

## CSKT Compact Frequently Asked questions

### *Would the proposed Compact protect existing rights?*

Report p. 4, #2

Yes. The Compact would completely protect all existing non-irrigation water rights from call and would provide substantial protections for existing irrigation rights through quantifications and limits on the Tribal water rights.

### *Would the Compact Close basins to new appropriations?*

p. 4, #4

No. One of the RWRCC's primary goals in negotiating the proposed Compact was to avoid basin closure and to ensure that new development in the compact area could occur. The Compact would allow new development to occur in many basins that are functionally closed due to lack of legally available water.

### *Would the Compact affect the ownership of water?*

p. 4, # 3

No. Under the Montana Constitution, the State of Montana owns all the water in the State. Montana provides water rights for the use of the State's water. The Tribes already have legally recognized water rights; the Compact simply quantifies those rights. The Water Use Agreement would resolve an existing dispute over Flathead Indian Irrigation Project Rights but would not "take" individually filed water rights.

### *What is the legal basis for the Tribes' claims to water?*

p. 6, #8

The Treaty of Hellgate established the Flathead Indian Reservation on July 16, 1855. By establishing the Flathead Indian Reservation the Treaty impliedly reserved sufficient water to fulfill the purposes of the Reservation, and reserved to the Tribes "aboriginal" rights to fish both on and off Reservation that serve as the basis for instream flow water rights.

### *Does the Compact quantify the Tribes' water rights?*

p. 6, #10

Yes. One of the primary purposes of the Compact is to quantify the Tribes' legally recognized but unquantified water rights. The Compact recognizes consumptive rights, which are quantified in terms of volumes diverted and consumed and include irrigation, stock water, domestic, municipal, commercial, and industrial uses; and non-consumptive rights, which include hydropower and instream flows to sustain fisheries, and which are quantified as rates of flow. It is not possible to legitimately add all consumptive and non-consumptive rights to obtain a total volume of the Tribal water rights because the non-consumptive uses do not use a constant volume of water and in many cases the same volume of water satisfies multiple non-consumptive rights.

### *Why does the Compact recognize off-Reservation rights for the Tribes?*

p. 9, #11

Language in Article III of the Hellgate treaty has been construed by courts to give tribes significant rights to access and harvest fisheries over and above those enjoyed by non-tribal citizens. The full scope of this language has yet to be defined by courts, but given expansive legal precedent, the Compact's recognition of a very limited number of off-Reservation water rights, accompanied by strict limitations on their use is far preferable to a litigated outcome in which the Tribes obtain substantial off-Reservation instream flow rights with a "time immemorial" priority date and no such constraints on use.

### *What would prevent other Tribes from claiming off-Reservation rights?*

p. 10, #13

This settlement specifically provides that it cannot be used as precedent for the resolution of the water rights claims of any other tribe. Every other Tribe in Montana has a compact requiring the tribe to relinquish all claims to water not recognized in the compact and providing that the compact is a final and binding settlement of all tribal claims. Finally, none of the other Tribes in Montana have treaty language supporting such claims.

### *Would the Compact "take" private water rights?*

p. 10, #15

No. Neither the Compact nor the Water Use Agreement (WUA) would take individual water rights. The Water Use Agreement represented a compromise between The Flathead Joint Board of Control (FJBC) representing Flathead Indian Irrigation Project (FIIP) irrigators, the Tribes, and the United States to recognize Tribal ownership of the disputed FIIP irrigation rights in exchange for protection of irrigation

deliveries from call by the Tribes' senior instream flow rights. The FJBC has since ceased to exist, and that agreement will need to be revisited. Neither the Compact nor WUA would take the water rights of any individual who has filed claims in the Adjudication, whose rights will be as they are finally decreed.

***How would the Compact protect irrigation rights from call by the Tribes?*** p. 10, # 17

Under the Compact, the Tribes would relinquish their right to call any groundwater irrigation rights less than 100 gallons per minute. The FIIP water use agreement or a similar mechanism would protect Project deliveries from call by the Tribes' legally recognized senior instream flow rights. Non-Project irrigators could enter into voluntary agreements to protect irrigation rights from call by Tribal instream flow rights or Project irrigation rights. Off-Reservation instream flows would be quantified and conditioned in a way that would reduce or eliminate the possibility of call by the Tribes.

***Would it be possible to obtain a new water right once the Compact is in place?*** p. 10, #14

Yes. The Compact not only does not close basins to new appropriations but supplies a substantial source of mitigation water to allow development of new uses to occur that are currently impossible due to lack of legally available water.

***Why would the Compact give the Tribes title to the Project Water Rights?*** p. 11, #18

The BIA and the FJBC filed identical claims to the FIIP rights. The Compact would resolve this dispute in a way that balances the needs of project deliveries and instream flows.

***What is the Flathead Indian Irrigation Project (FIIP) Water Use Agreement?*** p. 11, #19

The FIIP Water Use Agreement would resolve the dispute over ownership of the water right for the Project and would balance Project irrigation deliveries with senior Tribal instream flow rights. As the Flathead Joint Board of Control no longer exists, the agreement will need to be revisited and protections for Project deliveries ensured in the Compact or a successor agreement between the parties.

***What is the Unitary Management Ordinance?*** p. 11, #23

The DNRC has lacked authority to process new uses or changes of use since 1996. The Unitary Administration and Management Ordinance is the regulatory system that would apply primarily to new uses of water going forward on the Reservation. It is heavily modeled on the Montana Water Use Act.

***What is the Water Management Board?*** p. 12, #24

The Water Management Board is a joint State-Tribal body that would administer the Unitary Management Ordinance and fulfill the role the DNRC plays outside the Reservation.

***Would existing uses be protected under the UMO?*** p. 12, #28

Yes.

***Would the UMO affect Project irrigators?*** p. 12, #30

Only in case of a dispute between a Project and non-Project irrigator. The day-to-day management of Project operations would be determined by the Project Operator and FIIP Water Use Agreement terms.

***Does the Compact Require NEPA or MEPA review before legislative approval?*** p. 37, #63

No. None of the 17 previous compacts has undergone NEPA or MEPA analysis prior to state and federal ratification. The Commission does not have the ability to "act" under the terms of MEPA or EQC regulations (see specifically Montana Administrative Rule 17.4.603). There is no final action taken until the Compact has been ratified by the Montana Legislature and Congress and has been finally decreed by the Water Court. The Commission anticipates that MEPA or NEPA review will be implicated for various actions taken to implement the Compact.