

Visiting With Lawrence Kogan, Esq:

An Initial Consultation

By Rena Wetherelt

The following interview was conducted with New York attorney Lawrence Kogan immediately following his presentation on the Panel entitled, "[Preventing Congress From Ratifying a Flawed CSKT Water Compact](#)," convened on Thursday, May 21, 2015, at the Lexington Inn and Suites in Billings, Montana. Also participating on the Panel were Montana attorney Quentin Rhoades, 2012 Gubernatorial candidate, Robert Fanning, and Indian expert Elaine Willman. Clips from the interview are hyperlinked and the text of the clip highlighted.

The following background was provided:

The Water Compact (Treaty) entered into by the Confederated Salish and Kootenai Tribes (CSKT), the State of Montana, and the U.S. Department of Interior is a complex first-of-its-kind agreement that will seriously impair citizen rights. The Compact also will reshape, for the worse, future water compacts currently being contemplated by other U.S. states and regions (including in Alaska, Arizona, California, Hawaii, Oklahoma, the Midwest and the East).

Congress must first approve the Water Rights Compact before the Parties can implement it. This means that Congress will have the opportunity to closely examine the processes these Parties employed to enter into the Compact as well as the Compact's specific terms, *and* that Congress bears the primary legal and fiduciary responsibility for ensuring that such processes and terms, as defined *and* as to be applied, will not violate federal, state and/or tribal laws and Constitutional rights of Montana's citizens.

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#### [Changes 150 years of water rights law](#)

"We are looking at how the CSKT Water Compact that was enacted into law by the Montana Legislature in April affects property rights of landowners on the Reservation and their access to water. We are also looking to see how it affects the access to water of those landholders located off the Reservation but appurtenant [attached] to the Reservation. The crux of our analysis will focus on the processes

by which this Compact came into being from the State, Tribal and Federal perspectives.

We have three parties entering into a *treaty* that changes the law of water rights going back over 150 years. The paradigm of property that they are putting forth in the Compact is anathema to the individual and common-law based property rights that both Montana and the United States were based on. It goes against everything that our form of Republican government stands for. It has contempt for individualism - humanism. It has contempt for individual rights. And the communal rights that are being conveyed through the Compact pretty much can be used as a template to go beyond the Compact and extend to all of Montana and the Western Region of the United States and beyond. This communal focus of property is something that is very international in flavor. It really is an implementation of a European form of sustainable development, which is based on a compromise between Marxism and capitalism. And because this form of sustainable development rejects pretty much everything based on the Enlightenment Era thinking which our nation was founded upon and upon which the Montana Constitution is based as well, we believe it is necessary to take a non-linear approach to addressing these egregious violations of U.S. Constitutional rights.

### People have procedural rights

Focusing on process is a very important area that a lot of people may not pay very much attention to. It is because they are so focused on the growth of the administrative state and what's being done to them substantively, that they forget that they have procedural rights. The administrative state works on a *quid pro quo* [exchange] basis, which is unique to our country, as compared to countries in Europe and elsewhere. Essentially, the government notifies you about what they are going to do.

The role of government in the United States is different from the role of government in Europe. In Europe, they tell you what you can and cannot do. In the United States, they tell you only what you cannot do; everything else is permitted. However, this has changed during the past six and one-half years.

### Officials bound in law

In the United States, we grant the government the power to govern us and if they don't govern us by the procedures by which they are bound in law, if they don't follow Rule of Law procedure, then they must account to the public, which gives them their license to govern. Unfortunately, members of the State Legislature of Montana as in other states and members of the Federal Congress have forgotten their procedural obligations and their oaths of office. As a result, [in Montana,] this Compact came into being in such a way as to be an assault on and an affront to all of these procedural rules of law that they (the officials) are subject to.

This Compact was pretty much 'crammed down' into the Legislature without much time or opportunity to review in detail. The Compact may be a 150 or so page document with textual terms. However, the water abstracts, which are the focus and substance of the Compact, take up hundreds of additional pages and have highly technical detail, which was never adequately reviewed because the members of the Legislature were not given that opportunity. Now the Compact has a clause in it [in Section III] that generally says, 'in the event of conflict between the terms of the Compact and the terms of the abstracts, the abstracts prevail.' This clause presents you all with a very big problem, because essentially they [the Compact drafters] are hiding all the details in the abstracts which are highly detailed and technical and you need experts to unravel what is in there. The abstracts must be carefully reviewed, individually and as they relate to one another. That is why we are trying to offer an approach that we believe will be successful. This multilevel approach focuses on the processes at the state level, the processes at the federal level, the processes at the Tribal level, and on substantive Constitutional issues at the State and Federal levels.

### **[Those whose rights have been affected should contact us](#)**

There are many parties that should be interested in our approach to educating Congress through multiple means to stop the Compact at the Federal level. They include farmers whose rights and access to water will be adversely affected by the terms of this Compact, which restricts water use based on environmental concerns - sustainable development environmental concerns. In addition, the ability of ranchers - stock growers - to gain access to and use water, and to dig wells on their property, will be restricted out of concern for sustainable development principles. In addition, members of the CSKT Tribe, to the extent that their tribal government has intimidated them, withheld information from them, has in some way prevented them from exercising their private property rights on their own land, and/or their water rights appurtenant to that land, should also be very concerned and interested in speaking with us at a time of their choosing. Hopefully, this will be sooner rather than later given the July 1, 2015 date by which the CSKT Tribal government and the State of Montana will file water claims in Montana Court regarding the Compact.

In addition to the Constitutional issues and the good governance issues, which we mentioned in our recent meeting, in addition to the process issues more generally, we have environmental process issues. Now, obviously, if we are going to affect major flows of water coming through rivers and dams, there should be some sort of environmental impact that would invoke the provisions of the National Environmental Policy Act, NEPA. One would think, at least, that NEPA's provisions would require that an environmental assessment be undertaken by the Federal Government, but unfortunately, they did not undertake an environmental assessment and they didn't even mention NEPA. The Montana Water Commission dismissed the need to do so because it is only a document being signed; there is

nothing being activated by the signing of the document. That is a tall... that is something we cannot consume without indigestion.

The thing here, is, that they have used this Compact to transform common law and Constitutionally protected property rights into this communal sustainable development notion of property. If they then take these transformed property rights on the Reservation and use them as a template to be applied throughout the State of Montana and the regional West, you can be assured that such communal rights will be used also to classify species as endangered and to restrict the hunting, fishing, and other wildlife activities. As a result, they will effectively prevent you from doing what you have been doing for all the years, and they are going to do this by employing a new form of science.

**Science used in Compact not evidence based**

Just like they are employing a new form of property rights, they are employing a new form of science. This new form of science is not based on empirical science from the Enlightenment era. It is not based on observation. It is not based on causal evidence of harm. It is not based on foreseeable harm. It's based on precaution. The 'precautionary principle' is a European legal concept that is at the fulcrum – i.e., the basis of the sustainable development socialism doctrine that we are talking about. And when they do that, essentially a new lower threshold/standard of evidence is permitted, which is correlation; it is no longer causation. We are no longer looking at the risks that certain activities pose upon the wildlife. Rather, we are looking at the hazards, the intrinsic hazards of fishing in the abstract. We are looking at the intrinsic hazards of hunting in the abstract, without any evidence of the way the hunting is done, without looking at how the habitat is affected by your activities. So one thing we are looking closely at are the science studies that served as the basis for the Compact, and those science studies, unfortunately, do not show the causal evidence. The record doesn't even show that the science studies themselves were peer-reviewed properly.

This brings up another Federal statute, the Information Quality Act with which these studies failed to comply. So when we roll all of this together, the facts reveal that science evidence has been reduced under this new paradigm and doesn't require the Federal agencies to prove anything. They can just cite the possibility of something happening based on correlation not on causation. The fact that a reduced threshold of evidence now governs will allow the agencies to regulate more frequently and strictly, and will also change the burden of proof. The agency no longer has to prove anything. It is you, the hunter, the fisherman and the economic actor that has to prove no (zero) risk. So with that, I leave you with a summary of the approach that we have to offer."



Lawrence Kogan, Esq. is an international trade attorney. Read more from him in the National Association of Scholars 2015 report entitled, "*SUSTAINABILITY: HIGHER EDUCATION'S NEW FUNDAMENTALISM*" and in the 2015 Kentucky Journal of Equine, Agriculture and Natural Resources Law article entitled, "*LOCAL SUSTAINABILITY MOVEMENT RIDES WAVE OF EVOLVING FEDERALISM TO 'AXE' PRIVATE PROPERTY RIGHTS.*"

"APPENDIX IV, A TRANSNATIONAL, "PRECAUTIONARY" MOVEMENT: THOUGHTS FROM AN INTERNATIONAL TRADE LAWYER," (pp. 244 - 248).

[http://www.nas.org/images/documents/NAS-Sustainability\\_Appendix\\_4.pdf](http://www.nas.org/images/documents/NAS-Sustainability_Appendix_4.pdf)

Read the complete document here:

<http://www.nas.org/images/documents/NAS-Sustainability-Digital.pdf>.

"*LOCAL SUSTAINABILITY MOVEMENT RIDES WAVE OF EVOLVING FEDERALISM TO 'AXE' PRIVATE PROPERTY RIGHTS.*"

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