CSKT Settlement - Questions and Answers

1) Does the compact quantify the Tribes' water rights?

- Yes. The CSKT compact quantifies the Tribes water rights in great detail in the compact appendices. Listed is a sample of Appendix numbers and description:
  - Appendix 5 – FIIP Abstracts in 76L and 76LJ
  - Appendix 9 – Flathead System Compact Water
  - Appendix 10 – Natural Instream flow
  - Appendix 11 – FIIP Instream Flow Abstracts
  - Appendix 12 – Other Instream Flow Abstracts
  - Appendix 18 – Flathead Lake Abstract
  - Appendix 26 – Swan Mainstem ISF Abstract
- Looking at the CSKT water rights abstracts is no different than what every other Montana water user must do when the Water Court issues a preliminary decree and you need to see how your rights fit into it.

2) Why does this compact include off-reservation water rights for the CSKT?

- Language in the Hellgate Treaty provides the CSKT with the right to "take fish" in the Tribes' "usual and accustomed" locations (the CSKT are the only tribes in Montana with this treaty language).
- Case law in the 9th Circuit has held that this right includes the right to the use of water outside the Tribes' reservation to maintain fisheries flows and the Montana Supreme Court has held that Montana must apply federal law in resolving Indian water rights.
- The off-reservation provisions strike a balance that recognizes rights for the Tribes, protects existing water users, and allows for future development.

3) Has the Compact Commission exceeded its legislative authority by including off reservation water rights in the Compact?

- In a 1985 case, the Montana Supreme Court recognized that both the Tribes' treaty-based fishing rights and their on- Reservation rights are categories of their federal reserved water rights.
- By including off-reservation water rights as part of this settlement, the Compact Commission is carrying out its mandate from the Legislature, not exceeding it.

4) How were the off-reservation instream flow rights quantified?

- To arrive at the instream flow levels identified in the Compact, we started with what was a biologically healthy flow level for fish (using Fish Wildlife and Parks data for the upper inflection points), stemming from the Tribes' treaty rights. But those numbers were comparatively high, so we sought to reduce those flows to ensure that existing and future consumptive uses could continue to be exercised. The instream flow numbers in the Compact therefore represent a compromise on the part of the Tribes.

4) How will the off-reservation provisions of the compact affect frequency of call-
On the Flathead River upstream of the Reservation?

- The compact recognizes no water rights that will affect existing users for purposes of making call upstream of the Reservation.
- Constraints on the use of the Flathead System Compact Water require the water right to be used in a manner that ensures impacts associated with the exercise of the water right yield flow conditions that comply with: 1) Bureau of Reclamation modeling that ensures compliance with Columbia River Treaty requirements, 2) minimum instream flow schedules at Columbia Falls and Polson, 3) Ramping Rates for Kerr and Hungry Horse Dams, and 4) Flathead Lake filling criteria. Because of these required flow rates and timings, existing uses can continue to draw their water supplies without risk of call. The existing use flow rates and volumes are minor compared to the flow dynamics of this reservoir-dominated system.
- The minimum inflows of the Flathead River at Flathead Lake are substantially greater than the maximum flow rate associated with the Flathead System Compact Water Right.
- The other rights being recognized for the Tribes in the Compact are already existing uses that have consistently been exercised with no conflict with users upstream of the Reservation. Nothing in the compact changes that balance.
- All non-irrigation users have blanket protection from even the possibility of call.

On the Swan River?

- Other than the Swan River instream flow, there are no water rights being recognized for the Tribes that will affect existing users for purposes of making call in the Swan River Basin.
- The Swan River instream flow targets the 10th percentile flow rates, meaning that call could only be made during the driest 10 percent of years and that call can only be made on irrigation water rights. It is statistically unlikely that such a call would disable irrigators from being able to irrigate enough of the season to where crops would not be viable.
- For eight months of the year, including during July and August, the enforceable level of the CSKT right on the Swan is lower than the enforceable level of PacifiCorp right for the hydropower dam on Big Fork Lake, meaning that PacifiCorp would have the opportunity to make a call before the CSKT could.
- The Swan River instream flow will not affect future off-Reservation applications for new permits as the 10th percentile statistic is well below the 50th percentile statistic used for purposes of setting legal availability standards.
- All non-irrigation users have blanket protection from even the possibility of call.

On the Kootenai River?

- The Tribes' right on the mainstem of the Kootenai is not enforceable so long as Libby Dam is in existence.
- All non-irrigation users have blanket protection from even the possibility of call.

On the Lower Clark Fork River?

- The enforceable level of the Tribes' right on the Lower Clark Fork is set to be identical to the minimum flow that Avista must put through the Cabinet Gorge Dam under its license from the Federal Energy Regulatory Commission (presently 5000 cfs). If the FERC

license condition changes, the Tribes' enforceable level changes along with it. Thus there is no prospect of call in the Lower Clark Fork.

- All non-irrigation users have blanket protection from even the possibility of call.

On the Bitterroot River?

- The compact recognizes no water rights that will affect existing users for purposes of making call on the Bitterroot River.
- All non-irrigation users have blanket protection from even the possibility of call.

On the Upper Clark Fork and Blackfoot Rivers?

- The Compact makes the Tribes co-owners with Montana Fish Wildlife and Parks of the right the State has acquired for the former Milltown Dam. That right will be implemented and enforced by FWP whether or not it is included in the Compact.
- By including the former Milltown Dam Right in the Compact, there is not an additional senior water right being recognized for the Tribes.
- The Compact includes conditions on the exercise of the former Milltown Dam right that are binding on both FWP and the Tribes that would not exist in the absence of the Compact. These conditions reduce the impacts of the exercise of this right on existing irrigators. In the driest years, the exercise of the former Milltown Dam right could lead to a call being made on irrigators as early as mid-July. In low years, the exercise of the former Milltown Dam right could lead to a call being made in September or as early as late August. In roughly half the years in the period of record, no call would be possible.
- All non-irrigation users have blanket protection from even the possibility of call.

5) How will groundwater development be affected by the compact-

Developments requiring permits in the Flathead Valley upstream of the Reservation?

- Upstream of the reservation, the most pressing restriction to legal availability on new groundwater permits is the hydroelectric water right for Kerr Dam. This compact does not change this condition, nor does this compact recognize any water rights that are likely to result in additional impediments to legal availability beyond the existing Kerr Dam water right.

Developments exempt from the permitting requirements (small domestic groundwater and stock developments) off the Reservation?

- No impact. Permit exceptions not affected.

6) The Tribes plan to purchase Kerr Dam in 2015. How does this dovetail in with the compact documents, and what does it mean to water rights holders on the Flathead River?

- The Tribes' acquisition of Kerr Dam and the associated water rights is unrelated to the Compact. Those water rights are state law-based water rights, not federal reserved water right, and the Tribes' right to purchase them was established in the Federal Energy Regulatory Commission's most recent license for the dam. Those rights will be as they are finally decreed by the Montana Water Court in the regular course of the Adjudication.

7) Why allow leasing of parts of the Tribes' water rights off the reservation if it can be used and is needed on-reservation?

- Leasing rights are recognized in other Indian compacts in Montana. Allows the Tribes flexibility, which is an advantage to off-reservation residents who may want to lease water, including for mitigation purposes, and is something the State agrees to as part of securing protections for existing users from the exercise of the Tribes' senior water rights.

8) Has the quantification of the Tribes reserved rights been tied to specific purposes of the reservation?

- The Tribes' water rights are tied to the purposes of the Reservation. As recognized by the Montana Supreme Court, these purposes include at least present and future irrigation, water to preserve the Tribes' hunting and fishing rights, as well as water for industrial purposes and other "acts of civilization". Other purposes may exist as well, though the only way conclusively to determine every last purpose is to litigate the question, which is contrary to the Compact Commission's mandate from the Legislature. But every water right recognized in the Compact is tied to these recognized purposes.

9) How much water do the Tribes get from this settlement? 50 million acre feet annually?

- In terms of consumptive use, the Compact recognizes the Tribes' Flathead System Compact Water Right (229,383 AF diverted, 128,158 AF consumed) and the opportunity for Tribal Members to register individual uses not otherwise claimed via a state based water right. The Compact also reflects the Tribes' commitment of 11,000 AF of their Flathead System Compact Water toward the off-reservation mitigation of domestic, commercial, municipal, and industrial uses as they occur across Montana. The rest of the Flathead System Compact Water is for any new water developments which can be sourced from the mainstem and South Fork of the Flathead River and from Flathead Lake. At the discretion of the Tribes, this water can be used for future irrigation, leases to non-Indian water users, and any other purpose.

- The Compact also recognizes the Tribes' water rights totaling 179,539 AF of Farm Turnout, for purposes of serving the Flathead Indian Irrigation Project. This right to serve 130,000 irrigated acres is conditioned on the FIIP Water Use Agreement to ensure that it benefits the Project irrigators, the vast majority of whom are not tribal members.

- A major component of the settlement is the assurance of certain flow conditions that will maintain, and in some cases enhance, instream fishery and wildlife resources consistent with the Tribes' treaty-based hunting and fishing rights. Natural flow conditions will be maintained on Tribal lands where there are no conflicting water uses, while a reduced set of flow rate conditions have been designed to provide for simultaneous protections of the Tribes' treaty-based rights and existing water users.

- Regarding the computation of a single volume quantification of all of the Tribal water rights (like, say, 50 million AF annually), it is incorrect to convert continuous flow rates to volumes and then simply add them up. The instream flow water rights recognized in the Compact are to be enforced concurrently with one another, meaning that these values are not cumulative. This principle is the same for all large instream flow water rights

across the state. Although there is some historic convention in assigning volumes to non-consumptive instream flow water right claims, this information is not used for purposes of enforcement, assessments of legal availability, or depictions of long-term water planning – for all of those purposes, the flow rates are used.

- In this Compact, none of the instream flow water rights can be exercised against non-irrigation users, and each of the on-Reservation instream flow rights being exercised include opportunities for irrigators to agree to farm turnout allowances and measurement conditions in exchange for not being called by the Tribe's senior water rights. Therefore, individual instream flow water right numbers are unlikely to be enforced to their strictest potential.

10) What if the Tribes are not willing to lease the Hungry Horse water that is supposed to be dedicated to off-Reservation mitigation?

- The Tribes have no ability to decline to enter into a lease for any of the 11,000 acre-feet of water the Compact dedicates to off-reservation mitigation uses in western Montana. The Compact specifies the price per acre-foot for the water (which is $40/acre-foot plus an inflation adjustment factor to account for changes over time), which removes price as an obstacle to concluding a lease transaction.
- The Compact contains very specific process steps to ensure that the Tribes cannot unreasonably thwart the conclusion of a lease. If the Tribes and a prospective lessee of water cannot come to voluntary agreement over any of the non-price terms of the lease (recall that the price term is set by the Compact), the prospective lessee can file a notice of impasse with the Water Management Board, which obligates the Board to consider the last best offers made by the Tribes and the prospective lessee and to select the offer the Board deems most reasonable, thereby concluding the lease on the terms selected by the Board. Any Board decision may also be appealed to a court of competent jurisdiction. Thus there is a clear enforcement mechanism to ensure that the 11,000 acre-feet of water from Hungry Horse is in fact made available for off-reservation mitigation.

11) Why has the Compact Commission not completed economic or environmental impact studies? Doesn't this deprive legislators and the public of information needed to make an informed decision about the Compact?

- Neither the Montana Environmental Policy Act nor the National Environmental Policy Act (the state and federal laws dealing with economic or environmental studies) apply to the ratification of the Compact by the Montana Legislature or Congress. If and when specific projects (irrigation project infrastructure rehabilitation, for example) to *implement* the settlement, which would trigger MEPA or NEPA, all necessary environmental and economic studies will be conducted at that time.
- The legislature has voted on 17 previous compacts over the last 28 years without having economic or environmental impact studies done because such studies do not and cannot provide relevant information about the ratification of the settlements.

12) Judge CB McNeil called the Water Use Agreement unconstitutional and a taking of private water rights. How can the Compact Commission support it?

- The WUA is constitutional. Anyone who has a water rights claim filed in the Adjudication will have that same claim in the Adjudication after the settlement is approved, and will be entitled to have that water right as it is finally decreed by the Water Court.
- The FIIP Water Use Agreement resolves a dispute over the water right for the irrigation project (the FJBC and the US have filed competing claims to that right in the Adjudication), makes the Project right part of the Tribes' water right so that all Project lands can be served equally without needing to determine which ones might be entitled to an 1855 date and which ones to a 1910 date or later. It puts in place binding legal constraints on the Tribes to ensure that the Project continues to have access to sufficient irrigation water despite the fact that the Tribes' instream flow rights are senior to the Project rights as a matter of settled law. The Compact Commission believes the Montana Supreme Court will correct Judge McNeil's misunderstanding of the nature of the agreement.

13) Why is the Compact Commission creating a new water administration system or new "rule" (the Unitary Management Ordinance, or UMO) that enables Tribal jurisdiction over non-members within reservation boundaries, when it is an open reservation with a majority population of non-Indians?

- The UMO does not authorize tribal jurisdiction over non-members. It creates a joint State-Tribal body to administer all the water rights on the Reservation under a water code that the State and Tribes have jointly drafted. This was done in order to fill the regulatory vacuum that presently exists there because of a series of Montana Supreme Court decisions. Under Montana law, it has not been legally possible to obtain a new water rights permit anywhere on the Flathead Reservation since August 22, 1996. The Water Management Board and the UMO allow for new development of water rights on the Reservation going forward and protect those uses that have in fact been developed since 1996.
- The other six Indian Compacts in Montana have had the State administer the existing state law-based uses, leaving the tribes to administer both the existing uses of the tribal water rights and all future development on those reservations. Because of the demographics of the Flathead Reservation, which has a much larger non-Indian population than any of Montana's other reservations, the State wanted to maintain greater authority over future development of water, which is what the Unitary Ordinance process allows.

14) Does the compact give the CSKT a time immemorial water right to all the water in Flathead Lake?

- The Compact recognizes a time immemorial water right to a minimum pool level in Flathead Lake, not "all the water." This minimum pool level is well below the operating level of the Lake, which is governed by various federal laws that this Compact does not

affect at all. This right is not a consumptive right, meaning the Tribes' do not have the right to drain the water out of the lake, or to lower the lake to this minimum level.

- The Tribes cannot divert or control any water to satisfy this right and the purpose of this right (maintenance and enhancement of fish habitat) cannot be changed to any other purpose;
- Nothing in this right alters water supply in the Flathead River system or any of the operational constraints that govern lake levels, such as the Flathead Lake Drought Management Plan and the Biological Opinion governing the entire Federal Columbia River Power System, which will all remain in place.
- The Compact recognizes this right in the first place because the Tribes' possess a treaty-based right to fish in Flathead Lake and to keep water in the lake to support fish. The right recognized in the Compact respects the Tribes' treaty rights but has no effect on lake levels or other water users because the operation of the Lake is being unaffected.

15) Will this compact close basins, and what will that mean to future growth and development throughout western Montana?

- This Compact closes no basins. Instead, by resolving all of the CSKT's claims for off-reservation water rights, and by making available a minimum of 11,000 acre-feet per year of water for off-reservation mitigation, this Compact facilitates future growth and development in western Montana.

16) What impact will the compact have on environmental issues such as recharge of the aquifers, and on wetlands, as well as the needs of the fish?

- The Compact strikes a balance between providing for improved fishery flows and protecting existing consumptive water users.

17) What about other Tribes whose aboriginal territory was western Montana? Will this compact open the door for them to go after their off reservation treaty rights too?

- First, all other tribal compacts provide that the tribes give up forever all claims for water not recognized in the Compact. It would therefore violate those Compacts for the tribes to make such demands now.
- Second, none of the treaties and executive orders establishing the other reservations contain language that would support claims for off-reservation rights.
- Third, this settlement specifically provides that as a matter of state and federal law, it cannot be used as precedent for the resolution of the water rights claims of any other tribe.
- Fourth, no out-of-state tribes have filed claims in the adjudication. Under Montana law such claims are therefore conclusively deemed abandoned. Out-of-state Tribes have no legal basis to claim water rights in western Montana.

18) If ground water and surface water are connected as stated in the compact, how do you know existing wells won't be impacted in low water years, if instream flows cannot be met?

- As a matter of law, the Tribes are agreeing to give up their right to call any domestic, stock, municipal, commercial, or industrial well, or any other well (or surface right) whose purpose is not irrigation, as well as to call irrigation wells with a flow rate below 100 gpm. Thus the Tribes' will not be able to call those wells to satisfy their instream flow rights at all, irrespective of stream conditions. Irrigation users who might theoretically be subject to call can, as part of the settlement, protect up to 1.4 acre-feet per acre from call by following a free process set forth in the Compact.

19) Isn't the Unitary Management Approach unconstitutional since it gives up state control over the administration and management of state law-based water rights on the Flathead Reservation?

- The Unitary Management approach does not relinquish state control or state sovereignty over the administration of water rights on the Flathead Reservation. Rather, it enhances it, in furtherance of the constitutional directive to the legislature to provide for the administration and management of water rights in Montana. As a result of a series of Montana Supreme Court decisions, there is a regulatory void concerning the management or administration of water rights on the Flathead Reservation. By ratifying the Compact, including the unitary management ordinance, the Legislature fills that void.