

April 28, 2014

Memorandum

To: Water Policy Interim Committee

From: Representatives Nancy Ballance and Keith Regier

Subject: Review of the Proposed CSKT Compact

This memorandum clarifies the request for economic, legal/constitutional, and environmental analysis of the proposed CSKT Compact prior to its consideration in the legislature. Elements of the January 8 and March 19, 2014 memoranda to the Environmental Quality Commission are incorporated by reference herein. Those memoranda outline the reasons why the proposed CSKT Compact should be studied as a means to provide the information and confidence necessary for legislators to make an informed decision on Compact ratification.

Environmental Review

The purpose of the proposed environmental review is to conduct a preliminary environmental assessment¹ of key elements of the Compact in order to determine (a) if there are likely to be significant environmental impacts of the Compact, (b) whether further studies are required, and (c) whether the environmentally-offending elements of the Compact can be modified to reduce their impacts or need for any additional study.

The focus of the preliminary environmental assessment is limited to the irrigation Water Use Agreement, and in particular the impact of certain aspects of the agreement on local ground water wells and water levels². The State of Montana, through the DNRC and Compact Commission, failed to review the hydrologic model prepared by the CSKT, and the CSKT failed to share crucial data with the State³. Such a review would have provided key decision-making information necessary to determining the effectiveness of a key component of the Compact and whether it would have unexpected economic impacts for which the State and the United States would be liable.

There are two mechanisms through which to conduct this preliminary environmental assessment. The first is the use of the Tribes' existing model with an eye toward whether the data and model itself can be used to answer the question regarding the impact of the water use agreement on local ground water levels. The second method would involve the use of existing limited canal seepage studies combined with ground water and well information to estimate the scale of possible impacts of the water use agreement on shallow ground water levels. Either approach should be able to identify if further studies

¹ As distinguished from an Environmental Impact Statement, which is more detailed and intensive

² The focus will be on (a) the impact of removing 1 million acre feet of water from canals and fields on shallow ground water levels and wells and (b) lining of irrigation canals [rehabilitation project] on shallow ground water

³ Water Policy Interim Committee hearing of March 18, 2014

are necessary, or whether portions of the water use agreement can be modified to reduce and/or eliminate those impacts.⁴

The use of the Montana Environmental Policy Act (MEPA) as a framework for this limited analysis is appropriate and necessary⁵. First, the MEPA provides the proper scientific and analytical framework through which to conduct an evaluation of limited scope on a portion of the proposed Compact. Second, MEPA was designed to and is the only legal framework that allows the legislature to conduct any environmental review. Finally, there is ample language within MEPA itself that suggests that at a minimum, an environmental assessment was required on the proposed Compact because of the finality implied through its ratification by the legislature⁶. The MEPA was designed as a law to protect Montanans from any state agency action that would be harmful to the human environment, values that are enshrined in the Montana Constitution. Relevant language from MEPA is provided in Attachment 1.

Legal and Constitutional Review

Perhaps the most significant review that must be conducted of the proposed CSKT Compact prior to its ratification is a legal and constitutional review of its provisions, specifically the Unitary Management Ordinance and the off-reservation claims for aboriginal water rights. Neither the UMO nor the off-reservation claims for aboriginal water rights were evaluated by the legislative services division prior to the Compact's submission to the 2013 legislature because there was "no case law applicable or by which to evaluate them"⁷. That there is little case law applicable to these issues suggests that further analysis is required. Further, both the UMO and the inclusion of off-reservation aboriginal water claims in the Montana General Stream Adjudication are precedent setting not only for Montana but for all western states.

An independent review of key legal and constitutional components of the proposed Compact is recommended, through which the appropriate expertise is tasked with the activity⁸. Questions to be addressed are contained in Attachment 2, and the context for analysis includes but is not limited to the definition and quantification of federal reserved water rights, the Hellgate Treaty, the Montana and U.S. Constitutions, McCarren Amendment, and federal Indian law, tribal-state jurisdiction under Public Law 280 and the 1934 Indian Reorganization Act, and case law regarding off-reservation aboriginal claims for water.

⁴ We recommend that the Montana Bureau of Mines and Geology lead this effort. The Bureau of Mines just completed an analysis of effects to the water table from stream depletions in the Dillon area. See http://www.mbmgs.mtech.edu/gwip/gwip_pdf/2012/2012-factSheet-june-12.pdf

⁵ Additional legal framework includes the stream depletion zone rules, which could be used to 'reverse' the analysis and evaluate the removal of water from a canal (stream) and its impact on ground water wells.

⁶ The Compact cannot be changed once it is ratified, unlike every other bill the legislature considers.

⁷ Personal communication with legislative services staff, February 2014

⁸ We strongly recommend that no interested party—the Attorney General's Office, legislative services, or counsel for any of the participants in the proposed Compact—is tasked with this work.

Economic Evaluation

The primary purpose for conducting an economic assessment of the proposed Compact is to assess the potential economic liability to the State of Montana for private property takings resulting from implementation of the Compact. Equally important, this review will investigate the impacts on individuals, economic values, and on future growth and economic development. The specific elements of the Compact requiring this review include (a) the water use agreement, (b) the transfer of water use from irrigation to instream flow, (c) regulation imposed by the new unitary water management ordinance, (c) the tax implications of the transfer of lands from private property to reservation status, and (d) the preclusion of growth opportunities resulting from both on-reservation and off-reservation components of the Compact.

The most efficient mechanism through which to enact this review is the Attorney General's Private Property Assessment Act checklist combined with analysis conducted by the Montana Department of Revenue^{9,10}. If potential takings are uncovered, estimates are made of Montana's liability for such takings resulting from its approval of the Compact. Such an assessment can also be used to modify elements of the proposed Compact to minimize or eliminate such economic consequences.

Specific language from the Montana Private Property Assessment Act is included in Appendix A. Importantly, if such analysis is not completed, the affected counties can void the Compact in its entirety.

⁹ Because the Attorney General may be called upon to defend the State of Montana in a lawsuit on water rights, we do not recommend that the Attorney General's office be involved in this evaluation.

¹⁰ Such a study could be led by the Montana Department of Revenue and lead to an 'order of magnitude' estimate of economic impacts, including taxation. Elements of this analysis may include eminent domain components, devaluation appraisal of irrigated lands, and residential-real estate appraisals.

ATTACHMENTS

- 1. Excerpts from MEPA and Private Property Assessment Act**
- 2. Revised list of Questions for Review of CSKT Compact**

Attachment 1**EXCERPTS FROM MEPA AND PRIVATE PROPERTY ASSESSMENT ACT****Excerpts from MEPA**

1. Legislature, mindful of its constitutional obligations under Article II, section 3 (inalienable rights to clean environment and rights of pursuing life's basic necessities including enjoyment of property) and Article IX (state responsible for protection and improvement of environment) of the Montana constitution, has enacted MEPA
2. Legislative intent that the requirements of MEPA provide for adequate review of state ACTIONS in order to ensure that environmental attributes are fully considered "by the Legislature in enacting laws to fulfill constitutional obligations (75-1-102(1) MCA. Language added by SB No. 233 Chapter 396, Laws of 2011)
 - a. ACTION. An activity that is undertaken, supported, granted, or approved by a state agency. "Agency" includes "commission".
3. The purpose of requiring an EA and an EIS is to assist the legislature in determining whether laws are adequate to address impacts to Montana's environment and to inform the public and public officials of the potential impacts resulting from decisions made by state agencies (75-1-102(2))
4. General Requirements for the Environmental Review Process. Requires state agencies to...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 (MEPA Model Rules III, p 118-119 MEPA handbook).
 - a. (2) An EA may serve any of the following purposes
 - i. (a) Planning and decision making
 - ii. (b) Evaluation of reasonable alternatives and development of conditions, stipulations or modifications to be made part of a proposed action
 - iii. (c) Determine the need to prepare an EIS through an initial evaluation and determination of impacts associated with a proposed action
 - iv. (d) to ensure the fullest appropriate opportunity for public review and comment on proposed actions, including alternatives and planned mitigation
 - b. (3) An agency shall prepare an EA whenever
 - i. (a) the action does not have a categorical exclusion and it is not clear without preparation of an EA whether the proposed action is a major one significantly affecting the quality of the human environment
5. Determining the Significance of Impacts. The need to prepare an EIS or EA is determined by the agency's evaluation of (MEPA model rules IV, p 120 MEPA Handbook)
 - a. Severity, duration, geographic extent, and frequency of the occurrence of the impact
 - b. Probability that the impact will or will not occur
 - c. Growth inducing or growth inhibiting aspects of the impact
 - d. Quantity and quality of each environmental resource or value that would be affected
 - e. Importance to the state and to society of each environmental resource or value
 - f. Any precedent that would be set as a result of an impact of the proposed action
 - g. Potential conflict with local, state or federal laws, or requirements

Excerpts from Private Property Assessment Act

1. **2-10-102 Purpose.** An assessment of each state agency action with taking or damaging implications is needed to avoid imposing expensive litigation burdens on citizens and to minimize the risk of unanticipated demands on the state's fiscal resources
2. **2-10-103. Definitions.** (1) "Action with taking or damaging implications" means a proposed state agency 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 constitution.
3. **2-10-105. Impact Assessment.** (2) Using the attorney general's guidelines and checklist, the person shall prepare a taking or damaging impact assessment for each state agency action with taking or damaging implications that includes an analysis of at least the following:
 - a. the likelihood that a state or federal court would hold that the action is a taking or damaging;
 - b. 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
 - c. 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.
4. **2-10-112. Suit to invalidate state agency action.** (1) A state agency's adopted action is not valid unless the action was taken in compliance with [2-10-105](#). A private property owner affected by a state agency action taken without fulfilling the requirements of [2-10-105](#) may bring suit for a declaration of invalidity of the action.
 - (2) A suit under this section must be filed in a court in the county in which the property owner's affected property is located. If the affected property is located in more than one county, the property owner may file suit in any county in which the affected property is located.
 - (3) The court shall award a property owner who prevails in a suit under this section reasonable and necessary attorney fees and court costs.

Attachment 2
Revised List of Questions for Proposed
Legal/Constitutional, Economic, Environmental and Analysis of
The Proposed CSKT Compact

Legal/Constitutional Analysis

1. What is the purpose of the Flathead Indian reservation?
2. Unitary Management Ordinance
 - a. Is there a compelling legal reason for the State of Montana to delegate its constitutional responsibilities for water administration of its citizens on the Flathead Reservation to a foreign/sovereign government (Tribes, US)?
 - b. Does the State of Montana have the authority and is there a compelling legal reason to remove its citizens out from under the protection of the laws and Constitution of Montana?
 - c. Does the Unitary Management Ordinance violate the equal protection clauses of the Montana and United States Constitution?
 - d. Does the Unitary Management Ordinance, and to-be-developed regulations for its implementation, comply with the legislature's intent to protect the constitutional rights of its citizens?
 - e. Does the Unitary Management Ordinance enable the taxation of Montana citizens by a Tribal government? Is such taxation legal?
 - f. Is there a compelling legal reason for the land use ownership pattern on and demographics of the Flathead Indian Reservation to convey the need for the CSKT to have jurisdiction over state-based (and taxed) land and water rights?
 - g. Are there any judicial proceedings in which the construction or interpretation of the UMO is or could be at issue?
 - h. What are the "consensual agreements" in the Unitary Management Ordinance?
 - i. How will they be implemented
 - ii. How are they transparent
 - iii. Do they create an 'extra-legal' avenue to avoid the provisions of the Unitary Management Ordinance?
 - i. What is the court of competent jurisdiction, how will it be determined, are there standards?
 - j. Does the mutual defense clause constrain the right to or otherwise prevent the citizen to file suit or seek remedy or redress?
 - i. Under what conditions would the mutual defense clause be exercised?
 - k. Can other tribes whose compacts have been ratified by the state or are not ratified yet re-open their Compacts to seek jurisdiction over non-members if this compact is passed?
 - l. What regulatory authority does the state have in decisions of the Unitary Management Board, especially where those decisions conflict with state law?

3. Off-reservation instream flow claims on ceded aboriginal lands

- a. Are off-reservation claims to water “federal reserved water rights” within the context of Winters Doctrine and the McCarran Amendment?
 - i. Do federal reserved water rights exist absent a reservation of land by the federal government?
 - ii. Does the Montana Water Court have jurisdiction under the McCarren Amendment to hear any other federal water claim except reserved water rights?
 - iii. Are aboriginal claims to water off-reservation a ‘federal reserved water right’?
 - iv. Have off-reservation aboriginal claims to water ever been included in a federal reserved water rights proceeding?
 - v. What are the precedential implications of including off-reservation water claims in a federal reserved water rights proceeding?
 1. For Montana Indian Reservations
 2. For other states
 - vi. Can other Montana Tribes whose Compacts have been or have not been ratified by the State reopen their Compacts to seek water for off-reservation rights granted by treaty?
- b. Does the inclusion of off-reservation water claims in the proposed Compact comply with the intent and requirements of the McCarran Amendment, the Montana General Stream Adjudication, and the jurisdiction of the Montana Water Court?
- c. Does a “right to take fish...in common with the citizens of the territory” convey a water right for instream flow right to either the Tribe or Montana citizens?
 - i. Does the use of off-reservation instream flow to maintain habitat or flow change the purpose of the Treaty to “take fish” in common with the citizens of the Territory?
 - ii. Does the right to hunt maintain habitat or imply a water right to maintain

4. The Compact

- a. Does Montana have the legal and constitutional authority to review and alter a Compact after its ratification?
 - i. What provisions would be required in the Compact language to authorize such a review?
- b. Off of a federal reservation, does an Indian Tribe or the federal government have any legal authority to manage, administer, “call”, or develop water resources?
 - i. Does the DNRC have the authority to issue water rights to the federal government outside of its finalized Compact, and without an analysis of the preclusion of future growth or private property assessment act evaluation?
- c. Is there a distinction between the ownership of water and the ownership of a water right?
 - i. If a federal reserved water right is owned by the federal government, does Montana still own the water?

- ii. If Montana owns the water, who has the right to administer water rights, including federal reserved water rights?

Socioeconomic and Private Property Analysis

1. **Compact, Water Use Agreement, Unitary Management Ordinance, Off-Reservation Water Claims**
 - a. Have any of the compact components been ruled or are (possibility) likely to be ruled by a State or Federal court as a deprivation of private property in violation of the United States or Montana Constitution or laws?
 - i. Owner of fee land with property rights on it transferred over to the tribe
 - b. Is there risk of economic liability to Montana of payment for property takings resulting from the implementation of the Compact? What is the risk and range of dollars involved?
 - i. If there is a risk, who is liable for payment? MT, CSKT, or Feds? What is the liability of the United States to Montana citizens or the State for property takings?
 - c. What are the adverse economic effects of off-reservation claims for water, or the potential sale or lease of water by the CSKT, including basin closures, preclusion of future development, or private property takings?
 - i. Is there enough information available in the record to make such a determination at this point?
 - d. What are the adverse economic impacts of off-reservation "calls" for water by the Tribes?
 - i. Under what conditions can the Tribes make a call for water, and who has the burden of proof for making that call?
 - ii. Can the Tribes make a call for water if they plan to sell or lease water downstream either in-state or out of state, and what would be the adverse economic impacts of this action?
 - e. Could the entire Compact, or provisions of the Compact, be invalidated for failure to adhere to the analysis required under the Private Property Assessment Act, violations of the Montana Constitution or statutes, takings, environmental laws, rules of federal reserved water rights proceedings, economic impacts or any other reason?
 - f. What are the economic impacts to Montana citizens of resolving water disputes in a 'court of competent jurisdiction'?
 - g. Is there any guarantee that the UMO will not be dominated by or operate under the control of tribal law?

Environmental Analysis

1. **Water Use Agreement**
 - a. What are the physical and economic impacts of a change of use from irrigation to instream flow on shallow ground water levels and water wells?
 - i. How are wetlands be maintained?

- b. What is a 'robust river' standard?
 - i. What are the impacts of a 'robust river' (page compact) standard for fish survival, stream bank stability, erosion, and integrity of irrigation structures?
Increasing quadrupling instream flow in compact
 - c. What is the standard for instream flow cited in the water abstracts? Is the standard focused on fish survival, habitat maintenance, or something else?
 - d. What are the growth inducing or socioeconomic growth inhibiting impacts of the on-reservation "robust river" standard for instream flow (economic)
 - e. Is there enough information available to definitively determine the 'water savings' components of irrigation rehabilitation?
 - f. Is there a process to ensure that extra duty water will be received by those who apply for it?
 - i. Does or will the time period for this application for extra duty water (5 years) risk the economic viability of his/her agricultural operation?
 - ii. Could there be an added charge for this water?
2. Off-reservation instream flow claims
- a. What are the growth inducing or growth inhibiting impacts of the off-reservation instream flow claims?
 - i. Is there enough information to assess this question, including the aspects of basin closure, call results?
 - ii. How many times in 20 years will an irrigator be called on its water rights?
3. Compact
- a. What precedential components of the proposed Compact would commit the state to future actions with significant impacts or a decision in principle about such future actions?
 - b. What are the growth inducing or growth inhibiting impacts of the proposed Compact?
 - c. Does the proposed Compact or any part thereof restrict the use of private property, or impose undue governmental regulation that would prohibit the use and enjoyment of private property?
 - d. Are there alternatives to the proposed CSKT Compact that were not considered which would minimize or eliminate impacts to the human environment?