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ALERT: DAINES introducing his modified CSKT Compact in two weeks to Congress. Where the tribes get even more of Montana's resources in another sham "negotiation".

You can assume Greg Gianforte is on board.

They chose winners and losers and Montana citizens have lost, as Daines serves his tribal clients again.

Western Montana Water Rights ~ keeping western Montanans informed about the Flathead Reservation Water Compact



The CSKT Off-Reservation Water Claims: “If You Like Your Water Right You Can Keep It”

Posted by drkate | Nov 24, 2019

Once again, the proponents of the CSKT Compact are flooding the airwaves, newspapers, and mailboxes with threats of “endless litigation” and “having to hire your own lawyer” if the CSKT Compact is not passed by Congress. They claim that if the CSKT Compact is passed, Montanans will not have to go to court to defend their water rights from the 10,000 off reservation water claims filed by the Tribes and the United States.

This sounds like “if you like your health insurance (water right), you can keep it (won’t have to go to court to defend your water right)”, so just pass the CSKT Compact. But as with Obamacare—which had to pass in order to find out what was in it—this is a failed promise repeated endlessly by compact proponents much to the detriment of informed decision-making in Montana.

Two Sets of Off-Reservation Water Claims

There are two sets of off-reservation claims. The first set is associated with the CSKT Compact, with some geographically located off the reservation on rivers and streams in western Montana, Flathead Lake, and other claims on private lands within the reservation.

The second set of off-reservation claims were filed by the Tribe after the CSKT Compact was passed by the legislature, known as the “10,000 claims”, which cover additional sites in western Montana and expand to 2/3 of eastern Montana. The 10,000 claims are not part of the CSKT Compact. A database showing the 10,000 claims can be found at this link:

<https://tinyurl.com/10000Claims>

So, urging Congress to pass the CSKT Compact will not eliminate the 10,000 claims because these claims are not part of the Compact. They will still have to be separately adjudicated in the Montana Water Court.

Some have said that the Tribes will “give up” these off-reservation claims if Congress passes the Compact. That’s what they told Montana citizens before the legislature passed the Compact—that if it was passed, they would not file the 10,000 claims. But the Tribes filed those 10,000 claims anyway, and the state of Montana let them, despite “negotiating” the CSKT Compact “for 20 years”. So, what and who are citizens to believe? Did they file these claims to hold the state and its citizens hostage?

The Achilles Heel

The weak point of both the compact-related and non-compact 10,000 off-reservation water claims is that these claims are not “federal reserved water rights” associated with the Winter’s Doctrine. The state refers to them as ‘reserved rights’ in their advocacy literature without disclosing they are referring to the compact’s newly-created “tribal reserved aboriginal water right” that is allegedly derived from the Treaty of Hellgate, not the Winter’s Doctrine. But the only “reserved water right” that is relevant to any tribal compact in Montana and the United States is a “federal reserved water right” derived from the Winters Doctrine.

A federal reserved water right by legal definition exists only within the geographical boundaries of the reservation and is a discrete amount of water necessary to fulfill the purposes of the reservation. By definition there are no “off reservation federal reserved water rights”. That the State of Montana keeps representing that the CSKT Compact quantifies “federal reserved water rights—both on and off the reservation” is stunning because it is 100% incorrect. There are no “federal reserved water rights” off the reservation.

What’s Next? With and Without the CSKT Compact

Under the CSKT Compact, the state is bound to fight its own citizens in defense of the compact-related off reservation water rights through a federal-state-tribal “mutual defense” clause, both in state and federal court. With the Compact, if the state court does not have jurisdiction to address the off-reservation non-federal reserved water rights, then the state is bound by the Compact to fight its citizens in federal court in favor of the Tribes’ off-reservation 10,000 water claims (see page 62, CSKT Compact). Thus, the Compact binds the state to future litigation.

Finally, with the Compact, the 10,000 off-reservation claims remain to be adjudicated in the MT Water Court.

Without the Compact, all water claims go to the Water Court for adjudication with no “compact overlay”. Here, the state is required to defend its citizens against all the off reservation, non-federal reserved water right claims in both state and federal court. The myth that individuals will have to hire their own lawyers belies the fact that it is the responsibility of the state Attorney General’s office to defend the water rights of Montana and its people against encroachment by other states or the United States through the Tribes.

Remember that all the off-reservation claims filed in or outside of the compact are not federal reserved water rights, so it won’t take thousands of attorneys to defeat them. Just ask the state of Idaho, which recently defeated similar Tribal off-reservation water claims based on history and law. The Idaho Attorney General’s office was able to defeat hundreds of off-reservation claims on behalf of thousands of Idaho citizens.

Given the reality of the law and issue of the CSKT compact’s 10,000 off-reservation water claims, and the fact that the 10,000 off-reservation claims still exist with or without the Compact, the best environment to examine and validate or reject these claims is the MT General Stream adjudication.

Through the lens and application of federal and state law, the MT Water Court is fully capable of sorting it out and can then finish up the general stream adjudication.