Most Frequently Asked Questions/Assertions Regarding Constitutionality of the CSKT Water Compact

The Compact is unconstitutional as a Fifth Amendment taking.

Response: The CSKT Water Compact Is Not a Taking Under the Fifth Amendment to the United States Constitution. 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.

The Compact is unconstitutional because it violates Equal Protection by treating Reservation residents who are not Tribal Members differently from other Montana citizens.

Response: The Compact Does Not Violate Equal Protection By Treating Off-Reservation Water Users Differently Than On-Reservation Water Users. 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*, 313 Mont. 347, 351 (2002); *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.

The Compact is unconstitutional because it violates Article IX, Section 3 of the Montana Constitution by giving the Tribes ownership of water.

Response: The Compact Does Not Violate Article IX, Section 3 of the Montana Constitution. 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).