth inhibiting impacts of the proposed off-reservation instream flow claims
- Precedential components of the proposed Compact
- The impact of the Unitary Management Ordinance on the restriction of the use of private property

The overall goal of this effort would be to determine first, if a detailed EIS is required for the Compact, and alternatively, if there are changes or modifications to the Compact that would mitigate or eliminate these impacts.

Implementation of Study. It is proposed that the study be conducted using staff from the Montana Bureau of Mines and Geology, the MT Department of Fish, Wildlife and Parks, the Montana DEQ, the Montana Department of Agriculture and the MT DNRC.

Estimated Cost of Study. \$150,000

Recommended Source of Funding. DNRC and Compact Commission

Regulatory and Legal Studies 2-4-101 – 2-4-711 MCA

A major portion of the Compact is the proposed Unitary Management Ordinance (UMO) which is a new water administration program that replaces the state-based water administration in form and function. If the Compact is ratified as is, the UMO will effectively subcontract Montana’s constitutional authority and statutory responsibility for water administration for its citizens to the CSKT. In addition, the UMO will become state law.

The UMO exists now only as a proposed state law without implementing regulations. If and when those regulations are developed, the Montana legislature is required to review such regulations under Montana’s Administrative Procedures Act, Legislative Review of New Regulations as stated in 2-4-405 MCA. In addition, the development of those regulations must substantially comply with the mechanism outlined in 2-4-305 MCA and must be consistent with the intent of the legislature to protect the constitutional rights of and protections for its citizens per 2-4-403 MCA.

The proposed CSKT Compact bill was submitted to the 2013 legislative session without undergoing a legal and constitutional review. In addition, the lack of implementing regulations for the UMO make it impossible for the legislature to evaluate whether the UMO does comply substantially with the intent of the legislature to protect the constitutional rights of and protections for its citizens as outlined in 2-4-403 MCA. On its face, the removal of citizens from the protection of the Constitution and laws of Montana would seem to run contrary to legislative intent, as every legislator declares an oath to uphold the U.S. and Montana Constitutions. Any rules implementing the UMO could be problematic by implementing a law that is contrary to legislative intent.

Thus, a series of questions are proposed for the analysis of the UMO, and the Compact itself:

- Does the Compact and UMO comply with the Constitution and laws of Montana?
- Should the UMO be a part of the Compact especially since it has no implementing regulations and appears on its face to violate the laws and Constitution of the State of Montana?
- Should language be added to the Compact that requires the development and implementing regulations comply with state law as in 2-4-403 MCA and 2-4-405 MCA and that provides for legislative review before their implementation?
- Should language be added to the Compact that provides for legislative review, evaluation and adjustment at certain intervals instead of a forever document that cannot be changed?

It is suggested that these questions be addressed through a comprehensive legal, constitutional, and regulatory review of the UMO prior to submission of the Compact to the legislature in 2015.

The proposed CSKT Compact also includes an off-reservation claim for instream flow water rights. These water rights claims are not federal reserved water rights as per the Winters Doctrine⁵, but are instead aboriginal treaty rights held in common with the citizens of the Territory⁶. The Montana General Stream Adjudication, and thus the Montana Water Court, is able to address federal reserved water rights because of the McCarren Amendment⁷, which waived the sovereign immunity of the United States so that the water rights belonging to the federal government, and the Tribes claiming federal reserved water rights, could be resolved in State court. Significant legal questions remain as to the ability of the State Water Court, under the McCarren Amendment, to address non-federal reserved water rights treaty right claims outside of the Flathead Indian Reservation, and critically, whether a 'right to take fish...in common with the citizens of the Territory' conveys a water right.

It is further suggested that the comprehensive legal and constitutional review of the Compact's inclusion of off-reservation treaty claims be conducted prior to submission of the Compact to the 2015 legislative session.

Implementation of Study. It is proposed the study be implemented by the Code Commissioner and the Legislative Services Legal Services Office.

Estimated Cost. \$25,000

Recommended Source of Funds. Legislative Services Division

⁵ Winters v. U.S. 207 U.S. 564 (1908), establishing the Winters Doctrine that whenever the United States reserves land out of the public domain, the land carries an implied water right sufficient to fulfill the purposes of the reservation.

⁶ 12 Stat. 975 (1855) Treaty of Hellgate, Article III. Article I waived all rights, claims and title to aboriginal lands that were ceded to the United States in exchange for the reservation of the Flathead Indian Reservation.

⁷ 43 U.S.C. §666. See also Carter, John, *Indian Aboriginal Rights and Reserved Water Rights, An Opportunity Lost*, Essay, 64 Mont. L. Rev. 377 2003

Conclusion

Three sets of studies are proposed for the CSKT Compact that addresses, at the preliminary level: the private property, environmental and legal/regulatory aspects of certain provisions of the Compact. A fundamental threshold question that guides such studies is whether more detailed analyses, such as an EIS, are required, and, if so, whether adjustments can be made in the Compact that will eliminate the potential for private property takings or damage, environmental damages, or legal and regulatory issues of concern to the legislature and Montana citizens.

For the most part, it seems these studies can be completed 'in house', although expertise outside of the DNRC and EQC oversight is recommended so as to assure the legislature receives independent and unbiased information.

The estimated total cost of such studies is \$225,000, to be derived from existing agency and committee budgets and if necessary, the Governor's discretionary funds.

ATTACHMENTS

1. Ravalli County Resolution in Support of Environmental, Legal, and Regulatory Studies, Presented to the Montana Association of Counties
2. Sample Attorney General Checklist Private Property Assessment Act for a portion of the Compact's Irrigator Water Use Agreement and explanation for rankings

ATTACHMENT 1

RESOLUTION IN SUPPORT OF A NEGOTIATED COMPACT RESOLVING THE FEDERAL RESERVED WATER RIGHTS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

Whereas, negotiation is an effective means of resolving the federal reserved water rights of the Confederated Salish and Kootenai Tribes (CSKT), and

Whereas, extensive work has been done by the Montana Reserved Water Rights Compact Commission in successfully negotiating other federal reserved water rights Compacts across Montana, and

Whereas, the Montana Reserved Water Rights Compact Commission completed negotiation with the Confederated Salish and Kootenai Tribes and developed a proposed Compact for consideration in the 2013 Montana Legislative session, and

Whereas, the proposed CSKT Compact differs considerably from all the other Tribal Compacts negotiated by the Montana Reserved Water Rights Compact Commission, and

Whereas, the proposed Compact will be a legal document that cannot be amended by the State of Montana at a later date and whose components result in irretrievable actions that significantly affect the quality of the human and natural environment, and

Whereas, the title to the off-reservation water rights proposed in the Compact will be held by the United States, in trust for the tribes, increasing the likelihood of federal control and management of state and county watersheds, water quality, and water development, and

Whereas, the Compact's "Unitary Management Ordinance" sets dangerous precedent by its removal of Montana citizens from the protection of the Montana Constitution, and

Whereas, the information needs required to make an informed decision regarding the Compact include an evaluation of the potential economic, regulatory, and environmental impacts of the proposed Compact on the eleven counties of western Montana which may be affected, and

Whereas, the proposed Compact is currently being studied by the Water Policy Interim Committee, and

Whereas, twenty-five legislators presented a request to the Environmental Quality Council for an independent study of the potential economic, regulatory and environmental impacts of the proposed Compact, and

Whereas, the Compact will most likely be presented for consideration in the 2015 legislative session,

MACO supports:

1. A timely evaluation of the economic, regulatory, and environmental impacts of the proposed Compact so as to provide legislators with the information required to properly consider the proposed Compact in the 2015 legislative session, and
2. A one-year extension of the filing deadline for the CSKT federal reserved water rights claims until July 1, 2016 if needed to complete such studies, and
3. The resolution of the federal reserved water rights claims of the CSKT through negotiation provided the information requirements stated above are met.

SAMPLE
ATTACHMENT 2
MONTANA DEPARTMENT OF JUSTICE
PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST
DOES THE PROPOSED AGENCY ACTION HAVE TAKING IMPLICATIONS UNDER THE
PRIVATE PROPERTY ASSESSMENT ACT?

- | YES | NO | |
|-------------------------------------|-------------------------------------|---|
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | 1. Does the action pertain to land or water management or environmental regulation affecting private real property or water rights? |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 2. Does the action result in either a permanent or indefinite physical occupation of private property? |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | 3. Does the action deprive the owner of all economically beneficial use of the property? |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | 4. Does the action require a property owner to dedicate a portion of property or to grant an easement? [If the answer is NO , skip questions 4a and 4b and continue with question 5.] |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 4a. Is there a reasonable, specific connection between the government requirement and legitimate state interests? |
| <input type="checkbox"/> | <input checked="" type="checkbox"/> | 4b. Is the government requirement roughly proportional to the impact of the proposed use of the property? |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | 5. Does the action deny a fundamental attribute of ownership? |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | 6. Does the action have a severe impact on the value of the property? |
| <input type="checkbox"/> | <input type="checkbox"/> | 7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally? [If the answer is NO , do not answer questions 7a-7c.] |
| <input type="checkbox"/> | <input type="checkbox"/> | 7a. Is the impact of government action direct, peculiar, and significant? |
| <input type="checkbox"/> | <input type="checkbox"/> | 7b. Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded? |
| <input type="checkbox"/> | <input type="checkbox"/> | 7c. Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question? |

Taking or damaging implications exist if YES is checked in response to question 1 and also to any one or more of the following questions: 2, 3, 5, 6, 7a, 7b, 7c; or if NO is checked in response to questions 4a or 4b. If taking or damaging implications exist, the agency must comply with Section 5 of the Private Property Assessment Act, Mont. Code Ann. § 2-10-105, to include the preparation of a taking or damaging impact assessment. Normally, the preparation of an impact assessment will require consultation with agency legal staff.

SAMPLE
MONTANA ATTORNEY GENERAL PRIVATE PROPERTY ASSESSMENT CHECKLIST
CSKT COMPACT WATER USE AGREEMENT
EXPLANATION FOR RANKINGS

1. YES. The irrigator water use agreement pertains to the regulation of water applications to private property within the Flathead Indian Reservation.
2. NO. The action does not involve the permanent or indefinite physical occupation of private property.
3. YES. The action reduces the application of water to all irrigated lands from historic beneficial use (2-4 acre feet per acre) to a uniform application of 1.4 acre foot per acre of irrigated land. According to the DNRC, this amount of water is the minimum necessary to grow pasture, limiting the private property owner to pasture only. Private property growing potatoes, vegetables, sugar beets, mint and other crops would be deprived of all of the economically beneficial use of the property for those crops, and reduced to growing pasture.
4. YES. The government requirement to reduce the amount of water to irrigated land requires the irrigator to dedicate his land to low value pasture.
 - a. NO. The government requirement to reduce water to agricultural land conflicts with the legitimate state interest of protecting agricultural land, the economy of the region, and to not interfere with the use of private property
 - b. NO. The government requirement to reduce the amount of water to private agricultural lands so that water can be dedicated to instream flow will result in a significant drop in the value of private agricultural lands.
5. YES. The government action denies a private property owner the right to use and enjoy his/her property.
6. YES. The DNRC estimates that each acre foot of water adds \$2000 of value to each irrigated acre of land. Reduction of the amount of water beneficially used on private agricultural lands could result in thousands of dollars loss in the value of private property.
7. UNCLEAR. The physical disturbance of the property by applying less water is likely to impact ground water levels and thus water wells in the region, which impacts the private property of others. Suggest environmental assessment needed in order to answer this question and parts (a), (b), and (c).