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Water compact shreds U.S. and Montana constitutions

BY VERDELL JACKSON | December 8, 2019

The Confederated Salish and Kootenai Tribes Water Compact is supposed to secure federal reserved water rights. In 1908 in *Winters v. United States*, the Supreme Court case clarified water rights of American Indian reservations. Known as the Winters doctrine, it stated that when the United States established a reservation for tribal purposes, it impliedly included with that reservation a reserved water right of unappropriated water.

The reserved water rights were provided to reservations to make them productive. This case set the standards for the U.S. government to acknowledge the vitality of American Indian water rights, and how rights to the water relate to the continuing survival and self-sufficiency of American Indian people.

The CSKT Reservation was opened to settlement in 1909 by Presidential Proclamation with the promise that the federal government would plan and fund the construction of the Flathead Irrigation Project (FIP), along with Kerr Dam to serve all interests, Indian and non-Indian alike.

Approximately 128,000 acres of land on the reservation are irrigated with 350,000 acre feet of water mostly out of the Mission Mountains with some water pumped out of the Flathead River.

Because the United States developed the Flathead Irrigation Project to serve everyone, the reservation is presently very productive with almost all the irrigable land being farmed and producing cattle. If more irrigable land could be identified that is not being irrigated, additional water can be obtained by quantifying (justifying) an amount based on historical irrigation data.

The compact did not implement this opportunity like other reservation compacts in Montana. The CSKT leadership wanted total control of all of the water in Western Montana and realized that the federal government had already given their federal reserve water rights, which they elected not to use. The tribes currently have about 270,000 acre feet of instream flow water inside the irrigation project that has been in place since 1985.

The Montana Legislature recognized the value of leaving water in streams for fish and wildlife purposes in 1969.

That year they passed an instream flow protections bill that became law.

These water rights, which are managed by Fish, Wildlife and Parks, have become known as Murphy rights. Murphy water rights set minimum flows in streams and rivers that are needed to protect fish. Irrigators may be limited on the amount of water they use, and dams ordered to release water.

This eliminated the argument that water was needed for fish.

As a last resort, the CSKT leadership decided to go for control of all of the water that was in their traditional hunting and fishing area (aboriginal rights) and use article III of the 1855 Hell Gate Treaty for justification: “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 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; otherwise Montana citizens could get a water right to protect their favorite place to fish. The Indian right is in common with the citizens of the territory.

These subsistence rights which show up in some treaties are given only to tribes known to be peaceful. A subsistence lifestyle was common among both Indians and the citizens of the territory 159 years ago. Article III is a doctrine of public use of land on and off the reservation and cannot be legitimately stretched to include a stream flow water right for the CSKT. The Hell Gate Treaty is very specific and easy to understand and does not mention water or water right.

Article I of the treaty also makes it very clear that the CSKT cannot be granted off-reservation water rights based on the right to hunt and fish on their aboriginal land: the 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 aboriginal rights were given up and paid for.

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 right in place for “springs and fountains” with a priority date of 2007 while protecting all present uses and some future uses.

Adjudication is a fair and equitable process.

In most cases it is done without a lawyer. The tribe filed additional water claims after the Legislature voted on the compact. The Montana Water Court will sort and manage them based on their degree of validity.

Most of them, if not all of them, will not have a legal basis and will be dismissed.

On the other hand, the compact provides a kind of “certainty” because the tribe ends up with the ownership of almost all the water in Western Montana. There is nothing in the CSKT Compact that gets rid of the 10,000 claims that the tribe has already filed. The threat of 10,000 water claims filed by the CSKT has been effective for proponents of the compact. This threat and other lies were put in radio ads for months to get the Legislature to pass the compact.

Actually, 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.

Off-reservation water rights in the CSKT Compact will affect 11 counties (330,000 citizens) because their properties will be lowered in value when the compact grants water rights (1855 enforceable priority date) for all of the available water. Also, irrigation wells over 100 gallons per minute can be ordered to shut down in a call for a nearby stream. Private water rights of Indians and non-Indians on the reservation are given to the tribe which violates Montana’s constitution.

The 1,500 pages in the CSKT Compact is[sic] mostly water right abstracts that claim water on thousands of streams, rivers and lakes in Western Montana. This puts the CSKT in a position to control all the water in 11 counties. For example, one of the abstracts claims 229,000 acre feet in the head waters of the Flathead River and Flathead Lake. If Missoula wants more water in the future, they will have to buy it from CSKT if they choose to sell it. The abstract states that the CSKT can lease any portion of this water right for use on or off the reservation.

On the CSKT reservation, the water right abstracts take the unallocated water plus the existing water rights of Indians (5,000) and non-Indians (28.000).

This could be the end of the government-funded Flathead Irrigation Project because the compact cuts the water for irrigation by 50%. Only 179,000 acre feet is available and the remainder of the historical use (321,000 acre feet in wet years and 571,000 acre feet in dry years) goes to in-stream flow.

It saddens me to write another letter on the CSKT compact which occupied much of my 16 years in the Montana Legislature. As Sen. Al Olszewski said in his letter (Dec. 1), I will not violate my sacred oath to defend the United States and the Montana Constitutions. The CSKT Compact shreds both constitutions and every single Democrat voted for it, and Gov. Bullock and Attorney General Tim Fox supported it, even though it did not have the required 2/3 vote. It would be a disaster for our state and our children.

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