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TO: Tim Fox, Attorney General

FROM: Dale Schowengerdt, State Solicitor

RE: Constitutionality of the CSKT Water Compact

DATE: January 30, 2015

I. THE CSKT WATER COMPACT IS NOT A TAKING UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Brief Answer:

It is very unlikely that a court would consider the Compact to be a taking under the Fifth Amendment because it does not take title from any property owners. The Compact is explicit: "Nothing in this compact shall be construed or interpreted . . . [t]o transfer, convert, or otherwise change the ownership or trust/fee status of land on the Reservation. Specifically, nothing in this Compact changes fee owned land to trust land or trust land to fee land, or in any way alters the ownership status of land within the exterior boundaries of the Flathead Indian Reservation." January 12, 2015 Proposed Compact, Article V(B)(24), p. 58. Moreover, while the Compact does provide for a prioritization and regulated distribution of water on the Reservation, that does not make it a taking under the Fifth Amendment because it does not render non-Tribal water users' rights economically valueless. In fact, in many ways the Compact adds value and stability to existing water use claims by limiting the Tribes' ability to call junior water rights. Arguments that the Compact is a taking appear to be based on either a misunderstanding of what constitutes a taking under the Fifth Amendment or, perhaps more likely, a misunderstanding as to what the Compact actually does.

Analysis:

Some have questioned whether the CSKT Water Compact constitutes a Fifth Amendment "taking" of property of non-Tribal users/owners on the Flathead Irrigation Project. The arguments appear to be that the Compact is a taking because it (1) somehow transfers non-Tribal irrigators' water rights to the Tribes, (2) makes non-Tribal junior users' water rights subordinate to senior Tribal water rights, and (3) submits non-Tribal rights to Tribal regulatory authority.

First, it's important to briefly outline Supreme Court precedent on Fifth Amendment takings. The most obvious takings claim is if the government actually takes title of private property, which is known as a "physical taking." If the government takes an interest in property for some public purpose, it must compensate the former owner. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). This category of taking only comes into play if the government is actually taking title to the property. *Id.*

Although some opponents have made vague claims that the Compact removes title from non-Tribal water users and gives it to the Tribes, those claims are in error. Indeed, the Compact confirms that nothing in it can be construed to "transfer, convert, or otherwise change the ownership or trust/fee status of land on the Reservation." January 12, 2015 Proposed Compact, Article V(B)(24), p. 58. The Supreme Court precedent on physical takings is a bright line standard that is easy to apply here. Clearly, the Compact does not result in a transfer of title, and thus there is no physical taking under the Fifth Amendment.

The second type of taking that the Supreme Court has identified is a "regulatory taking." This is likely what proponents of this argument mean when they claim that the Compact is a taking. The argument is that by subordinating non-Tribal water rights to senior Tribal water rights and by submitting those water rights to Tribal regulatory authority, the government has deprived non-Tribal water users of an interest in their property.

Supreme Court precedent makes regulatory takings claims extraordinarily difficult to maintain. Compensation is required only if a law or regulation "deprives an owner of '*all* economically beneficial uses' of his land." *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). Regulatory takings are limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Id.* (emphasis in original); *see also Kafka v. Mont. Dep't of Fish, Wilflife & Parks*, 2008 MT 460, 348 Mont. 80, 201 P.3d 8 (law that substantially decreased profitability of land did not constitute a taking).

There is simply no argument that the Compact deprives non-Tribal property owners of *all* economically beneficial uses. No state law-based water rights are being eliminated through the Compact.[1] Rather, the Compact quantifies the Tribes' water rights, whose priority dates are – as a matter of federal law – senior to state law-based water rights on the reservation. This is consistent with Montana's prior appropriation doctrine. Thus, there is no regulatory taking.

In fact, the opposite is arguably true because the Compact imposes conditions on the Tribes' senior water rights in favor of junior users. The Compact is a legally binding allocation of water between tribal instream flows and project uses that is designed to keep water available for project irrigators despite the junior priority date of the irrigation project's water rights in relation to the Tribes' instream flow rights. *See Joint Bd. of Control v. United States*, 832 F.2d 1127 (9th Cir. 1987) (noting that the Tribe's "priority date of time immemorial obviously predates all competing rights asserted by the Joint Board for the irrigators" and that absent a binding agreement the Tribe's aboriginal water rights can "prevent other appropriators from depleting the streams waters below a protected level.") (quoting *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985)). Moreover, part of the bargain is that the Tribe will limit its rights to make a call on existing irrigation rights on the reservation, and relinquish its right to make a call on irrigation rights off the reservation. Without the Compact, the Tribe would reserve their right to call water claims far and wide. In this way, the Compact adds value to existing non-Tribal water rights by providing stability to those claims.

In any event, it seems implausible that the courts would determine that the Compact constitute a taking under the Fifth Amendment.

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[1] Although the State does not believe that the 2013 draft Water Use Agreement among the Tribes, the Flathead Joint Board of Control ("FJBC") and the United States constituted a taking, the current Compact does not call for or require the withdrawal of the claims filed by the FJBC for the Project. Those claims remain to be resolved in the Adjudication.

II. THE COMPACT DOES NOT VIOLATE EQUAL PROTECTION BY TREATING OFF-RESERVATION WATER USERS DIFFERENTLY THAN ON-RESERVATION WATER USERS.

Brief Answer:

The Compact does not violate Equal Protection by treating non-Tribal water users on the Reservation differently than water users in other parts of the state. Non-Tribal water users on the Reservation are not similarly situated with water users in the rest of the State because of the unique water rights that the Tribes have under federal law. The State is not free to disregard the Tribes' superior water rights on the Reservation, and that naturally has implications for non-Tribal water users living on the Reservation. Thus, the Montana Supreme Court and the United States Supreme Court have recognized that it does not violate equal protection to treat tribal members differently when doing so is "rationally tied to the fulfillment of the unique obligation" to Indians that is created by federal law. *State v. Shook*, 2002 MT 347, 313 Mont. 347, 67 P.3d 863; *Morton v. Manacari*, 417 U.S. 535, 555 (1974). In short, even if the Compact is viewed as treating water users differently, those distinctions are based on federally defined Indian reserved rights that the State is required to recognize and administer.

Analysis:

One argument against the Compact is that it violates the Equal Protection guarantees of the U.S. and Montana constitutions. The argument apparently rests on the premise that the Compact treats non-Tribal water users on the Reservation different from non-Tribal water users in other parts of the State. But even if that is true, it is not enough to prove a violation of equal protection.

Equal protection under both the state and federal constitutions follows a similar analysis. "The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment." *Rausch v. State Compen. Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, 114 P.3d 192; *Carpinteria Valley Farms, Ltd v. County of Santa Barbara*, 344 F.3d 822 (9th Cir. 2003). Courts recognize that virtually all laws draw distinctions between classes. That is not what Equal Protection prohibits. So long as the distinctions are justified by a sufficient purpose, equal protection is not offended simply because a law makes distinctions. *Henry v. State Compen. Ins. Fund*, 1999 MT 126, ¶ 27, 294 Mont. 449, 982 P.2d 456.

Here, it is doubtful that non-Tribal water users on the Reservation are similarly situated with non-Tribal water users in the rest of the state. Property on the Reservation is subject to special rules derived from the unique federal status of the Tribes. Non-Tribal citizens moving to the Reservation should know that when they live within the boundaries of the Reservation, they might be subject to different rules that may not otherwise apply if they lived off the Reservation, especially on issues surrounding water use.

In fact, the Montana Supreme Court has not only allowed different treatment of non-Tribal members on the Reservation than non-Tribal members in the rest of the state, it has mandated it in certain contexts. In 1996, the Court prohibited the Department of Natural Resources and Conservation ("DNRC") from issuing any new non-Tribal water permits to landowners on the Reservation until the Tribes' water use rights are quantified. *In the Matter of Beneficial Water Use Permit,* 278 Mont. 50, 61, 923 P.2d 1073, 1080 (1996). The Court noted that it "has long recognized a distinction between state appropriative water rights and Indian reserved water rights," and that the "Montana Water Use Act, our prior decision in *Greely*, and the decisions of the federal courts make it clear that an applicant for a permit to use water within the exterior boundaries of the Flathead Reservation must prove that his proposed use does not unreasonably interfere with the Tribes' reserved water rights." *Id.* at 56, 61, citing *State ex. rel.*

Greely v. Confederated Salish & Kootenai Tribes 219 Mont. 76, 712 P.2d 754(1985). In other words, non-Tribal water users on the Reservation are subject to different rules than non-Tribal water users off the Reservation because they are not, as a matter of law, similarly situated.

Moreover, even if similarly situated, differing treatment between those classes does not violate Equal Protection. The Compact's recognition of the Tribe's superior water rights and its establishment of the Water Management Board is based on the Tribes' unique water use rights under federal law. This is nothing new. Indeed, the Montana Supreme Court has recognized "the distinctions between federal reserved water rights, Indian reserved water rights, and state appropriative use rights and the manner in which the Water Use Act permits each different class of water rights to be treated differently." *Greely*, 219 Mont. at 99, 712 P.2d at 768.

In *Greely* the Montana Supreme Court reiterated that Indian reserved water rights are very broad and are much different than typical water rights in several respects. For example, beyond the Tribe's superior priority date, it is also clear that Indian reserved water rights may include *future* uses, not simply beneficial past use. *Greely*, 219 Mont. at 93-94, 712 P.2d at 765; *see also id.* 219 Mont. at 95-98, 712 P.2d at 765-767 (discussing distinctive features of Indian reserved water rights and noting that the purposes of those rights "are given broad interpretation in order to further the federal goal of Indian self-sufficiency").

Because federal law requires those distinctive features of Indian water rights, the State is not free to disregard them. Thus, the Montana Supreme Court and the United States Supreme Court have affirmed that it does not violate equal protection to treat tribal members differently when doing so is "rationally tied to the fulfillment of the unique obligation" to Indians that is created by federal law. *Shook*, ¶¶ 352-53 (holding that hunting classifications based on tribal membership did not violate equal protection); *see also Morton v. Mancari*, 417 U.S. 535, 552 (1974) (holding that employment preferences for Indians did not violate equal protection). Thus, someone living on the Reservation should not be surprised that they may be subject to different rules than non-Indian water users off the Reservation.

In sum, even if the Compact is viewed as treating water users differently, those distinctions are based on federally defined Indian reserved rights that the state recognizes and administers pursuant to federal law. Non-Tribal water users within the boundary of the Reservation will necessarily be subject to different rules than water users in the rest of the state. Those distinctions, even if considered relevant to an equal protection challenge, would satisfy scrutiny under the state and federal constitutions.

III. THE COMPACT DOES NOT VIOLATE ARTICLE IX, SECTION 3 OF THE MONTANA CONSTITUTION.

Brief Answer:

Article IX, section 3 states that all water within the State is owned by the State. The Compact does not give ownership of State water to the Tribes. Rather, the Compact is a negotiated settlement of water *use*. The State is obligated to follow federal law in recognizing the superior on-Reservation water rights of the Tribes. The Compact is designed to balance those interests with non-Tribal water use, and limit the Tribe's ability to call junior water rights.

The Compact, if approved by the Legislature, will also be in conformance with Article IX, section 3's requirement to administer, control, and regulate water rights. Indeed, that is the Compact's very purpose.

Moreover, the Compact requires that all changes in water rights must be entered into the DNRC's "system of centralized records" that the Montana Legislature established pursuant to Article IX, section 3(4).

Analysis:

Under Article IX, section 3, the State owns all the water within the State. The Compact does not (and could not) alter that. Rather, the Compact is a negotiated settlement of water use rights, not water ownership.

Water rights in Montana are based on a system of prior appropriation, which means that water rights have priority dates. Senior water users with an earlier priority date are entitled to use the last drop of their water rights before junior water users are entitled to the first drop of theirs. Under this system, the water user with the most senior priority date may call a junior user, and the junior user may be forced to curtail water use until the senior user's right is satisfied.

Courts have already determined that the Tribes have a priority date of time immemorial for inflow stream rights, and an 1855 priority date for other on-Reservation water rights. *Joint Board of Control of Flathead, Mission and Jocko Irrigation Districts v. U.S.*, 832 F.2d 1127, 1132 (9th Cir. 1987). Further, the Montana Supreme Court described the distinction between State appropriated and Indian reserved water rights in *Greely*:

> State appropriative water rights and Indian reserved water rights differ in origin and definition. State-created water rights are defined and governed by state law. (citing Art. IX, section 3). Indian reserved water rights are created or recognized by federal treaty, federal statutes or executive order, and are governed by federal law.
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> The United States is not the owner of Indian reserved rights. It is a trustee for the benefit of the Indians. . . .Indian reserved water rights are "owned" by the Indians.

Greely, 219 Mont. at 89-90, 712 P.2d at 762. The Court also noted that Indian reserved water rights are broadly construed under federal law. *Id.* The United States Supreme Court has also recognized that "[t]he power of the government to reserve the waters and exempt them from appropriation under state laws is not denied, and could not be." *Winters v. U.S.*, 207 U.S. 564, 600-01 (1908).

The Tribes and the State, however, do have authority to negotiate and agree "upon the extent of the reserved water rights of each tribe. In order to be binding, a negotiated compact between the State and tribe must be ratified by the Montana legislature and the tribe." *Greely*, 219 Mont. at 91, 712 P.2d at 763. That is precisely what the CSKT Compact aims to do. Consistent with Article IX, section 3, the Compact does not cede ownership of State water. Instead, it is designed to provide a negotiated settlement of competing water use claims in a manner that ensures continued use by non-Tribal water users. Without the Compact, those claims will only be settled by litigation.

One other minor point is often raised that the Compact somehow violates the requirement in Article IX, section 3(4) that "[t]he legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records." The Compact, however, does not relinquish the State's duty regarding this provision.

First, the Constitution does not delineate how the State is to accomplish the objective to administer, control, and regulate the State's water rights. Indeed, the Legislature has broad authority to do so, especially when laws are "rationally tied to the fulfillment of the unique obligations toward Indians". *Shook*, ¶¶ 352-53. Thus, if the Montana Legislature approves the Compact, including its unitary administration framework, it is acting in furtherance of its obligation to administer, control, and regulate water rights, not in violation of it.

Moreover, the proposed Compact specifically requires that the Water Management Board enter any water rights or change authorizations it approves into the DNRC water rights database, which is of course the "system of centralized records" that the Montana Legislature established pursuant to Article IX, section 3(4).

In sum, it is unlikely that a court would find that the Compact violates Article IX, section 3 given the well-established precedent concerning Indian reserved water rights and the deference afforded the Legislature in complying with its federally-mandated obligations toward the Tribes.