

Exhibit No. 4

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Bill No. SB 262

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■ CSKT Compact Education Session

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CSKT Compact Education Session

Saturday, February 7, 10:00 a.m. - Room 303
Hosted by Senator Chas Vincent

This event is an informational session for legislators regarding the CSKT Water Compact. The public is welcome to observe from the 4th floor gallery.

Documents for this educational session are included below:

- [CSKT Water Rights Summary](#)
- [Response to Six Reasons to Reject the CSKT Water Compact](#)
- [Letter to Senator Vincent in Response to Letter from Mr. Richard Simms](#)
- [Flathead System Compact Water and Hungry Horse FAQs](#)
- [Irrigator FAQs](#)
- [Local County Government FAQs](#)
- [Non-Indian Reservation FAQs](#)
- [Legislator FAQs](#)
- [Constitutional FAQs](#)
- [Constitutional Memo](#)
- [Understanding Abstracts for Statements of Claim in Montana](#)
- [Cover Letter from Colleen Coyle, Director, Water Services, Ponderosa Advisors LLC](#)
- [Article: Process and Implications of Adjudication through Litigation of CSKT Reserved Water Right Claims vs. Legislative Approval of a Compact](#)
- [DNRC and CSKT Water Compact and Appendices](#)



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Reserved Water Rights Compact Commission

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Hearing**CSKT Water Compact
Education Session for
Legislators**Video of Water Compact
Education Session for
Legislators February 7, 2015**2015 Public Meeting
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Materials****2014 Public Meeting
Audio****2014 Public Meeting
Materials****2014 Negotiation Materials****WPIC Documents****2013 Compact Documents****2013 Bills****2008-2012 Negotiation
Document****Legislator
Informational Materials**Can't open the pdf's? Make
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Confederated Salish and Kootenai Tribes

The proposed CSKT-Montana Compact is the result of more than a decade of negotiations to resolve the Tribes claims to reserved rights within the State. The 2013 Legislature did not ratify a prior version of the Compact. Following a request for a limited reopening of negotiations by Governor Bullock in early 2014, the State and Tribes negotiated key provisions relating to irrigation use and instream flows on the Reservation and incorporated recommendations from the Montana Water Policy Interim Committee following two years of review.

On December 10, 2014, the negotiating parties reached an agreement that fulfills the State's legal obligation to recognize the CSKT's reserved rights and simultaneously provides protection for existing uses on and off the Reservation. The Compact will make new water available for commercial and irrigation use, end the water administration void on the Flathead Reservation, allow for economic development under conditions of legal certainty on and off the Reservation, and facilitate the completion of the statewide general stream adjudication. In addition, the Compact would establish a technical team with irrigator representation to implement irrigation project upgrades to protect historic irrigation use and meet Tribal in-stream flow targets.

On January 12, 2015, the Montana Reserved Water Rights Compact Commission unanimously voted to forward the proposed CSKT Compact to the 2015 Legislature. Legislative information will be posted on this site as it becomes available.

PDF files viewable only with the [Acrobat Reader](#).

January 2015 Revised Compact

[SB 262 Bill Text](#)[Proposed Compact Approved by RWRCC, January 12, 2015](#)[Legislator Informational Materials](#)[Summary of Water Rights Quantified by Compact-2015](#)[Compact Summary](#)[Off-Reservation Impact Analysis-2015](#)

2015 Appendices

- [Appendix 1](#) (Hydrologic Basin Maps)
- [Appendix 2](#) (FIIP Influence Area Map)
- [Appendix 3.1](#) (MEFs, TIFs, Minimum Reservoir Pool Elevations)
- [Appendix 3.2](#) (River Diversion Allowances)
- [Appendix 3.3](#) (Historic Farm Deliveries)
- [Appendix 3.4](#) (Implementation Schedule)
- [Appendix 3.5](#) (Adaptive Management and CITT)
- [Appendix 3.6](#) (Rehabilitation and Betterment)
- [Appendix 3.7](#) (Determination of Wet, Normal and Dry Years)
- [Appendix 4](#) (Proposed Law of Administration/Ordinance)
- [Appendix 5](#) (FIIP Abstracts in 76L and 76LJ and [Maps](#))
- [Appendix 6](#) (Map of Non-FIIP Historic Irrigated Acres Lands Eligible for Registration)
- [Appendix 7](#) (Bureau of Reclamation Modeling Report)
- [Appendix 8](#) (State Biological Constraints Evaluation)
- [Appendix 9](#) (Flathead System Compact Water Abstract and [Map](#))
- [Appendix 10](#) (Natural Node Instream Flow Abstracts and [Maps](#))
- [Appendix 11](#) (FIIP Instream Flow Nodes Abstracts and [Maps](#))
- [Appendix 12](#) (Other Instream Flow Abstracts and [Maps](#))
- [Appendix 13](#) (Interim Instream Flows and Interim Reservoir Pool

- Elevations
- [Appendix 14](#) (Interim Instream Flow Protocols)
 - [Appendix 15](#) (FIIP Reservoir Minimum Pool Abstracts and [Maps](#))
 - [Appendix 16](#) (Wetlands Abstracts and [Maps](#))
 - [Appendix 17](#) (High Mountain Lakes Abstracts and [Maps](#))
 - [Appendix 18](#) (Flathead Lake Abstract and [Map](#))
 - [Appendix 19](#) (Boulder Creek Hydroelectric Project Abstract and [Map](#))
 - [Appendix 20](#) (Hellroaring Hydroelectric Project Abstract and [Map](#))
 - [Appendix 21](#) (MTFWP Wetlands Abstracts and [Maps](#))
 - [Appendix 22](#) (MTFWP Claim Number 76L 153988-00 to be Co-Owned by Tribes)
 - [Appendix 23](#) (USFWS Wetland Abstracts and [Maps](#))
 - [Appendix 24](#) (USFWS Claims to be Co-Owned by Tribes)
 - [Appendix 25](#) (Kootenai Mainstem Instream Flow Right Abstract)
 - [Appendix 26](#) (Swan Mainstem Instream Flow Right Abstract)
 - [Appendix 27](#) (Lower Clark Fork Mainstem Instream Flow Right Abstract)
 - [Appendix 28](#) (MTFWP Claims to be Decreed as Part of the Compact)
 - [Appendix 29](#) (MTFWP Claims Not to be Decreed as Part of the Compact)
 - [Appendix 30](#) (Former Milltown Dam Instream Flow Abstracts)
 - [Appendix 31](#) (Former Milltown Dam Instream Flow Enforceable Level Technical Document)
 - [Appendix 32](#) (2004 DNRC-MTFWP Painted Rocks Contract)
 - [Appendix 33](#) (1958 Painted Rocks Contract Including Amendment)
 - [Appendix 34](#) (1992 MTFWP-BOR Lake Como Contract)
 - [Appendix 35](#) (Placid Creek Instream Flow Right Abstract and [Map](#))
 - [Appendix 36](#) (Kootenai River Tributary Instream Flow Abstracts)
 - [Appendix 37](#) (Flathead Reservation Unitary Water Management Board Forms)
 - [Appendix 38](#) (Flathead Proposed Preliminary Decree)

2013 Compact Documents

2008-2012 Negotiation Documents

Hungry Horse Reservoir

Below are links to a cover letter and a report detailing the State's response to the Tribes' proposal for access to up to 90KAF of releases from Hungry Horse Reservoir as a component of a comprehensive water rights settlement.



Below is also a link to the Bureau of Reclamation's report modeling the possible effects of the Tribes' proposal.

CONTACT

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DIVISIONS

[9-14-11 Revised H H Biological Constraints Report](#)
[HH Response Cover Letter](#)
[HH Biological Constraints Report](#)
[April 2010 Bureau of Reclamation Draft Modeling Report](#)
BOARD OF OIL & GAS
RESERVED WATER RIGHTS COMPACT COMMISSION
TRUST LAND MANAGEMENT
WATER

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KEY TERMS & CONCEPTS

WATER RIGHT KEY TERMS

Abandonment: Intentional, prolonged nonuse of a water right, resulting in its loss

Appropriate: To capture, impound, or divert water from its natural course and apply toward a beneficial use.

Basin: The area drained by a river and its tributaries; a watershed. Montana has been divided into 90 water rights basins. See http://dnrc.mt.gov/wrd/water_rts/adjudication/

Call: The holder of a water right with a senior priority date and an immediate need for a use of water may require a holder of a water right with a junior priority date to refrain from appropriating water otherwise physically available until the senior water right is satisfied. This curtailment is termed "making a call".

Consumptive Use: A beneficial use of water that reduces supply, such as irrigation or household use.

Diversion: An open, physical alteration of a stream's flow away from its natural course.

Flow Rate: That rate at which water is diverted from a source, generally expressed in cubic feet per second or "cfs".

Ground Water: Any water beneath the land surface, bed of a stream, lake, or reservoir.

Instream Flow: Water left in a stream for nonconsumptive uses such as preservation of fish or wildlife habitat.

Junior Appropriator: A secondary user on a watercourse who holds a water right inferior to previous (senior) users.

Priority Date: The official date of an appropriation, generally the date of established intent; used in determining seniority among water users.

Prior Appropriations: The principle governing water law in Montana, namely that first in time is first in right, and that a senior appropriator is entitled to use the last drop of water to which that user is entitled before a junior appropriator may use the first drop of theirs.

Senior Appropriator: An original user on a watercourse who holds a water right superior to all subsequent (junior) users.

Surface Water: Water above the land surface, including lakes, rivers, streams, wetlands, wastewater, flood water, and ponds.

Watercourse: Any naturally occurring stream or river, not including ditches, culverts, or other constructed waterways.

Watershed: A geographic area that includes all land and water in a drainage system.

MEASUREMENT TERMS & ACRONYMS

Acre Foot (AF): A measurement based on the volume of water that will cover 1 acre to a depth of 1 foot.

Acre Feet per Year (AFY): Maximum volume allowed for use during the course of a year

Cubic Feet per Second (cfs): A measurement based on a rate of water flow that will supply 1 cubic foot of water in 1 second.

Gallons per Minute (gpm): A measurement based on a rate of water flow that will supply 1 gallon of water in 1 minute.

Miner's Inches (MI): By Montana law, 1 cfs is approximately equal to 40 miner's inches.

Volume: Amount of water diverted over a specific period of time.

DNRC QUICK CONVERSION CHART

$MI \times 11.22 = GPM$	$CFS \times 40 = MI$
$MI \div 40 = CFS$	$CFS \times 448.8 = GPM$
$MI \times .0495 = AF/ DAY$	$CFS \times 1.98 = AF/ DAY$
$GPM \div 11.22 = MI$	$AF/DAY \div 1.98 = CFS$
$GPM \div 448.8 = CFS$	$AF/DAY \times 226.67 = GPM$
$GPM \div 226.67 = AF/DAY$	$AF/DAY \div .0495 = MI$

For DNRC's full conversion & usage chart:

https://dnrc.mt.gov/wrd/water_rts/wr_general_info/wrforms/615.pdf

COMPACTS & RESERVED WATER RIGHTS

Aboriginal Water Right: Aboriginal (or original) title to Indian lands and waters established long prior to the creation of an Indian reservation by Indian occupation of the land and use of water for hunting, fishing and spiritual purposes. These rights typically become recognized when a reservation is established by treaty or statute on aboriginal lands. The recognized priority date is usually "time immemorial," *see definition below. See also U.S. v. Adair*, 723 F.2d 1394, 1412-15 (9th Cir. 1983).

Compact: A legal agreement between Montana and a federal agency or an Indian tribe determining the quantification of federally or tribally claimed water rights.

Reserved Water Right: A special water right accompanying federal lands or Indian reservations, holding a priority date originating with the creation of the land.

Time Immemorial: Time extending beyond the reach of memory, record, or tradition, indefinitely ancient, "ancient beyond memory or record;" a time before legal history and beyond legal memory.

Walton Right: A non-Indian purchaser of an Indian allotment also acquires the Indian allottees' share of the reservation's irrigation water rights; the priority date of the right remains the date of the creation of the reservation; and, unlike the Indian allottee, the non-Indian purchaser loses the reserved water right if it is not put to use. The non-Indian purchaser is limited to the quantity of water that he/ she puts to use with reasonable diligence after the transfer of title to the land. See *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) and William C. Canby, Jr., *American Indian Law in a Nutshell* 485-487 (West 2009).

Winters Doctrine: Amalgamation of federal case law defining a reserved Indian water right as a right to water sufficient to carry out the purposes of the reservation with a priority date as of the date of establishment the reservation. See *Winters v. U.S.*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. U.S.*, 426 U.S. 128 (1976); *U.S. v. Adair*, 723 F.2d 1394, 1408-1411 (9th Cir. 1983). Under the Montana Water Use Act, tribal reserved water rights must be resolved through Montana's statewide adjudication process. The Montana Supreme Court has ruled that the Act is adequate to adjudicate federal and Indian reserved water rights. *State ex rel. Greely v. Confed. Salish & Kootenai Tribes*, 219 Mont. 76, 95 (1985). However, though the Water Court can adjudicate tribal reserved rights, its decisions will be subject to scrutiny by both the Montana and U.S. Supreme Courts. *Id.*

ADJUDICATION TERMS

Adjudication: A judicial procedure decreeing the quantity and priority date of all existing water rights in a basin.

Administrative Rules of Montana (ARM): A collection of state agency rules used in the implementation of federal and state codes.

Appeal: To transfer a case from a lower to a higher court for a new hearing.

Claim: An assertion that a water right exists, usually occurring during the adjudication process.

Decreed Water Right: A water right issued by the court upon adjudication of a stream.

Existing Right: A Montana water right originating on or before July 1, 1973, that is subject to adjudication.

Injunction: A court order prohibiting a specific act or commanding the undoing of some wrong or injury.

Issue Remark: A statement added to an abstract of water right in a water court decree by the department or the water court to identify potential factual or legal issues associated with the claim. The term also includes "gray area remarks" that were the result of the verification process.

Interested Person: A person with a real property interest, water right, or other economic interest that may be directly affected.

Montana Water Use Act (MWUA): The laws of Montana that govern water rights adjudication and administration. Found at Title 85 of the Montana Code Annotated.

Murphy Right: In 1969, the Montana Legislature enacted legislation granting the Montana Fish and Game Commission authority to appropriate unappropriated waters on 12 streams to maintain instream flows for the preservation of fish and wildlife habitat. These are known as Murphy rights after Representative James E. Murphy, who sponsored the measure. The Legislature established specific reaches of the following sources: Big Spring Creek in Fergus County; Blackfoot River in Missoula and Powell Counties; Flathead River and Middle Fork Flathead River in Flathead County; South Fork Flathead River in Flathead and Powell Counties; Gallatin River and West Gallatin River in Gallatin County; Madison River in Madison and Gallatin Counties; Missouri River in Broadwater, Lewis and Clark, and Cascade Counties; Rock Creek in Granite and Missoula Counties; Smith River in Cascade and Meagher Counties; and Yellowstone River in Stillwater, Sweet Grass, and Park Counties. The priority dates are 1970 or 1971.

Preponderance of the Evidence: Convincing evidence that shows that the facts are more probable than not. Standard used in the Montana Water Court to determine water right validity.

Valid: Recognized by law; legal and enforceable. Under Montana water law *validity* is used to determine water rights possession and assignment. Only those with valid water rights have an enforceable right to water. Validity for pre-1973 rights is determined through the adjudication process in the Montana Water Court. Post-1973 water rights are obtained through the permitting process with DNRC.

Vested: A term used in some other Western states to describe water rights that are secured in the possession of or assigned to a person. Montana water law does not use this term or concept for determining water rights possession or assignment. *See Valid, above.*

Water Court: Only Montana court with exclusive jurisdiction over the adjudication of water rights claims.

Water Master: An attorney versed in water law who serves at the discretion of the Water Court.

OBTAINING NEW WATER RIGHTS & PERMITTING

Permit: An authorization to use water, issued by the state, specifying conditions such as type, quantity, time, and location of use, and required for any new appropriation of water under State law after June 30, 1973.

Provisional Permit: Temporary permit for use of water.

ADDITIONAL HELPFUL RESOURCES

Water Rights in Montana, April 2014:

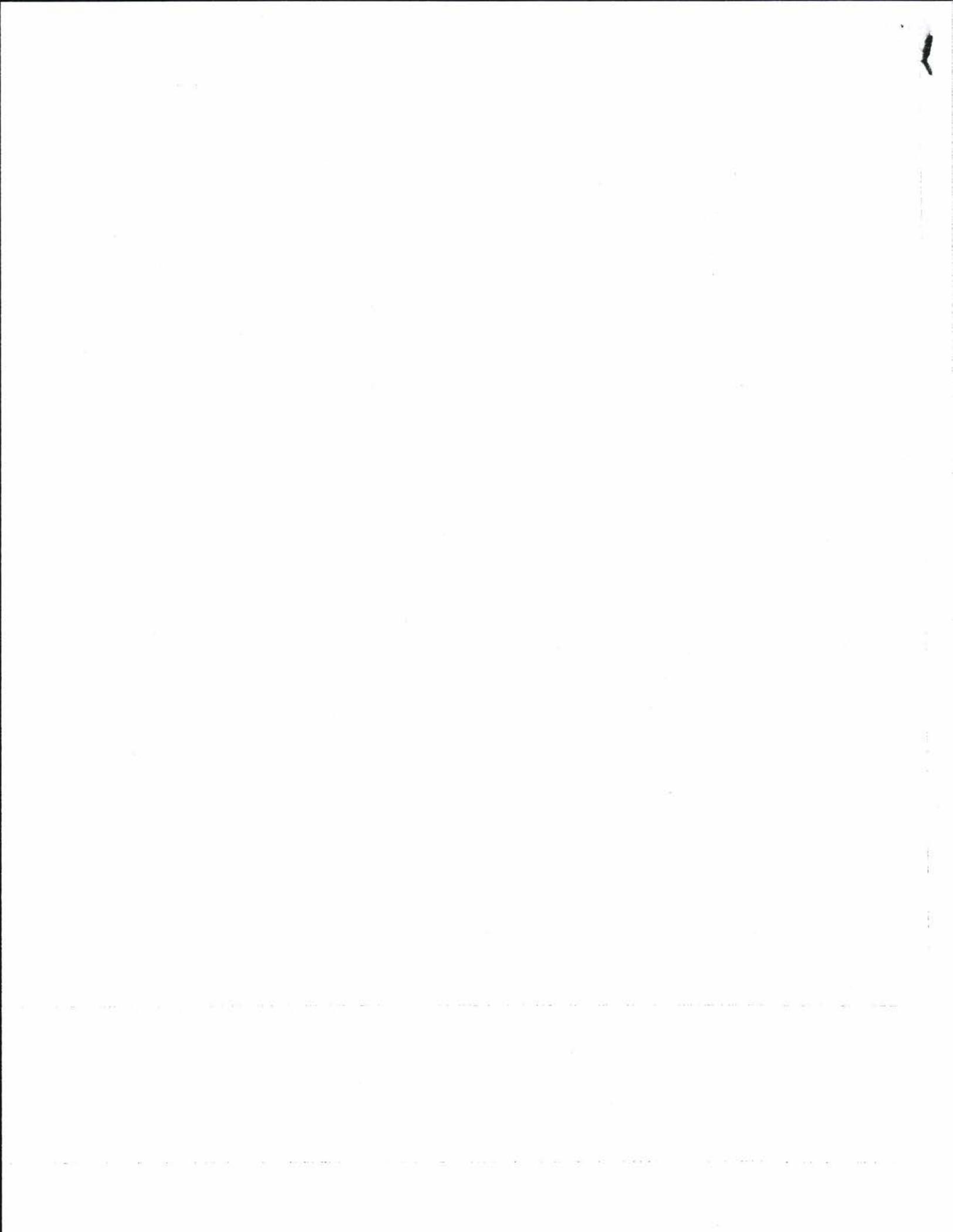
<http://leg.mt.gov/content/publications/environmental/2014-water-rights-handbook.pdf> (Most of the definitions in this handout are taken from this publication)

William C. Canby, Jr., *American Indian Law in a Nutshell* (West 2009)

DNRC Available Resources:

- Water Adjudication Bureau: http://dnrc.mt.gov/wrd/water_rts/adjudication/
- Reserved Water Rights Compact Commission: <http://www.dnrc.mt.gov/rwrcc/>
- Montana Closed Basins Map:
http://dnrc.mt.gov/wrd/water_rts/appro_info/basinclose-cgw_map.pdf

NOTE: The proposed Compact contains a comprehensive list of definitions. Those definitions, and any other legal definitions under State law are controlling for purposes of legal interpretation. The definitions contained in this document are merely intended to help the reader familiarize themselves with basic principles of Montana water law.



Water Right Summary of 2015 CSKT - Montana Compact

Description	Priority Date	Count	Purpose	Appendix	Water Right	Description in Practical Terms	Flow Rate (cfs)	Volume (acre-feet)
On-Reservation Water Rights								
Flathead Indian Irrigation Project (FIIP) Water Use Right	1855	3	Irrigation	Appendix 5	76L 30052930 - 76L 30052932	May serve up to, but not more than 135,000 acres (currently 128,242 acres); Exercise of this right satisfied by meeting the RDA values for each RDA Area described in Appendix 3.2. FIIP Irrigators entitled to delivery of water pursuant to Article IV.D.2.	220 Individual Points of Diversion	Maximum Diverted: 360,950
Flathead System Compact Water Right	1855	1	Any	Appendix 9	76LJ 3006381	Direct flow water right from the Flathead River, including Flathead Lake; Up to 90,000 AF per year of storage water from Hungry Horse Reservoir; state has ability to issue leases for 11,000 AF for DCMI mitigation off Reservation; Additional water can be leased from Tribes for any beneficial purpose (on or off Reservation) and is available for FIIP during Shared Shortages.	Details in Abstract	Diverted: 229,383 Consumed: 128,158
Instream Flow - Natural Sites	Time Immemorial	102	Fish & Wildlife	Appendix 10	76LJ 30052674- 76L 30052775	Nonconsumptive instream use; cannot be changed; located in headwaters above existing uses; no existing uses subject to call.	Individual Monthly Values	N/A
Instream Flow - FIIP Sites	Time Immemorial	33	Fish & Wildlife	Appendix 11	76L 30052776- 76L 30052808	Nonconsumptive instream use; cannot be changed; administered with regard to FIIP diversions according to Article IV.C.F of Compact; administered with regard to existing non-project irrigation uses according to Article III.G.3 of the Compact.	Individual Monthly Values	N/A
Instream Flow - Other Sites	Time Immemorial	49	Fish & Wildlife	Appendix 12	76LJ 30052818- 76L 30052866	Nonconsumptive instream use; cannot be changed; enforcement schedules developed per UMO section 2-1-115 must allow for exercise of all valid existing water rights.	Individual Monthly Values	N/A
FIIP Reservoir Minimum Pool	1855	2	Fish & Wildlife	Appendix 15	76L 30052927 & 76L 30052927	Pool minimums designated to protect reservoir biology.	54 Individual Points of Diversion	Evaporation
Wetlands - Protective	Time Immemorial	12	Fish & Wildlife	Appendix 16 Appendix 21 Appendix 23 Appendix 24	76L 30052661- 76L 30052667, 76L 30052922- 76LJ 30052926	Cannot be used to make call on any water right; no artificial means of diversion or control of water that can be used to manipulate or otherwise affect the water supply, these water rights serve to protect existing Wetlands from adverse effects from new permits and changes to existing water rights.	N/A	N/A
High Mountain Lakes	Time Immemorial	6	Fish & Wildlife	Appendix 17	76L 30052668- 76L 30052673	No artificial means of diversion or control of water; Located in headwaters above all existing water uses, therefore no existing uses will be subject to call.	N/A	N/A
Flathead Lake	Time Immemorial	1	Fish & Wildlife	Appendix 18	76LJ 30052867	Nonconsumptive minimum lake elevation water right that protects the natural elevation level of Flathead Lake, below elevations maintained by Kerr Dam. No artificial means of diversion or control of water. Enforceable at natural lake level 2883' in elevation; Does not affect any existing water users or allow Tribes to drain the lake to that level.	N/A	N/A
Power Generation - Boulder & Hellroaring	1855	3	Hydropower	Appendix 19 Appendix 20	76LJ 30052870- 76LJ 30052872	Non consumptive hydro power water rights.	8 6	nonconsumptive

Water Right Summary of 2015 CSKT - Montana Compact

Description	Priority Date	Count	Purpose	Appendix	Water Right	Description in Practical Terms	Flow Rate (cfs)	Volume (acre-feet)
Off-Reservation Instream Flow Water Rights								
Kootenai River	Time Immemorial	1	Instream Fishery	Appendix 25	76D 30063810	Nonconsumptive instream flow right. Enforceable daily flow schedule based on seasonal water supply under dry year conditions. Not enforceable up tributaries or at all so long as Libby Dam remains in existence, and the Army Corps is in compliance with 2008 Biological Opinion.	Individual Daily Values	N/A
Swan River	Time Immemorial	1	Instream Fishery	Appendix 26	76K 30063809	Nonconsumptive instream flow right. Enforceable daily flow schedule based on seasonal water supply under dry year conditions. Enforceable only against surface water irrigation and over 100 gallons per minute hydrologically connected groundwater irrigation rights. Water right does not affect legal availability for new permit applicants under current DNRC regs.	Individual Daily Values	N/A
Clark Fork River	Time Immemorial	1	Instream Fishery	Appendix 27	76N 30063808	Nonconsumptive instream flow right that equals the Cabinet Gorge and Noxon Dam minimum FERC requirement currently established at 5,000 cfs. Should the FERC requirement be lowered, the enforceable flow rate for this water right must be reduced to match. Enforceable only against mainstem (not tributary) surface water irrigation and over 100 gallons per minute hydrologically connected groundwater irrigation rights. Right does not affect legal availability for new permit applicants under current DNRC water right permitting regulations.	5,000	N/A
North Fork Placid Creek	Time Immemorial	1	Instream Fishery	Appendix 35	76F 30063811	Nonconsumptive instream flow right. There is only one (FIIP) diversion upstream of the protected stream reach; historic diversion levels for this right are maintained.	10	N/A
Kootenai Tributaries: Big, Steep, Sutton, and Boulder Creeks	Time Immemorial	4	Instream Fishery	Appendix 36	76D 30063807, 76D 30052869, 76D 30063806, & 76D 30052868	Nonconsumptive instream use; Cannot be changed; Located in headwaters above all existing water uses, therefore no existing uses subject to call.	Individual Daily Values	N/A
Former Milltown Dam Water Right	1904	2	Instream Fishery	Appendix 30 Appendix 31	76M 94404 01 & 76M 94404 02	Former Milltown Dam hydroelectric water right is changed by the Compact into 2 nonconsumptive instream flow rights. Enforceable daily flow schedule based on seasonal water supply under dry year conditions. Enforceable only against junior surface water irrigation and > 100 gallons per minute groundwater irrigation rights after 4 of 5 consecutive days below minimum flow. Requires 10 years stakeholder planning effort.	Individual Daily Values	N/A
Total Water Rights Recognized		222						

- This summary does not include existing water rights to be co-owned by the Tribes and DFWP as these are previously existing, filed water rights-appendices 22, 24, 28, 30
 - For more information email: dnrwrcc@mt.gov or call 406-444-5700

Most Frequently Asked Questions/Assertions by Non-Indian Reservation Residents

Why does the Commission support this diminishment of citizenship status for non-tribal member state citizens who live within the Reservation?

Response: This question assumes that the State has and properly should have full control of administration of water rights within the Reservation.

As to the first part, the State does not currently have control of administration of water rights within the Reservation, because, since 1996, the Montana Supreme Court has prevented the State of Montana from issuing new water use permits on the Reservation until tribal reserved water rights are fully quantified and determined.

As to the second part, the Tribes have reserved water rights and treaty rights under both federal and state law. Those rights affect water rights arising under State law. In light of that, the question of who administers the water rights within the Reservation is one of the questions that has to be answered by any Compact between the State and the Tribes. Montana's Compacts with some other Tribes have set up dual administration, with the Tribes administering tribal rights and the State administering state-based rights. Even with dual administration, the State wouldn't fully control administration of water rights within the Reservation. In this Compact, the negotiated resolution sets up a unitary administration under a Board that has both tribal and non-tribal membership, a practical solution given the circumstances of this Reservation. The alternative to the Compact solution to the problem would be litigation in which a court would try to find a solution, but even the court would be constrained to recognize tribal rights under applicable law, meaning the solution would not be for full State control over water rights within the Reservation.

The Compact will bring the current uncertainty to an end in a way that balances tribal and non-tribal interests and reflects the realities of the applicable law for both the Tribes and the State.

If Article VIII of the Montana constitution applies fully to these individuals and their property why would Article IX not apply fully as well? (Article VIII is taxation, Article IX is Natural Resources.)

Response: Article IX does fully apply to non-Tribal member state citizens who live within the Reservation, and the Compact doesn't change that. Article IX section 3 subsection (3) provides that "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Under this section, the State owns all the water, and its job is to ensure that "its people" can use the water as set forth in applicable law. Nothing in the Compact changes that, as the Commission cannot, does not and will not negotiate over ownership. What the Compact does is make agreements as to the rights to use of water owned by the State. The Compact is also consistent with the provisions of Article IX section 3 subsection (4) that the legislature shall provide for the administration, control, and regulation of water rights and establish a system of centralized records. This is so because, in approving the Compact, the legislature will be providing for a system of administration of water, one which will create a database which operates with the State's DNRC database, to create a centralized system of records.

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. Mancari*, 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).

Most Frequently Asked Questions/Assertions by County & Local Governments

The Compact may not be used as a vehicle to take irrigation project water rights or individual irrigators' water rights and transfer them to the Tribes.

Response: The assertion that the quantity of water allocated to the irrigation project is significantly less than historical use is not accurate, and the Compact gives irrigators water deliveries based on historic on-farm deliveries. Under the Compact, irrigation water will be provided to irrigators pursuant to a system of River Diversion Allowances that take into account transmission losses and inefficiencies between the river diversion point and the farm turnout. In response to concerns expressed in 2013 about the accuracy of the model used to set the River Diversion Allowances, the Compact now contains provisions for an evaluation process to adjust the River Diversion Allowances to assure irrigators get the water they have historically received.

The unitary management (the Board) set up by the Law of Administration improperly removes involvement of the state water court in administration of water rights on the reservation, treats Montana citizens within the FIP differently than citizens elsewhere, and disproportionately favors tribal representatives as to review, adjudication and control of water rights on the reservation and directs appeals from Management Board decisions to an undefined court of competent jurisdiction.

Response: The Tribes have reserved water rights and treaty rights under both federal and state law. Those rights affect water rights arising under State law. In light of that, the question of who administers the water rights within the Reservation was one of the questions that had to be dealt with in the Compact. Montana's Compacts with some other Tribes have set up dual administration, with the Tribes administering tribal rights and the State administering state-based rights. Even with dual administration, the State wouldn't fully control administration of water rights within the Reservation.

In this Compact, the negotiated resolution sets up a unitary administration under a five-member Board with two members selected by the Tribal Council, two by the Governor, and the fifth by the four other appointees, or, in case of a deadlock, by the Chief Judge of the U.S. District Court for the District of Montana, a balanced and practical approach that does not disproportionately favor any interest. In setting up the unitary management system, the Commission ensured that the rules the unitary administrator (the Water Management Board set up by Article IV.I.) would have to apply would be both explicitly spelled out pursuant to the Compact, to avoid disparate treatment of any water users, and consistent with State water law except where specific departures from current State law were appropriate.

The Compact does define Court of Competent Jurisdiction, and in such a way that in event of disagreements by the litigants, the Court will end up being the United States District Court rather than a State Court or Tribal Court.

The alternative to the Compact solution of unitary management would be litigation in which a court would try to find a solution, but even the court would be constrained to recognize tribal rights under applicable law, meaning the solution would not be for full State control over water rights within the Reservation.

Most Frequently Asked Questions/Assertions by Legislators

The Compact implies that project irrigators get less water than they have been getting and that it is reduced to 1.4 acre feet per year.

Response: The Compact does not say that project irrigators get less water than they have been getting, it gives them water based on historic on-farm deliveries. The 1.4 acre feet per acre provision has been removed from the Compact, one of the changes negotiated from the previous version. That provision has been replaced with provisions that irrigation water will be provided to irrigators pursuant to a system of River Diversion Allowances that take into account transmission losses and inefficiencies between the river diversion point and the farm turnout. In response to concerns expressed in 2013 about the accuracy of the model used to set the River Diversion Allowances, the Compact now contains provisions for a process to adjust the River Diversion Allowances to assure irrigators get the water they have historically received.

With possible improvements to the irrigation ditches the Tribes get all the water savings.

Response: Under Article IV(C)(2) of the Compact, the water savings from improvements to the ditches (and other project facilities), referred to as Reallocated Water, is divided as equally as practicable between Instream Flow Rights and the Irrigation Project Water Right once the Tribes' instream flow rights are satisfied. This tiered system, which shares water savings once Target Instream Flows are achieved, takes into account that the Tribes agreed to defer the full implementation of their Instream Flow Rights in order to protect the ability of the project irrigators to receive historic farm deliveries, even though the 9th Circuit Court of Appeals rule in 1987 that the Tribes' instream flow rights are senior to the water rights associated with the Irrigation Project. The way it works is during the period in which operation and infrastructure improvements are being carried out to free up additional water to allow for both the Tribes' and project irrigators' water rights to be satisfied, the Tribes are agreeing to accept lower instream flows to ensure that project irrigator use is not displaced. So the first batch of water freed up by these improvements goes to the Tribes to allow them to achieve their full instream flow rights without impact to project irrigators, but once those rights are satisfied, any additional water savings are split equally.

Improvements to the irrigation ditches may also harm the water table and reduce capacity of nearby water wells. Will these well owners be protected?

Response: Generally, under either State water law or the Compact, if the source of supply of a well is leakage from irrigation ditches, actions by the ditch owner to reduce leakage do not subject the ditch owner to liability. However, under the Adaptive Management provisions of the Compact, the Compact Implementation Technical Team can use excess interest payments from the pumping fund to mitigate ditch improvements which reduce well yields.

Why are exempt wells being reduced from 35 gpm/10 acre feet to 35 gpm/2.4 acre feet?

Response: The 2.4 acre feet per year well limit was calculated, based on actual average use of exempt wells statewide, to be sufficient to provide ample water for a household including irrigation of .7 acres of land, and was put in place to avoid misuse of the exempt well category for non-domestic uses. This provision is the result of negotiations. At present there is no legal mechanism to recognize *any* new wells (whether above or below the 35 gpm/10 acre feet exemptions in State law) on the Reservation. In negotiating to obtain legal protection for those wells that have been drilled since 1996, the State had to come to an agreement with the Tribes over the size of the exemption going forward, and the 35 gpm/2.4 acre feet was the end result, representing a volume sufficient for domestic, household and residential irrigation purposes (.7 acres is the amount of defensible space recommended for buildings in the wildland-urban interface for fire prevention purposes). Without a Compact, any well drilled on the Reservation since August 22, 1996, does not have a legal water right under State law.

Why are the Tribes getting Control of all the water west of the continental divide?

Response: They aren't, in fact the Compact doesn't even recognize a Tribal right to control all the water on the Reservation or even the Tribal exclusive control over the administration of their own water rights. There is a recognition of some limited off-reservation rights owned by the Tribes, but the nature of those rights combined with the protections built into the Compact and the shared management through the Water Management Board, means the Tribes will have less control over water in western Montana under the Compact than they could have with judicial recognition and enforcement of their claims.

Why does the State have to pay \$55 million when it is a federal irrigation project?

Response: The State is agreeing in the Compact to pay a total of \$55 million – the majority of which (\$30 million) is to assist with pumping costs for project irrigators. The remaining \$15 million will be allocated as follows: \$4 million for water measurement; \$4 million for on-farm efficiency improvements on lands served by the project; \$4 million for on-farm stock water systems; and, \$13 million to the Tribes for aquatic and terrestrial habitat enhancement. The State is agreeing to make this contribution as part of the consideration for the various concessions the Tribes are making in the Compact. The State has made significant contributions to other Indian water rights settlements (such as the Blackfoot Tribe and Crow Tribe) as well. The State's contribution represents the value to the State of having a final determination of the Tribes' water rights and protection for existing State water uses.

The State is not the only one that will be making a monetary contribution towards settlement of the Tribes' water rights. The U.S. Government will also be required to contribute to the settlement of the Tribes water rights. Most estimate the federal contribution will exceed Congress' appropriation of \$460 million in 2010 for settlement of the Crow Tribe's water rights.

Why the Six Legislative Reasons to Reject the CSKT Water Compact are Incorrect.

The Compact gives all surface and ground water within the borders of the reservation to the CSKT Tribal government, including water rights belonging to both non-Indian and Indian private landowners. No Tribe in Montana or the United States has been given all the water on a reservation.

Response: The Compact does not give all surface and ground water within the Reservation to the Tribes. Instead, as with all other Indian compacts in Montana, the CSKT Compact quantifies the Tribes' water rights. The CSKT Compact also provides for a system of shared administration for the use of water by Indian and non-Indian land owners within the Reservation. It does not transfer anyone's private water rights to the Tribes. Specifically, the claim of FIIP irrigators to ownership of the FIIP water right is unaltered by the Compact. It will move forward in the statewide water adjudication process for final resolution by the state water court.

The CSKT Compact has never identified the quantity of water needed by the CSKT to fulfill the purposes of the Flathead Indian Reservation. How much do they need, what are the anticipated needs, looking down the road, what is the volume of water needed for future development of the Tribe on the Reservation?

Response: The Compact provides specific quantification of the Tribes' water rights, both on and off the reservation. In fact, through the abstracts appended to the Compact, the CSKT Compact quantifies the Tribes' rights with more specificity than any prior Indian water rights Compact in Montana. By agreeing to the Compact, the Tribes have agreed that the above specific quantification fulfills their present and future water needs. In exchange, they have agreed to relinquish their right to make any other claims to water within the State and to dismiss any pending claims on final approval of the Compact by the water court. The quantification is accomplished as follows:

- i. The Tribes' consumptive use water right from Flathead system water is quantified in Article III.C.1.c., appendix 9. The Tribes have a diversion right in the amount of 229,383 acre-feet per year from Flathead Lake, the Flathead River, and the South Fork of the Flathead River. Water that may actually be depleted is limited to 128,158 acre-feet per year. Use of this water right must comply with various Endangered Species Act requirements, requirements for federal dams and reservoirs, and with filling criteria for Flathead Lake.
- ii. The water right for the Flathead Indian Irrigation Project is quantified at Art. III.C.1.a., and appendices 3.2 through 3.7. The quantified water diverted into the Project is specified for each administrative area within the Irrigation Project, and varies depending on whether the water year is a wet, normal or dry year. These quantifications are termed River Diversion Allowances, or RDAs. The total RDAs for wet, normal, and dry years respectively are 302,250 acre-feet, 278,000 acre-feet, and 256,900 acre-feet. It is important to note that these numbers do not include pumped water available through the Flathead pumping station RDA, which is set at 65,000 acre-feet. This additional water is capable of being pumped directly or transported between administrative areas within the Mission and Jocko.

- iii. The on-reservation instream river flow water right is quantified at Art. III.C.1.d., and appendices 10 through 14, and is measured in cubic feet per second at specific locations during specific times of the year. On-reservation instream flows were quantified, conditioned and/or located specifically to protect existing uses. For example, the natural instream flows have enforcement points located upstream of consumptive diversions, meaning they cannot be used to call other uses.
- iv. The water right for "Other Instream Flows," is quantified at Art. III.C.1.d., appendix 12. These flow rates must accommodate existing uses. The "other" instream flows will not have an enforceable level set until after the adjudication is complete (although they are currently quantified), and that process for setting the enforceable level is 1) public and 2) requires it to be set to allow existing uses to continue. See *Unitary Management Ord.* § 2-1-115.
- v. Other non-consumptive water uses within the reservation are quantified at Art. III.C.e – I, and accompanying appendices.
- vi. The water right for off-reservation instream flows is quantified at Art. III.D and accompanying appendices.

The "Abstracts of Water Right" are the defining and controlling documents for implementing the compact (Article III(B), page 14). There are 1,000-plus pages to read in order to know what is in the Compact and to find out how much water has been awarded to the Tribes.

Response: Abstracts are important, however, they are voluminous. Rather than reading the abstracts as a single comprehensive set of documents, they were intended to provide reference information linked to the water right descriptions in the Compact. The quantifications for the most substantial rights are either set forth in the Compact directly or in the non-abstract appendices (for the Flathead System Compact Water and the FIIP Water Use Right.)

The Compact awards to the CSKT alone the equivalent of 40 feet of water on every acre of land within the 1.2 million acre reservation. This is more water awarded to a single tribe than all the water awarded to every Tribe in Montana and every Tribe in the United States combined.

Response: At the outset it is important to note that this statement does not include any information as to the methodology or source for its calculation as to the amount of water being awarded to the Tribes in the Compact, thus it is impossible to assess for accuracy. That being said, this assertion is simply incorrect. The actual quantification of the Tribes' water right as set forth in the Compact does not support the amount of water that this statement claims is being awarded to the Tribes. See previous response summarizing the specific quantification amount of the Tribes' water rights in the Compact. In order to get anywhere close to the amount of water contemplated in this statement one would likely have to conflate the Tribes' consumptive and non-consumptive water rights and add the non-consumptive rights in a way that results in a double-counting of water.

This Compact would create the first-time ever off-reservation water right in Montana, taking the state water rights out of the hands of Montana and giving the control of state water over to the federal government.

Response: It is correct that the proposed water compact with CSKT is the only compact to include off-reservation water rights derived from treaty fishing rights. The reason for the inclusion of this type of off-reservation right is very straight forward – CSKT is the only Tribe in Montana to have entered into a “Stevens Treaty.” Legal precedent has established that (1) Stevens Treaty Tribes, including the Hellgate Treaty of 1855, have off-reservation fishing rights; (2) these rights are substantive and continue to exist; (3) beneficial uses in Montana include instream flows for fisheries; and (4) a tribal reserved right for fishing includes the right to “prevent other appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies.” *State ex. rel. Greely v. Confederated Salish & Kootenai Tribes* (1985), 219 Mont. 76, 93. While it is true that a court has not yet adjudicated the precise issue of CSKT’s off-reservation water rights as derived from the Hellgate Treaty, based on the language of existing legal precedent it is very likely that the Tribes’ claims to off-reservation instream flow rights will be upheld by both federal and state courts. It is the very likelihood of such an outcome that necessitates the passage of a water compact addressing off-reservation rights.

The inclusion of off-reservation water rights in the Compact, however, does not result in the federal government having control over State water rights. Instead, the State, through negotiation, was able to limit the Tribes’ ability to exercise the off-reservation water rights so as to preserve and protect existing water uses. Mere ownership of a water right off the reservation in no way conveys regulatory control to either the Tribes or the federal government. On the contrary, the state has direct jurisdiction over such rights, as it always has.

The Compact will remove 28,000 Montana citizens’ water rights out from underneath the protection of the Constitution and laws of the State, placing them under the jurisdiction of the CSKT. This has never been done before in the United States.

Response: The Compact does not remove Montana citizens from the laws of the State. Instead, the Compact provides for a new ordinance that will apply equally to both Indian and non-Indian water users on the Reservation, and that will be adopted in functionally identical form as both State law and Tribal law. In this Compact, the negotiated resolution sets up a unitary administration under a five-member Board with two members selected by the Tribal Council, two by the Governor, and the fifth by the four other appointees, or, in case of a deadlock, by the Chief Judge of the U.S. District Court for the District of Montana, a balanced and practical approach that does not disproportionately favor any interest. The board does not place water users “under the jurisdiction of the CSKT.” Rather, it is a joint state-tribal board with equal representation, implementing an ordinance that will be part of State law. The ordinance is consistent with current State water law except where specific departures from current State law were appropriate. As the ordinance will need to be approved by the Montana legislature to become effective, it is entirely consistent with Article IX(3) of the Montana Constitution.

Most Frequently Asked Questions/Assertions by Irrigators

The irrigation water rights belong to the irrigators or the irrigation districts, not to the Tribes.

Response: Both the BIA and the Flathead Joint Board of Control (FJBC) filed claims in the Montana Water Court for the water historically used by FIIP irrigators. Applicable law does not clearly support the claim that these rights belong to the irrigators or to the irrigation districts, nor does it support a claim by the FJBC or fee land irrigators to an 1855 priority date, which is the date the Project right has under the Compact. This priority date is important because it means the Project won't be required to change from its historic practice of delivering water to lands based on quota rather than priority date. In the Compact, the State has made the decision to recognize these rights as part of the Tribal Water Rights in exchange for the Tribes' agreement to assure that the irrigators remain entitled to the right to use of water they have historically put to beneficial use. In addition, unlike the 2013 draft Water Use Agreement among the Tribes, the FJBC and the United States, the Compact does not call for or require the withdrawal of claims filed by the FJBC for the Project. Those claims remain to be resolved in the Adjudication by the State Water Court.

The compact improperly converts the irrigators' property right in water use to a contract right.

Response: The status of the irrigators' rights to Project water is not at all settled under the law. While reasonable minds may differ over how a court might resolve this question (possibilities include personal water rights; delivery rights derived from the Project right; delivery rights derived from the federal rules and regulations governing the Project; contract rights, no legal entitlement to water at all), the Compact provides certainty by quantifying the Project right as part of the Tribal Water Right with an 1855 priority date while ensuring that irrigators' ability to continue to use their water is protected, and that their right to continue to use water is transferrable with the land.

The Compact transforms federal reserved water rights under the Winters Doctrine into Indian reserved water rights, greatly expanding the scope of the permissible claims Indian Tribes can make under the Winters Doctrine.

Response: The Compact Commission made the determination, reflected in the Compact, that the tribes were entitled to at least the water rights allocated to the Tribes in the Compact. This determination was based on the fact that the controlling case law, including the controlling Montana Supreme Court case, *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 99 (1985), does not support the sort of bright-line distinction between Winters Doctrine rights and Indian reserved water rights asserted in the question. There are no rights recognized in the Compact that fall outside the rights recognized by this case law, and the fact the Compact references language from the Treaty in the Recitals doesn't change the derivation or the legal significance of those rights.

The Compact reduces the water historically available to irrigators will get from 4.7 acre feet per acre to 1.4 acre feet per acre.

Response: The assertion that irrigators historically received 4.7 acre feet per acre is not accurate, and the Compact does not limit irrigators' rights to 1.4 acre feet per acre. That provision was in the draft Water Use Agreement among the Flathead Joint Board of Control (FJBC), the Tribes and the United States that was intended to be an Appendix to the 2013 version of the Compact. The current Compact does not set a fixed quantity by farm turnout but instead uses River Diversion Allowances to satisfy the irrigation project water right and Historic Farm Deliveries that take into account transmission losses and inefficiencies between the river diversion point and the farm turnout to assure irrigators get the water they have historically needed to grow their crops. The Compact leaves distribution of the water up to the Project Operator and the project's operations plan, as it has always been. The relevant provisions in the Compact are found at Article IV.D.

The Compact, through the RDA, further diminishes the 1.4 acre feet per acre because if 1.4 acre feet is made available from the river diversion, some of that is lost in transmission before it gets to the farm turnout.

Response: The Compact does not limit irrigators' quantity rights to 1.4 acre feet per acre per year per irrigable acre, and the current Compact language instead says that irrigation water will be provided to irrigators pursuant to a system of River Diversion Allowances, consistent with Historic Farm Deliveries, that take into account transmission losses and inefficiencies between the river diversion point and the farm turnout to assure irrigators get the water they historically have needed to grow their crops. The relevant provisions in the Compact are found at Article IV.D.

The instream flow provisions improperly give the Tribes rights to control water resources on and off the Reservation, taking water from irrigators (by cutting the water available to the irrigator's right from 4.7 acre feet to 1.4 acre feet).

Response: In 1987, the Ninth Circuit Court of Appeals ruled that the Tribes' instream flow rights on the Flathead Indian Reservation were senior to any water right associated with the Project. The Compact seeks to lessen the potential severity of this ruling on Project water users by including provisions to ensure irrigators will get the water they historically received even while protecting instream flow rights. The Compact provisions addressing this subject are found in Article s IV.C through F and Appendix 3.5. The Compact does not limit irrigators' quantity rights to 1.4 acre feet per acre per year per irrigable acre, and the current Compact language instead says that irrigation water will be provided to irrigators pursuant to a system of River Diversion Allowances, consistent with Historic Farm Deliveries, that take into account transmission losses and inefficiencies between the river diversion point and the farm turnout to assure irrigators get the water they historically have needed to grow their crops. The relevant provisions in the Compact are found at Article IV.D.

The instream flow provisions improperly give the Tribes rights to control water resources on and off the Reservation:

- by recognizing more than the minimum instream flows which is what Stevens Treaty court decisions have recognized;
- by recognizing the Tribes' rights to the water necessary to revitalize the pre-Treaty natural environment of the reservation, which fits neither within the Winters Doctrine nor the Treaty rights related to fishing;
- by elevating the Tribes' treaty rights related to right to fish in common with other citizens "of the Territory" fishing above the rights of non-Indians (which improperly gives Tribes control of nearly all the waters west of the Continental Divide).

Response: The Compact Commission determined that the Tribes were entitled under the *Winters* Doctrine, the Hellgate Treaty, and pertinent judicial decisions, to at least the instream flow rights which are reflected in the Compact. In exchange for recognition of these rights in the Compact, the Tribes agreed to extensive provisions that limit or wholly eliminate the Tribes' ability to exercise these rights to the detriment of other water users. For example, in exchange for the recognition of these rights, the Tribes have agreed to waive any ability to enforce them against any non-irrigation water user and against small irrigators. In addition, even where irrigators could theoretically be called by the Tribes to satisfy their instream flow rights, the quantification of the rights and the baseline hydrology of the streams in question are such that the risk of a Tribal call is minimized. The Compact Commission made the determination that the balance of rights and protections achieved by the Compact was preferable to facing the risks of litigation, which could result in the outcome predicted by these questions (smaller or no instream flow rights, especially off the Reservation) but that could also lead to the recognition of senior tribal instream flow rights free to be exercised with no consideration or protection for junior water users. The relevant Compact provisions are at Article III.G.

The Compact may not be used as a vehicle to take irrigation project water rights or individual irrigators' water rights and transfer them to the Tribes.

Response: Both the BIA and the Flathead Joint Board of Control (FJBC) filed claims in the Montana Water Court for the water historically used by FIIP irrigators. Applicable law does not clearly support the claim that these rights belong to the irrigators or to the irrigation districts, nor does it support a claim by the FJBC or fee land irrigators to an 1855 priority date, which is the date the Project right has under the Compact and which eliminates the prospect of the Project needing to depart from historic practice by beginning to deliver water to lands based on priority date rather than quota. In the Compact, the State has made the decision to recognize these rights as part of the Tribal Water Right in exchange for the Tribes' agreement to assure that the irrigators remain entitled to the right to use of water they have historically put to beneficial use. In addition, unlike the 2013 draft Water Use Agreement among the Tribes, the Flathead Joint Board of Control and the United States, the 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.



PONDEROSA ADVISORS LLC

energy agriculture water

February 2, 2015

Senator Chas Vincent
Montana Senate
PO Box 200500
Helena, MT 59620-0500

Senator Vincent,

In response to recent questions regarding interpretation of water right abstracts, I am providing the attached article. This article is based upon my past experience as a Senior Water Master with the Montana Water Court, although it is not intended to speak for the Court or represent its opinion. The article references the Montana Claims Examination Manual, and includes discussion of the elements of water rights as shown on water right abstracts, with examples of each field.

I am available to answer any questions or to provide additional information.

Sincerely,

Colleen Coyle
Director, Water Services
ccoyle@ponderosa-advisors.com

Process and Implications of Adjudication through Litigation of CSKT Reserved Water Right Claims vs. Legislative Approval of a Compact

Colleen Coyle¹

On December 10, 2014, the Confederated Salish and Kootenai Tribes (CSKT), the Montana Reserved Water Rights Compact Commission (RWRCC), and the United States reached agreement on a revised compact for CSKT reserved water rights. With approval by the RWRCC, the revised compact will be introduced at the 2015 Montana Legislature. This is the second time that the Montana Legislature will be considering a CSKT compact, having rejected the previous version during the 2013 session. This compact process has attracted national attention, including a New York Times article with this description of the 2013 version:

The proposed compact is 1,400 pages long, a decade in the making and bewilderingly complex. Essentially, it helps to lay out the water rights of the tribe[s] and water users like farmers and ranchers. It provides \$55 million in state money to upgrade the reservation's water systems. And it settles questions about water claims that go back to 1855, when the government guaranteed the tribes' wide-reaching fishing rights across much of western Montana. Healy, Water Rights Tear at Indian Reservation, New York Times, April 22, 2013.

At least four lawsuits in different state and federal jurisdictions have already been filed over claims to water related to the CSKT reservation. Opinions differ on how best to quantify the CSKT reserved water rights. Some who oppose the revised Compact have indicated support for adjudication through litigation of the CSKT

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The opinions expressed in this article are solely the author's, and are not intended to represent those of the Montana Water Court or Ponderosa Advisors LLC.

water rights. This article summarizes the adjudication process as it generally applies to CSKT and state-based water rights.

The United States began litigating Indian water rights for Montana tribes when it filed two lawsuits in 1975 on behalf of the Northern Cheyenne and Crow Tribes and two lawsuits in 1979 on behalf of the Fort Peck tribes in federal court. See Folk-Williams, The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights, 28 Nat. Res. J. 63, 82 (1988). In 1979, Congressional hearings recorded widespread concern by non-Indians about the consequences of this litigation. *Id.*, citing Senate Select Committee on Indian Affairs, *Indian Water Rights in Montana* (1979). In 1979, largely because of the federal lawsuits, the Montana Legislature enacted the statewide water rights adjudication effort.

In Montana's adjudication process, statements of claim for all state-based water rights (rights other than federal and Indian reserved water rights) were required to be filed by April 30, 1982. Late claims were allowed until 1996. Late claims are subordinate to reserved water rights and sometimes to timely filed claims. Section 85-2-221, MCA. Indian reserved water rights did not need to be filed in 1982 if the tribes agreed to negotiate the rights with the Montana Reserved Water Rights Compact Commission. Compacts reached through the Compact Commission are required to be approved by the Montana Water Court. Section 85-2-217, MCA.

When the Montana Water Court approved the legislative approved Compacts of the Fort Peck and Rocky Boy Reservations in 2001 and 2002, Judge Loble concluded:

All negotiations and adjudications quantifying Indian reserved water rights involve extensive and complex disputed issues of fact and law. They inherently involve competing interests in a scarce resource, the allocation of which must be determined by ambiguous, perhaps anachronistic law, evolving governmental policies, and increasingly sophisticated science—all amidst rapidly changing circumstances, within the confines of a complex adjudication process. That is precisely the incentive for negotiation and settlement of complex water right adjudications. Memorandum Opinion, Case WC 92-1 (2001).

If the CSKT Compact is not approved by the Legislature, then all CSKT Indian reserved water right claims must be filed with the Montana Department of Natural Resources and Conservation (DNRC) by July 1, 2015. These new filings must be given treatment similar to that given all other filings. Section 85-2-702(3), MCA.

Differences between state-based and federal rights for adjudication, and some rules that would apply in adjudication

Indian reserved water rights were first recognized by the United States Supreme Court in a case regarding the Fort Belknap Indian Reservation in northern Montana, Winters v. United States, 207 U.S. 564 (1908). Recognizing that the “lands were arid, and, without irrigation, were practically valueless,” the Court concluded that Congress, by creating the Indian reservation, impliedly reserved not only land, but all of the waters of the Milk River necessary for the purposes for which the reservation was created. 207 U.S. 564, 567 (1908).

In Cappaert v. United States, the United States Supreme Court summarized the federal reserved water rights doctrine as follows:

When the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Cappaert v. United States, 426 U.S. 128 (1976).

In 1985, the Montana Supreme Court directed the Water Court to adjudicate reserved water rights in accordance with State ex rel. Greely v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, 214 Mont. 143, 691 P.2d 833 (1985). In that opinion, the Montana Supreme Court described the holdings of several federal court decisions and provided the following summary:

- State appropriative water rights and Indian reserved water rights differ in origin and definition.
- Appropriative rights are based on actual use. Appropriation for beneficial use is governed by state law.
- Reserved water rights are established by reference to the purposes of the reservation rather than to actual, present use of the water. The basis for an Indian reserved water right is the treaty, federal statute or executive order setting aside the reservation. Treaty interpretation and statutory construction are governed by federal Indian law.

- The date of priority of an Indian reserved water right depends upon the nature and purpose of the right.
- Reserved water rights are difficult to quantify. Because the purposes of each reservation differ, federal courts have devised several general quantification standards. These standards differ depending upon the purpose for which the water was reserved.
- For agricultural purposes, the reserved right is a right to sufficient water to "irrigate all the practicably irrigable acreage on the reservation."
- The right to water reserved to preserve tribal hunting and fishing rights is unusual in that it is non-consumptive. A reserved right for hunting and fishing purposes "consists of the right to prevent other appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies." Greely, 214 Mont. 143,691 P.2d 833.

Many aspects of these rules and decisions are ambiguous and thus it is difficult to predict the outcome of their application to CSKT water rights in litigation. For example, the Winters Court held that reserved water on the Fort Belknap Reservation could be beneficially used for "acts of civilization" as well as for agricultural purposes. Winters v. United States, 207 U.S. 564 (1908). "Acts of civilization" could be found to include a variety of uses, including consumptive uses for industrial purposes. Also, reserved rights may reflect future need as well as present use. Most reservations have used only a fraction of their reserved water, but the "practically irrigable acreage" standard applies to future irrigation of reservation land, not present irrigation practices and current consumptive uses. Winters rights are not subject to abandonment. See Arizona v. California, 373 U.S. 573, 577 (1963).

The Montana Water Court has recognized that "[w]hether by adjudication or by negotiation, determining the scope and extent of Indian reserved water rights has proved difficult at best." Memorandum Opinion, Case WC 92-1 (2001). This case discusses several of the Supreme Court decisions, stating that:

As articulated by the United States Supreme Court, the Reserved Water Rights Doctrine is vague and open-ended and has been construed both broadly and narrowly by subsequent federal and state courts. *After nearly one hundred years of legislation, litigation, and policy making, there are still*

no bright lines clearly and consistently delineating the Doctrine. Most of the legal issues inherent in the Doctrine remain unsettled and hotly debated and are now complicated by decades of distrust and competing policies.

Memorandum Opinion, Case WC 92-1 (2001) (Italics mine).

All statements of claim are prima facie proof of their content in Montana. This legal standard did not apply to Indian reserved water rights litigation in Wyoming.

Claims for all existing (pre-July 1, 1973) water rights were required to be filed by April 30, 1982, and late claims were accepted for filing until 1996. Section 85-2-221, MCA. These deadlines were suspended only for federal and Indian reserved water rights during the compact negotiation process. Section 85-2-217, MCA. Some rights, such as instream stock and domestic rights, were exempt from the claim filing process. Section 85-2-222, MCA. Claims for existing rights can no longer be filed, because the deadlines have passed for all claims other than any remaining federal and Indian reserved rights that are not resolved through compacts, and processes for exempt rights pursuant to Section 85-2-222, MCA.

All statements of claim, for state-based claims and federal and Indian reserved rights, are prima facie proof of their content. Section 85-2-227(1), MCA. Objectors have the burden of producing evidence that contradicts and overcomes elements of the prima facie claim. Memorandum Opinion, Water Court Case 40G-2, p. 13 (March 11, 1997). This is the burden of proof for every assertion that a claim is incorrect, including for claimants objecting to their own claims. Rule 19, Water Right Adjudication Rules (W.R.Adj.R.)

This prima facie standard for water rights is not a feature of law in all Western states and was not the legal standard in Montana prior to 1979. Prior to 1979, any party asserting a water right in Montana had the burden of proving every element of their water right claim. See Case 40G-2. Recognizing the evidentiary difficulty in proving up elements of historical water rights when all witnesses to the original appropriations have long since died, and the need to speed up the process, the 1979 Legislature enacted the prima facie proof statute. Section 85-2-227, MCA.

In Montana, this prima facie standard would apply to CSKT claims just like any other claims in the adjudication process, so any objectors would have the burden to attempt to contradict or overcome elements of CSKT claims. This makes comparisons or predictions based on Indian reserved water rights litigation in other states very difficult. For example, in Wyoming, the Wind River Reservation Tribes and the United States were required to substantiate their claims to reserved water

rights, and the State of Wyoming served as an opposing party in the litigation. See Wyoming v. United States, 492 U.S. 406 (1989), reh'g denied, 492 U.S. 938 (1989) [Big Horn I].

This structure is very different in Montana. In Montana, unless DNRC places issue remarks on claims (see below discussion on issue remarks), the Court reviews claims pursuant to Rule 8, W.R.Adj.R, or objectors actively oppose claims through the objection process, the prima facie standard can result in claims proceeding through adjudication unchallenged. The final decree can then reflect the claims as they originally appeared on the statements of claim. Objectors must actively participate in adjudication proceedings in order to maintain an objection. If an objector fails to appear at a scheduled conference or hearing, or fails to comply with an order issued by the Water Court, the Water Court may issue orders of sanction including dismissal of the objection. Rule 22, W.R.Adj.R.

Adjudication Process

The adjudication process for any basin decree begins with DNRC examination of all claims filed in the basin, using a detailed claims examination manual and a set of claims examination rules adopted by the Montana Supreme Court. This examination reviews claims for factual discrepancies and issues, such as whether acreage claimed appears to be irrigated in historical aerial photos, whether claimed acreage can be reached by claimed ditches or diversions, questionable flow rates and volumes, legal description errors, duplicate claims, questionable priority dates, and a wide variety of other discrepancies. DNRC contacts claimants to attempt to resolve issues that it identifies, and issues that remain unresolved are written on the claim abstracts as issue remarks. Many of the objections filed in recently issued basins are based on the DNRC issue remarks. The Water Court resolves issue remarks pursuant to Section 85-2-248, MCA, so claims examination is a significant component of the current adjudication process.

The claims examination rules do not provide procedures to examine federal and Indian reserved water right claims, and it is not clear whether these claims would be examined by DNRC. CSKT could object to examination of its claims, so litigation on this issue is likely. If examination is ordered, the Montana Supreme Court would most likely be asked to issue new claims examination rules to govern that examination process. If the claims are not examined, objectors will not be able to rely upon DNRC issue remarks to assist in identifying factual discrepancies. If claims examination is ordered, it is not possible to estimate how long any DNRC examination of CSKT claims would take because all claims are not yet filed, and

any litigation over this issue would delay examination. The claims examination process can generally take a year or longer in a basin, but with litigation and possible new rules for examination, it could take DNRC several years to complete an examination process for CSKT water right claims.

After examination, the Water Court issues the basin decree. Unlike traditional District Court cases where a decree is issued at the end of litigation, a Water Court decree is issued at the beginning of the litigation process. The Water Court decree is basically a compilation of water right abstracts for claims filed in a basin. Parties receive notice of the decree, have an opportunity to object to claims in the decree, and the decree is then modified after hearings, objections, and settlements. The Water Court provides notice that a decree has been issued and that it is available for review, and the time period for filing objections begins. The objection period lasts at least 6 months and is commonly extended. Deadlines for counter objections and notice of intent to appear are set, and once all deadlines have passed the Court will begin to consolidate cases. This is generally about 2 years after issuance of the decree.

The Water Judges refer many of the cases to Water Masters, who manage the cases through resolution by settlement or hearing. Masters set orders for conferences, manage settlement and prehearing deadlines, order field investigations, manage discovery processes, accept or reject settlement agreements, and issue decisions on motions. If parties are not able to reach settlement, Water Masters conduct hearings and issue decisions in the form of Master's Reports with findings of fact, conclusions of law and recommendations. Parties can object to Master's Reports, and Master's Reports can be accepted, rejected, or modified by the Water Judges. Rule 23, W.R.Adj.R. Water Judges will often hold additional proceedings, including hearings, at the request of a party in review of an objection to a Master's Report.

Currently, the average basin takes at least 5 years to be 90% complete. The remaining 10% are generally the most contentious cases in the basin, which could take several more years to complete. See Montana Water Court website, http://courts.mt.gov/water/water_court_statistics.mcp.

The CSKT claims, if they are required to be filed, will present substantially different procedural and legal issues than any the Water Court has previously addressed due to the application of federal reserved water rights doctrine.

Adjudication of the CSKT reserved water rights through the claims filing, objection, and litigation process will involve not only the basins where the reservation is

located, but a likely reopening of other basins to address claims for aboriginal rights which CSKT has indicated it will file in several off-reservation basins. CSKT has asserted that its aboriginal range may include most of Montana west of Billings and Lewistown. If CSKT claims are filed in off-reservation basins, then it might also result in litigation and reopening of litigation for state-based rights in those same off-reservation basins.

Consequently, the basins where CSKT claims are filed, including Basin 76L (Flathead River below Flathead Lake) and Basin 76LJ (Flathead River to and including Flathead Lake) will take longer to complete than the average for basins. The basins where aboriginal claims are filed, off the reservation, are also quite likely to take longer than average. No one can estimate the length of time it will take to adjudicate these claims, and appeals to state and federal courts are far more likely than with any other litigation the Water Court has addressed, including the potential for appeals to the United States Supreme Court. The United States Supreme Court has reserved the right to review state court adjudications of Indian reserved water rights, which the Montana Supreme Court has directly acknowledged. State ex rel. Greely v. Confed. Salish & Kootenai Tribes, 219 Mont. 76, 95 (1985). In the San Carlos Apache case, the U.S. Supreme Court emphasized:

"[O]ur decision in no way changes the substantive law by which Indians rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a *particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.*" 463 U.S. at 571, 103 S.Ct. at 3216. (Emphasis mine).

If the CSKT Compact is approved by the Legislature, it will be subject to Congressional, Tribal, and Water Court approval. Preliminary decrees will be issued incorporating the Compact and state based claims. The Compact could be included in a Preliminary Decree with all the state law based claims filed in the Flathead Valley basins. Alternatively, the state based water right claims of the Flathead Valley basins could be issued in a separate Preliminary Decree while the CSKT Compact is reviewed by Congress. If Congress and the President approve the Compact, the Compact would then be filed with the Water Court for approval or rejection. The Water Court reviews Compacts to determine if they are "fundamentally fair, adequate and reasonable", and to determine whether they

conform to applicable law. Case WC 2007-03. The Water Court cannot modify a compact. It can only approve or reject compacts.

Because predicting a final outcome of the claim filing, objection, and litigation process is so difficult, there are significant benefits to negotiating water right settlements. Settlements can address issues such as water administration and funding, but a Water Court decision, issued after the claims are filed and all objections are litigated to finality, would set forth only the findings of fact, conclusions of law, and elements of water rights as dictated by Section 85-2-234, MCA. The Water Court has recognized that a water right decision litigated through the objection process is less flexible than a negotiated compact settlement:

The parties to this Compact, and the negotiators to compacts generally enjoy considerable freedom in reaching the compacted results, and may achieve results through the compact process that are more favorable to their interests than would be achieved through litigation. If other parties claiming reserved water rights proceed to litigation on the merits before the Montana Water Court, the Court will have to draw hard lines and resolve ambiguous legal precedent on many of the issues which are given broad brush in this Compact review. Case WC 92-1.

Conclusion

The Montana Water Court and the adjudication staff at DNRC have outstanding expertise and procedures in place to adjudicate state based rights, and also federal and Indian reserved water rights if compact efforts fail. If CSKT water rights are litigated in Montana's general statewide stream adjudication, the Montana Water Court will be faced with the most complex, most contentious litigation it has encountered to date. The water rights adjudication process in Montana has currently been proceeding for over thirty years, and has cost nearly ninety million dollars in state funding so far, not counting expenses by litigants including federal agencies, local governments, and individual water users. Many commenters before the Montana Water Policy Interim Committee express an interest in seeing an expedited completion of the adjudication process, and benchmarks and funding have been incorporated into the process to speed its conclusion. A recent legislative audit predicted that the adjudication may be completed by 2028, but that prediction assumed Montana would successfully negotiate compacts for federal and Indian reserved water rights. June 2010 Performance Audit Report to the Montana Legislature. If the CSKT water right claims are required to be adjudicated through the objection and litigation process, the only certainty will be that Montana water

rights will remain unsettled for much longer than any previous estimates could predict.

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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.*

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MONTANA DEPARTMENT OF JUSTICE

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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, Wildlife & 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.

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.

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.

RESERVED WATER RIGHTS COMPACT COMMISSION



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STATE OF MONTANA

Senator Debby Barrett
Dorothy Bradley
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Rep. Daniel Salomon

Senator Dick Barrett
Mark DeBruyker
Richard Kirn
Rep. Kathleen Williams

February 2, 2015

Senator Chas Vincent
Montana Senate
PO Box 200500
Helena, MT 59620-0500

Dear Senator Vincent,

You have asked me to respond to assertions made in a letter addressed to Montana Legislators on January 12, 2015, from Mr. Richard Simms, on behalf of the Montana Land and Water Alliance regarding the proposed CSKT Compact. Mr. Simms makes a number of incorrect statements pertaining to both the Compact itself and to historic irrigation practices on the Flathead Indian Reservation. For ease of reference, I have reproduced Mr. Simms' numbered claims and addressed them in the order in which he raised them in his letter and accompanying "Executive Summary.

Mr. Simms claims at the outset that The Compact transforms "Federal reserved water rights under *Winters v. United States*, 207 U.S. 564 (1908), into Indian reserved water rights, greatly expanding the nature and scope of the permissible claims that Indian tribes can make under the Winters Doctrine."

To support his initial premise, Mr. Simms describes arguments made in the context of litigation by the Tribes as to their ownership of land and water on and underneath the Reservation and attributes that legal position to the Commission, going further to state that the Compact ratifies that position. The articulated position of the Tribes that Mr. Simms attributes also to the Compact Commission likely reflects the Tribes' legal position should their filed claims go forward in the Adjudication if the Compact fails. They do not, however, reflect a position agreed to by the parties in the Compact, nor do they accurately represent the underlying premise of the Compact. The proposed Compact, on the contrary, quantifies usufructuary rights for the Tribes, and contains nothing inconsistent with Article IX, Section 3 of the Montana Constitution providing that "waters within the boundaries of the state are the property of the state for the use of its people."

Mr. Simms' assertion that the Compact Commission has adopted "the legal proposition that the Tribes reserved their own Reservation with a 'time immemorial' water rights priority" appears to lie at the heart of his argument that the Compact transforms federal reserved rights into Indian reserved rights. It is also incorrect. Fundamental to the Commission's negotiating position is the proposition that the United States withdrew the Flathead Indian Reservation from the public

domain, that appurtenant water rights have a July 16, 1855 priority date, and that the Tribes retained some “aboriginal” rights while ceding the majority of their aboriginal territory to the United States. This is reflected in the proposed Compact and attached abstracts, which recognize rights with both a July 16, 1855 priority date and those with a “time immemorial” priority date. This recognition is consistent with controlling legal precedent determining that rights held by the Tribes prior to the treaty date and not ceded by them, carry a time immemorial priority date.¹

Ultimately, Simms’ arguments are based on a manifestly false assumption: namely that the Tribes have the ability to claim—and by extension that the State has the ability to negotiate—only so called “*Winters*” rights, those rights created through the reservation of land from the public domain. This premise ignores the fact that state and federal courts have determined that not only do aboriginal rights carrying a time-immemorial priority date exist, but they are also part and parcel of the category of “reserved rights” for purposes of McCarran Amendment adjudicatory jurisdiction, and for purposes of the Montana General Stream Adjudication.²

1. “The Tribes claimed and the 2013 Compact would have awarded 179,539 acre feet of water, measured at the farm turnouts, for the irrigation of 128,241.73 acres of land in the Flathead Irrigation Project. The historical duty of water in the Project was 4.7 acre feet per acre. The 2013 Compact reduced the historical duty by 3.3 acre feet per acre to 1.4 acre feet, diminishing the amount of water historically available to the irrigators on farm by 423,200 acre feet annually. This reduction in supply is carried into the new Compact.”

At the outset, Mr. Simms does not identify the source from which he derives a “historic duty” of 4.7 acre feet per acre, citing only a 1938 Bureau of Indian Affairs report as support for the numbers used throughout his argument on this point. Mr. Simms also fails to note that the 1.4 acre-feet per acre—the amount that represented the maximum Farm Turnout Allowance under the former Water Use Agreement—is not part of the current proposed Compact.³

It appears that the most likely source for Mr. Simms’ claims is a document referred to as the “Clotts” report in the BIA’s “Operation and Maintenance Guidelines for the Flathead Indian Irrigation Project.” The report is attached as Appendix A to those Guidelines.⁴ Mr. Simms claims, based on this report, that 490,859 acre-feet of water was available for the irrigation of 104,859 project acres, equaling a “historic duty” of 4.7 acre-feet per acre. The clear implication is that this “historic duty” was actually delivered to irrigators on the project. In fact, the 490,859 referred to in the report represents a tally of *the total supply of water theoretically available for irrigation of the project*, and is not only predicated on diversion and pumping structures that had yet to be built but actually counts at least 48,000 acre-feet of water from the Jocko twice,

¹ *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 92 (1985).

² See *Greely*, 219 Mont. 76, 99; *Joint Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. U.S.*, 832 F.2d 1127, 1131 (9th cir.1987).

³ Neither is it a correct characterization of the limitations of the 2013 FIIP Water Use Agreement, which also provided for a Measured Water Use Allowance to allow delivery of up to two acre-feet per acre.

⁴ *Operation and Maintenance Guidelines, Flathead Indian Irrigation Project, Flathead Agency*, available at: [http://projects.battelle.org/fiipea/BIA Operation and Maintenance Guidelines.pdf](http://projects.battelle.org/fiipea/BIA%20Operation%20and%20Maintenance%20Guidelines.pdf).

anticipating that it could be made available in the Mission after construction of the Flathead pumping station.

The irrigated acreage cited by Simms is equally hypothetical. The Clotts report does not contain a reference to 104,859 acres, but does reference 104,490 acres of land “Under Constructed Works.” The actual number of acres irrigated in 1938, according to the report, was only 76,002. The amount of 4.7 acre-feet per acre derived by Mr. Simms is a purely imaginary one based on a division of all sources of water in the project area by the total acres at the time that were physically capable of being served by the project.

Two other reports reference historically delivered amounts and associated quotas reported contemporaneously with the Clotts report. The first is a 1939 Department of Interior, U.S. Indian Irrigation Service report titled “Report on Water Supply of the Flathead Irrigation Project Montana,” prepared by P.V Hodges. The second report expands the period of record addressed in the Hodges report to include a period following the construction of the Flathead pumping plant, and is referenced here as the Kollenborn report.⁵ Both of these sources cite historic delivery amounts of much less than 4.7 acre-feet per acre.⁶ Both reports demonstrate that even prior to the implementation of interim instream flow requirements, the FIIP was a deficit irrigation system, and both current and historic quotas reflect that fact.⁷

All of the referenced sources cite delivery amounts for a time when the acreage irrigated by the project was significantly less than it is today, which would in theory have resulted in a larger per-acre quota. This is somewhat offset by the fact that the Flathead River pumping plant had not yet been completed, thus reducing the supply available to the Mission Valley relative to the present. It is also important to view these sources in light of the fact that the interim instream flows—instituted as a result of a 1987 judicial decision—had not yet been implemented.⁸

One of the difficulties faced by the negotiating parties was to accurately quantify historic farm deliveries on the project in the face of missing or incomplete records of water actually delivered to individual farm turnouts. The method used to calculate allocations between instream flow rights and project deliveries used measured data from the period from 1983 to 2002 to create a water budget for the entire project. The water budget was then input unto the HYDROSS water accounting model, which was used to create water budgets for individual service areas and ultimately to determine water savings that could be achieved through improvements to the project and added to instream flows while maintaining farm delivery values.⁹

⁵ H.S. Kollenborn, 1945. *Report on Water Supply and Water Use for the Flathead Irrigation Project Montana*. United States Department of the Interior Office of Indian Affairs Irrigation Division Agricultural Economics Unit.

⁶ For example, according to the Hodges Report, average deliveries to the Mission Valley in the period from 1934 through 1938 were 1.45, 1.17, 1.26, 3.40, and 1.54 acre-feet per acre for Mission, Post, Pablo, and Hillside Lands respectively. Memo from Seth Makepeace, dated January 22, 2015, p. 2, citing the Hodges Report.

⁷ Makepeace Memo.

⁸ *Id.*

⁹ CSKT Compact Technical Working Group, *Report of Findings: Technical review of proposed CSKT water rights settlement for the Water Policy Interim Committee*, August 26, 2014 (hereinafter “Technical Working Group Report”), available at: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/wpic/tech-work-group_findings-sept23.pdf

Mr. Simms cites the 2013 proposed abstracts for the FIIP water rights for the proposition that the total quantification for the project equals 179,538 acre-feet, resulting in a “duty” of 1.4 acre feet per acre. Those abstracts were limited by the maximum Farm Turnout Allowance agreed to in the FIIP Water Use Agreement. As demonstrated in the State’s technical review, the Farm Turnout Allowances accurately reflect historic farm deliveries when aggregated and averaged across a service area.¹⁰ They do not, however, form an appropriate “duty” or quota at the individual farm turnout because they do not accurately reflect individual variations in crop consumption and application efficiency across the project.

Partially as a result of the State’s analysis, the Farm Turnout Allowance is not a provision of the current proposed Compact. The Compact clearly states that the River Diversion Allowances supply the FIIP Water Use Right.¹¹ The River Diversion Allowances, which are set forth in Appendix 3.2 to the 2015 proposed Compact, add up to a maximum RDA of 302,250 acre-feet.¹² The 2015 proposed compact uses the RDAs as evaluated using Historic Farm Deliveries set forth in Appendix 3.3 to satisfy the FIIP Water Use Right. These numbers are consistent with historic use on the FIIP. In the event that RDAs are not sufficient to meet Historic Farm Deliveries, they can be adjusted.¹³

2. “The 2013 Compact, discussed above, would have permanently reduced the irrigators’ water supply by 423,200 acre feet annually. The new Compact, released on January 7, 2015, preserves what would have been done by the 2013 Compact, but exacerbates the permanent reduction in the irrigators’ water supply by 35,908 to 71,816 more acre feet annually by changing the measurement of the water delivered to the irrigators from the farm turnouts to a River Diversion Allowance.”

Mr. Simms’ assertion on this point is incorrect. The RDA numbers are identical to the 2013 RDA numbers. The key change in the 2015 proposed Compact is that the RDAs, as evaluated using Historic Farm Deliveries, and not the FTAs, are the limiting factors for FIIP deliveries. The cumulative RDA, as illustrated above, is a much larger amount of water than the FTA for the three project service areas precisely *because* it was quantified to take into account project inefficiencies between the River Diversion point and the farm turnout, and to be capable of supplying excess water on top of the FTA, even after these carriage inefficiencies are accounted for. This change was in direct response to irrigator requests for verification that the modeled numbers were capable of supplying historic delivery amounts. The evaluation process is also intended to address this point. In the unlikely event that RDAs are incapable of supplying Historic Farm Deliveries within a service area, those RDAs may be adjusted using pumped water.

¹⁰ *Instream Flow and Irrigation Diversion Aspects of the FIIP Water Use Agreement: State of Montana Evaluation and Recommendations*, August 4, 2014, available at: http://www.dnrc.mt.gov/rwrec/Compacts/CSKT/state_wua_evaluation_8-4-14.pdf.

¹¹ See Compact Article II.58.

¹² Not included in this number is the 65,000 acre foot RDA for the Flathead pumping station. RDAs are quantified for wet, normal, and dry years. The cumulative RDAs are 302,250 (wet), 278,000 (normal), and 256,900 (dry).

¹³ Compact Article IV.D.3.

3. **“The on-Reservation instream flows were created: 1) to provide a basis upon which to exercise Tribal control over all of the water entering the Reservation; 2) to impose numerous conservation measures on the Irrigation Project irrigators and to convert the water thus saved to Tribal instream flows 3) to make it possible to control the “secretarial water rights” within the Irrigation Project; and 4) to make it possible to control all of the state-based, private diversions on the Reservation outside of the Irrigation Project to minimize their use of water. These four objectives are accomplished through the Tribes’ on-Reservation instream flow claims, which are adopted in the Compact.”**

The basis of Mr. Simms’ argument appears to be that fisheries instream flow water rights may only be used to preclude upstream diversions by junior users and to prevent new development. Therefore, he argues, to quantify water rights for the Tribes for the sole purpose of exerting control over all of the water on the Reservation is an illegal use of such rights. He appears to derive this theory—once again—from the Tribes’ articulated litigation position as to ownership of water on the Reservation. He concludes, based on this reasoning, and without any legal citations to support his argument, that the Supreme Court would not recognize the types of instream flow rights quantified under the Compact, and that the Compact “eliminates the State of Montana’s constitutional mandate to administer public waters on the Flathead Reservation.

The Compact manifestly represents not an adoption of the Tribes’ legal argument but a significant compromise of their legal positions on ownership and instream flow needs for fisheries. The instream flow rights quantified to the Tribes under the compact for the purposes of maintaining fisheries were almost universally calculated, located, or conditioned to protect existing uses rather than to maximize flows for fish or exert control over water resources. This is clear from a close look at the three types of on-Reservation instream flows categorized by the compact and criticized by Simms. Finally, the Compact, by implementing a system of shared administration over waters on the Reservation that must be adopted by the Montana legislature, comports with Article IX, Section 3(4) of the Montana Constitution.

- a. Natural Instream Flows

Simms asserts that the “Natural Instream Flows” quantified in Compact Article III.C.1.d.i and Appendix 10, were “designed to make it possible for the CSKT to exercise control over all of the natural runoff from the Mission Mountains that enters the Reservation.” This is manifestly untrue. These flows were established in a way that overtly protects existing uses. This is demonstrated by the fact that every one of the enforcement points for these flows is located *upstream* of existing diversions. This means that these rights *cannot* be used to make a call against any existing uses. The argument that these rights are somehow intended to “exert control” over all natural runoff is senseless.

- b. FIIP Instream Flows

The FIIP instream flows quantified by Compact Article III.C.1.d.ii and Appendix 11, were derived based not on optimal fisheries conditions but rather on the existing water budget for

streams feeding the FIIP, taking into account relatively modest gains in efficiency that would be achieved through State and federal contributions to settlement.¹⁴ Simms implies that these increases in efficiency are obtained at the expense of “conservation measures” imposed on FIIP irrigators. To the contrary, the majority of both Operational Improvements and Rehabilitation and Betterment activities will be implemented using State and federal dollars that will not be available without the settlement. Projects affecting FIIP infrastructure will be implemented without the imposition of any conditions or requirements on individual irrigators. Ultimately, the extent to which the irrigators participate in project improvements relating to on-farm measurement and efficiency will directly impact the ability to evaluate the sufficiency of RDAs, to provide direct benefits to irrigators in terms of on-farm efficiency upgrades, and to achieve satisfaction of the Tribes’ target instream flows which will allow additional saved water to be shared between instream flows and the project.

Simms is correct that the FIIP instream flows, as opposed to the interim instream flows that are currently in place were not calculated using “three commonly accepted fishery methodologies to determine minimum instream flows.” Rather, the FIIP instream flows were quantified based on “streamflow remaining after irrigation diversions have occurred” and taking into account efficiency increases from Operational Improvements.¹⁵ When compared to streamflows generated using a “commonly accepted fishery methodology,” the compacted FIIP instream flows are *lower* than those generated using the type of methodology of which Simms appears to approve.¹⁶ This is precisely the type of concession that is possible through the Compact as opposed to litigation. The Tribes’ filed claims will almost certainly be calculated based on “commonly accepted fishery methodologies” and will undoubtedly represent much larger claimed instream flows than those quantified by the Compact.

c. Other Instream Flows

Simms next asserts that 82 instream flow rights quantified under the compact were created to “exercise Tribal control over the ‘Secretarial water rights’ within the Flathead Irrigation Project and the ‘private water rights’ outside of the Project. This section of the letter is titled “The Other Reservation Instream Flows” and presumably Simms is referring to the “Other” category of instream flows quantified under Article III.C.1.d.iii and Appendix 12 of the Compact, given that he previously addressed both the FIIP and Natural instream flow categories. It is difficult to determine that this is the case, however, as there are only 49 “Other” instream flows, not 82, and the terminology used in the letter and attached map is only partially consistent with that used in the Compact.

Presuming, nonetheless, that the “Other” instream flows are at least in part the rights to which Simms refers, he fails to mention a critical protection for existing uses. Namely, the “Other” instream flows, while quantified in the Compact,¹⁷ cannot be enforced until a final decree for the

¹⁴ *Technical Working Group Report* at 46.

¹⁵ *Id.*

¹⁶ *Id.* at 46-47. (The Report notes that “in some stream reaches, the use of streams to convey water to or from storage reservoirs inflates these numbers above that which would have naturally occurred.”)

¹⁷ Compact Article III.C.1.d.iii, Appendix 12.

relevant basin has been issued by the Montana Water Court *and* an enforceable schedule has been established pursuant to Section 2-1-115 of the Unitary Management Ordinance. The process for setting an enforceable schedule requires notice and one or more public meetings, as well as extensive technical work to establish the extent of existing uses and the proposed enforceable schedule. Most important, the enforceable schedule must be “based on a water budget that allows valid water rights to be exercised,”¹⁸ meaning that these flows, just like the Natural flows, by definition protect existing uses rather than controlling them, as Simms asserts.

4. **“In the guise of off-reservation instream flows, the Compact would award the Tribes control over almost all of the water west of the Continental Divide in Montana, the use of which was previously under the control of the State of Montana for the Beneficial Use of its Citizens.”**

Mr. Simms once again appears to base his argument the Tribes’ articulated litigation position. As previously explained, the Tribes’ litigation position, to the extent it is represented by the document cited by Mr. Simms, is neither representative of the Commission’s position on these issues nor reflective of the settlement provisions contained in the Compact. On the contrary, the Tribes made substantial concessions on their legal claims in the Compact.

Mr. Simms asserts that Article III of the Treaty of Hellgate cannot be interpreted to provide off-Reservation instream flow water rights for the Tribes. The language at issue reads: “The exclusive right of taking fish in all streams running through or bordering said reservation is further secured to said Indians; *as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory...*” (emphasis added). Simms asserts that the italicized language provides the Tribes with no greater rights than are held by non-Indians in the State of Montana: “A right owned in common is a right owned or shared equally by all members of the common group, which in this case includes the Tribes and the non-Indian citizens of Washington Territory, who today are the non-CSKT citizens of the State of Montana.” (Simms, pp. 11-12).

Simms’ literal interpretation has been considered and explicitly rejected by the U.S. Supreme Court: “The Court has interpreted the fishing clause in these treaties on six prior occasions. In all of these cases the Court placed a relatively broad gloss on the Indians’ fishing rights and—more or less explicitly—rejected the State’s “equal opportunity” approach.”¹⁹ Simms further maintains that there is no legal precedent for recognizing off-reservation rights with a “time immemorial” priority date, and that Article III and its reference to “usual and accustomed places” is limited to the areas ceded by the Tribes west of the Continental divide. Simms provides no legal precedent in support of either proposition.²⁰

¹⁸ UMO Section 2-1-115(3).

¹⁹ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979) .

²⁰ The citation to the Indian Claims Commission Findings of Fact for Docket No. 61, available as 8 Ind. Cl. Com. 40 is misplaced. Findings of fact no. 17 through 19 make no reference to Article III or the rights it conveys but instead represent general historical observations about the territories the various tribes considered to be part of their exclusive ownership.

The off-Reservation rights quantified under the Compact reflect the underlying uncertainty in this area of the law. It is precisely this uncertainty and the associated risks to both parties that the off-Reservation rights are intended to resolve. The Commission has consistently emphasized this fact and its importance to the negotiated provisions ultimately agreed to in the Compact. While there is substantial precedent for the existence of on-Reservation instream flows with a time-immemorial priority date,²¹ limited precedent exists for or against the extension of these types of rights to the Tribes' ceded aboriginal territory off the Reservation.

What precedent does exist is conflicting. Idaho's Snake River Basin Adjudication Court determined that the Nez Perce tribes lacked rights to off-Reservation instream flows with the exception of a limited number of named springs.²² The Tribes' claims were never considered on appeal as the State of Idaho entered into a settlement with the Tribes that included the recognition of a number of state-based instream flow water rights, among other concessions. By contrast, the Washington Supreme Court affirmed a state trial court decision that despite congressional diminishment of the Tribes' off-reservation rights, the Yakima Tribes nonetheless possess time-immemorial off-Reservation rights in the Yakima River and its tributaries to preserve the fishery.²³

Because there is no controlling precedent on the issue of whether the Article III language provides a minimum instream flow water right to sustain off-Reservation fisheries, the Commission looked to the limited existing state court precedent on this point as well as to existing federal precedent interpreting other aspects of this treaty language.²⁴ In doing so, it concluded that there is enough uncertainty about the meaning of this language that settlement of the Tribal claims in a way that effectively mitigates adverse impacts to state water users and does not create legal precedent is far preferable to the time, expense, economic impact, and risk of litigation. This is particularly true given that existing precedent does provide support for tribal claims, and it is well established that ambiguity in treaty language must be resolved in favor of tribal interests.²⁵

Conclusion

Simms closes with a refrain of his first argument, stating that the Compact gives "control of the public water supply to the Tribes" and violates Article IX, Section 3 of the Montana Constitution. The Commission has previously addressed this argument in numerous documents and in response to Simms' first point above. Contrary to Simms' assertion, the Compact, far from giving the Tribes control over all water on the Reservation or in Western Montana, precluding the continued use of existing state based rights, preventing changes of use of existing rights, and preventing the development of new uses under state law, does precisely the opposite. The Compact protects existing uses while complying with the State's obligation under federal

²¹ See *U.S. v. Adair*, 723 F.2d 1394, (9th Cir. 1983), cert. denied 104 U.S. 3536 (1984); *Greely*, 219 Mont. at 99.

²² *In re. SRBA Case No. 39576, Consolidated Subcase 03-10022*, Idaho Fifth Judicial District Court (Nov. 10, 1999).

²³ *State, Dept. of Ecology v. Yakima Reservation Irr. Dist.*, 121 Wash.2d (1993).

²⁴ See pp. 2-4 of RWRCC letter to Chairman Vincent and the Water Policy Interim Committee, dated 12/16/2013, available at: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/wpic/rwrcc_letter_to_vincent.pdf

²⁵ *Greely*, 219 Mont. at 90; see also Memo from Helen Thigpen, Staff Attorney, to Montana Water Policy Interim Committee, Dated August 22, 2014 at p. 29.

law to recognize Tribal reserved rights; it provides for changes of use on the Reservation— something that has not been legally possible since 1996; and it provides a large supply of newly available water from the Flathead River system and Hungry Horse reservoir that will allow for new development of water uses both on and off the Reservation.

Sincerely,



Melissa Hornbein
Staff Attorney
Montana Reserved Water Rights Compact Commission

C: Governor Steve Bullock
Attorney General Tim Fox
John Tubbs
Chris Tweeten

Understanding Abstracts for Statements of Claim in Montana

The Montana Claims Examination Manual, Rule 2(a), defines an abstract as “the computer printout of each claim of an existing water right showing the information submitted on the original or amended statement of claim, any changes authorized by these rules or by the water court, remarks noting any obvious factual or legal issues presented by the claim, and other remarks explaining the nature and extent of the claimed water right.”

An abstract will typically contain the following elements of a water right:

1. Owner and address
2. Purpose
3. Source
4. Type of irrigation system (for irrigation claims)
5. Priority date
6. Type of historical right
7. Flow rate
8. Volume
9. Maximum acres
10. Period of use
11. Point of diversion
12. Means of diversion
13. Reservoir (if applicable)
14. Place of use.

An abstract also includes the basin code, water right identification number, surface water or groundwater designation, climatic area for irrigation, and period of diversion. This article describes these elements as they are reflected on an abstract for a statement of claim. All definitions of water right elements described in this article are generally drawn from Rule 2 of the Montana Claims Examination Manual, and portions of several different abstracts are used as examples below.

Over 200,000 water right claims have been filed in Montana’s general stream adjudication, and their abstracts reflect their status as statements of claim. Abstracts are also generated for water right permits, certificates, and reservations. This is designated on an abstract after the basin code and water right identification number:

GENERAL ABSTRACT

Water Right
Number: 41F 78415 00 STATEMENT OF CLAIM

The version type indicates whether the abstract is showing the original right, post-decree modifications from the Montana Water Court, or a change authorization. Version status indicates whether an abstract is active, or a different status such as dismissed or withdrawn.

Version: - ORIGINAL RIGHT
Version Status: ACTIVE

"Owner" means any person, according to Section 85-2-102, MCA, who has title or interest in water rights or properties. The claim owner is reflected with a mailing address:

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
BILLINGS, MT 59101 4669

"Priority Date" means the allocation date, or date of first use associated with a beneficial use of water which determines ranking among water rights, usually expressed by day, month, and year. The priority date is shown with its enforceable priority date, and the type of historical right will indicate whether the claim's historical basis was a filed right, use right, or based upon a pre-1973 District Court decree. Most claims will show the priority date and enforceable priority date as the same:

Priority Date: September 6, 1966
Enforceable Priority Date: September 6, 1966

Type of Historical
Right: FILED

Late claims (those filed pursuant to Section 85-2-221, MCA) will show an enforceable priority date of June 30, 1973:

Priority Date: May 10, 1889
Enforceable Priority Date: June 30, 1973

Type of Historical
Right: DECREE

The purpose of a right will indicate whether its use includes irrigation, stock, domestic, municipal, industrial, or another purpose such as fishery or fish and wildlife.

Purpose (use): FISH AND WILDLIFE
Maximum Flow Rate: 1050 CFS
Maximum Volume: 351883.00 AC-FT
Source Name: MADISON RIVER
Source Type: SURFACE WATER

"Flow Rate" means the rate at which water has been diverted, impounded, or withdrawn from the source for beneficial use. Historically, flow rate was measured in miner's inches. The official unit of measurement for water in Montana is cubic feet per second, or CFS. Section 85-2-103, MCA. 40 miner's inches equals one CFS, or 448.83 gallons per minute. Small flows are measured in gallons per minute and larger flows are measured in cubic feet per second.

Volumes are quantified in acre-feet per year. An acre-foot is the amount of water necessary to cover one acre with one foot of water. One acre-foot is about 325,000 gallons. Not all claims are decreed a quantified volume, such as direct flow irrigation claims, and many stock claims.

The source name is the natural source from which water is diverted or otherwise taken for a beneficial use, and the source type reflects whether the right is for surface or ground water.

Source Name: NORTH MEADOW CREEK
Source Type: SURFACE WATER

"Point of Diversion" (POD) means the location or locations where water is diverted from the source.

Points of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNE	30	4S	1W	MADISON
Period of Diversion:	APRIL 1 to OCTOBER 4					
Diversion Means:	HEADGATE					

Period of Use: APRIL 1 TO OCTOBER 4

Purpose (use): IRRIGATION

For instream or inlake appropriations, the point of diversion is the portion of the source in which the instream or inlake use occurs. Period of use is generally defined as the time from the first use of the year through the last use of the year, and period of diversion indicates the time

that water is diverted for beneficial use. For many rights that do not involve storage, period of use and period of diversion may be the same.

Points of Diversion and Means of Diversion:

ID	Govt Lot	Qtr. Sec	Sec	Twp	Rge	County
7			17	2N	2E	GALLATIN
Period of Diversion: JANUARY 1 to DECEMBER 31						
Diversion Means: INSTREAM						
31			6	1N	1E	JEFFERSON
Period of Diversion: JANUARY 1 to DECEMBER 31						
Diversion Means: INSTREAM						
49			18	1N	2W	JEFFERSON
Period of Diversion: JANUARY 1 to DECEMBER 31						
Diversion Means: INSTREAM						

"Place of Use" (POU) means the lands, facilities, or sites where water is beneficially used. For irrigation, the place of use will be shown with the maximum irrigated acres.

Purpose (use): IRRIGATION
Place of Use: (3 total records)

ID	Acres	Govt Lot	Qtr. Sec	Sec	Twp	Rge	County
1	81.00		SE	29	4S	1W	MADISON
2	41.00		W2SW	28	4S	1W	MADISON
3	10.00		NWNW	33	4S	1W	MADISON
Total:	132.00						

For a municipal well, the place of use may be depicted as follows:

ID	Acres	Govt Lot	Qtr. Sec	Sec	Twp	Rge	County	
1			S2	25	2N	1E	GALLATIN	
	Subdivision:	MILWAUKEE LAND CO SECOND ADD (
2			SE	26	2N	1E	GALLATIN	
	Subdivision:	MILWAUKEE LAND CO SECOND ADD (
3			NE	35	2N	1E	GALLATIN	
	Subdivision:	MILWAUKEE LAND CO SECOND ADD (
4			NW	36	2N	1E	GALLATIN	
	Subdivision:	MILWAUKEE LAND CO SECOND ADD (

An instream stock right will be depicted this way if the stock use extends along a stretch of a stream or river that encompasses multiple quarters or sections in a legal description:

Purpose (use): STOCK
 Place of Use: (10 total records)

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1			N2N2SE	29	1N	4E	GALLATIN
2			SENESE	29	1N	4E	GALLATIN
3			SWNESE	29	1N	4E	GALLATIN
4			SENWSE	29	1N	4E	GALLATIN
5			SWNWSE	29	1N	4E	GALLATIN
6			SESENE	29	1N	4E	GALLATIN
7			NWSENE	29	1N	4E	GALLATIN
8			SWSENE	29	1N	4E	GALLATIN
9			SESWNE	29	1N	4E	GALLATIN
10			NESWNE	29	1N	4E	GALLATIN

An instream flow right for fisheries will have a place of use that details the different reaches on which the flow rate is claimed, similar to the description for the instream stock right. The place of use parcels listed should not be used to add up the flow rate. The flow rate for the claim is designated under the maximum flow rate and maximum volume fields of the abstract. The place of use should be used to interpret the specific stream reaches where the instream flow would be protected for that particular claim. The place of use for an instream flow right for fisheries is reflected this way:

ID	Acres	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1			SE	10	5S	1W	MADISON
2			SW	11	5S	1W	MADISON
3				14	5S	1W	MADISON
4				15	5S	1W	MADISON
5				22	5S	1W	MADISON
6				23	5S	1W	MADISON
7				27	5S	1W	MADISON
8				34	5S	1W	MADISON
9				3	6S	1W	MADISON
10				4	6S	1W	MADISON
11				8	6S	1W	MADISON
12				9	6S	1W	MADISON
13				17	6S	1W	MADISON
14				20	6S	1W	MADISON
15				29	6S	1W	MADISON
16				30	6S	1W	MADISON
17				31	6S	1W	MADISON
18				32	6S	1W	MADISON
19				5	7S	1W	MADISON
20				6	7S	1W	MADISON
21				8	7S	1W	MADISON
22				17	7S	1W	MADISON
23				20	7S	1W	MADISON
24				28	7S	1W	MADISON
25				29	7S	1W	MADISON
26				33	7S	1W	MADISON
27				34	7S	1W	MADISON

The point of diversion and place of use for instream and inlake claims are clarified during examination:

RULE 31. POINT OF DIVERSION (POD) AND MEANS OF DIVERSION FOR INSTREAM OR INLAKE APPROPRIATIONS. The department's examination of the claimed POD for instream or inlake other uses claims shall follow the procedures described in Rule 8, W.R.C.E.R. In addition, the following procedures will apply to the examination of the POD for such claims. (a) For instream water use, the legal land description of the POD will be the same as the legal land description of the POU. (b) The claimed POD may be revised by the department so that the POD and POU legal land descriptions for instream water use will be the same. (c) A clarifying remark should be added to the point of diversion to provide a general geographic description of the instream reach claimed and to promote the public's ability to understand the extent of the claim. Example: THIS RIGHT FOR INSTREAM USE APPLIES FROM SMITH DAM IN JONES COUNTY DOWNSTREAM TO THE CONFLUENCE OF THE NORTH FORK OF ROCK CREEK WITH THE GREEN RIVER IN MACON COUNTY. (d) For all instream or inlake surface appropriations, the claimed means of diversion will be changed during the department's examination to "INSTREAM" or "INLAKE."

Abstracts reflect a geocode, which assists the Montana Department of Natural Resources and the Montana Department of Revenue in updating ownership for water rights transfers.

Geocodes/Valid: 06110536201040000 - Y

The last field in an abstract may contain remarks, including informational remarks and issue remarks.

Remarks:

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

CLAIMS 41F-W133728-00, 41F-W133729-00 AND 41F-W133730-00 ARE ALL FOR THE SAME SINGLE WATER RIGHT. THREE CLAIMS WERE FILED TO SHOW THE DIFFERENT QUANTITIES OF WATER USED DURING THREE DISTINCT SEASONAL USES. CLAIM 41F-W133728-00 IS FOR JUNE 1 TO JULY 15, 41F-W133729-00 IS FOR JANUARY 1 TO MAY 31, AND 41F-W133730-00 IS FOR JULY 15 TO DECEMBER 31.

Remarks are added by the department or the Water Court to limit or define a water right, to explain unique aspects of a water right, and to identify potential factual and legal issues. Remarks that limit, define, or explain unique aspects of a claim are "clarifying" or informational remarks and appear on the abstract under the element they clarify or at the end of the abstract if they contain general information. Remarks that identify potential factual or legal issues are "issue" remarks and appear in the issue remark box at the end of the abstract. Because issue remarks must be resolved by the Montana Water Court pursuant to Section 85-2-248, MCA,

and also because objectors often use issue remarks to decide whether to object to a claim, these remarks are some of the most important aspects of an abstract.

All of Montana's Indian water rights settlements involve the use of supplemental water sources to facilitate the balancing of the tribal water rights being recognized with the protections of state law-based uses. The Flathead System Compact Water Right (FSCW), set forth in Article III.C.1.c. and abstracted in Appendix 9 of the Compact, is the proposed CSKT Compact's version. The FSCW can be sourced from the mainstem of the Flathead River, Flathead Lake and the South Fork of the Flathead River, either on or off the Flathead Indian Reservation, or, with DNRC approval, it may be used downstream of the confluence of the Flathead and Clark Fork Rivers. This direct flow water right includes the use of up to 90,000 acre-feet from Hungry Horse Reservoir.

The Diversion Means and Purposes are uniquely flexible for this water right, a design that accommodates the diverse host of potential future and existing uses to be supplied by this water right:

1. State Water Mitigation Bank: Pursuant Article IV.B.7, 11,000 acre-feet of this water right can be designated by the Montana DNRC for the purposes of mitigating new or existing domestic, commercial, municipal and industrial water uses for a lease fee of \$40/acre-foot/year plus inflation. and amount of water allocated at the discretion of the State that can be used to address existing limitations of legal water availability in some areas of the Clark Fork Basin.
2. Flathead Indian Irrigation Project Water Use Right Supplemental Water: the Tribes are obligated to lease water from the FSCW right for purposes supplementing River Diversion Allowances during periods of Shared Shortages as set forth in Article IV.C through F of the Compact for a lease fee of \$8/acre-foot/year plus inflation plus a \$25 administrative fee per lease.
3. Uses by the Tribes: FSCW provides water for the Tribes for existing and future tribal water needs, thereby settling for all time the Tribes' claims to reserved water rights.
4. Future Water Lease Options: FSCW provides the Tribes an opportunity to lease this water to water users within Montana in both the Flathead and Clark Fork River basins.
5. Keeping Water in Montana: FSCW may not be used or leased outside of Montana.
6. ESA and Columbia Treaty Compliant: FSCW has been reviewed by the Bureau of Reclamation and Army Corps of Engineers as an amount of water that can be obligated in Montana without disrupting endangered species flow augmentation requirements or flood storage obligations for Hungry Horse Reservoir.
7. Maintains off-Reservation Jurisdiction: The use of the FSCW off the Reservation may only be done under the terms and conditions of state law (e.g. for quantification or issuance of water rights, water quality, species management, etc.).
8. Tracking FSCW use: FSCW uses and leases will be accounted for in the DNRC water rights database.
9. Call Protection: this water right does not subject any existing water users to call (see FSCW exercise constraints below).

The use of FSCW is restricted as to the flow conditions required to be present along the south fork and mainstem of the Flathead River before the water right can be used. There are also conditions regarding the filling and release of water impounded by both Hungry Horse Reservoir and Flathead Lake.

The requirements to maintain these instream flow and ramping rates provide assurances that the use of FSCW will comport with the FERC licensing regulations for Kerr Dam, the Biological Opinion requirements of Hungry Horse Reservoir, the downstream Columbia River Endangered Species Act requirements, Flathead Lake Filling targets, flood storage requirements, and the Biological Constraints of Hungry Horse Reservoir. Accordingly, the Tribes are required to coordinate with the Hungry Horse Operator so as to ensure that Hungry Horse releases match depletions associated with the FSCW use during lower flow periods of the year. In contrast to a typical water right that would look to make call on junior uses during times of limited supply, the FSCW use is predicated on the mandate that the 90,000 acre-feet of storage be released in a manner so that call conditions will not occur, with the strict stipulation that should such call conditions occur, FSCW use would need to be curtailed until such time as call conditions are no longer present. In other words, the water right mandates that it mitigate its own depletive use with Hungry Horse Reservoir storage water, thereby protecting other existing water uses (regardless of purpose) from depletions associated with FSCW use.

Table 3: Flathead Flow Minimums below Hungry Horse Dam (USGS gage 12362500) and Columbia Falls (USGS gage 12363000)

If the April-August	below Hungry Horse Dam	below Columbia Falls
greater than 1,790 KAF	900 cfs	3,500 cfs
1,190-1,790 KAF	400-900 cfs	3,200-3,500 cfs
less than 1,190 KAF	400 cfs	3,200 cfs

Table 4: Hungry Horse Dam Ramping Rates

If the discharge below Columbia Falls is:	Ramping UP may not exceed:
greater than 10,000 cfs	12,000 cfs / day
8,000 – 10,000 cfs	3,600 cfs / day
below 8,000 cfs	1,800 cfs / day
If the discharge below Columbia Falls is:	Ramping DOWN may not exceed:
greater than 12,000 cfs	5,000 cfs / day
8,000 – 12,000 cfs	2,000 cfs / day
6,000 – 8,000 cfs	1,000 cfs / day
below 6,000 cfs	600 cfs / day

Table 6. Flathead River Ramping Below Kerr Dam at U.S. Geological Survey gage 12372000

If the required release from Flathead Lake is:	Ramping may not exceed:
greater than 40,000 cfs	10,000 cfs / day
20,000 – 40,000 cfs	5,000 cfs / day
10,000 – 20,000 cfs	2,500 cfs / day
5,000 – 10,000 cfs	1,000 cfs / day
below 5,000 cfs	500 cfs / day

FLATHEAD SYSTEM COMPACT WATER & HUNGRY HORSE WATER

CSKT Water Compact FAQs

Table 5: Minimum Flathead River Flows Below Kerr Dam (U.S. Geological Survey gage 12372000)

Flathead River Mainstem Minimum Flow Daily Values As Measured at USGS Gage #12372000 Below Kerr Dam												
Da	Month											
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1	3200	3200	3200	3200	5510	12700	12280	3200	3200	3200	3200	3200
2	3200	3200	3200	3200	6020	12700	11860	3200	3200	3200	3200	3200
3	3200	3200	3200	3200	6530	12700	11440	3200	3200	3200	3200	3200
4	3200	3200	3200	3200	7040	12700	11020	3200	3200	3200	3200	3200
5	3200	3200	3200	3200	7550	12700	10600	3200	3200	3200	3200	3200
6	3200	3200	3200	3200	8060	12700	10180	3200	3200	3200	3200	3200
7	3200	3200	3200	3200	8570	12700	9760	3200	3200	3200	3200	3200
8	3200	3200	3200	3200	9080	12700	9340	3200	3200	3200	3200	3200
9	3200	3200	3200	3200	9590	12700	8920	3200	3200	3200	3200	3200
10	3200	3200	3200	3200	10100	12700	8500	3200	3200	3200	3200	3200
11	3200	3200	3200	3200	10610	12700	8080	3200	3200	3200	3200	3200
12	3200	3200	3200	3200	11120	12700	7660	3200	3200	3200	3200	3200
13	3200	3200	3200	3200	11630	12700	7240	3200	3200	3200	3200	3200
14	3200	3200	3200	3200	12140	12700	6820	3200	3200	3200	3200	3200
15	3200	3200	3200	3200	12650	12700	6400	3200	3200	3200	3200	3200
16	3200	3200	3200	3320	12700	12700	6200	3200	3200	3200	3200	3200
17	3200	3200	3200	3440	12700	12700	6000	3200	3200	3200	3200	3200
18	3200	3200	3200	3560	12700	12700	5800	3200	3200	3200	3200	3200
19	3200	3200	3200	3680	12700	12700	5600	3200	3200	3200	3200	3200
20	3200	3200	3200	3800	12700	12700	5400	3200	3200	3200	3200	3200
21	3200	3200	3200	3920	12700	12700	5200	3200	3200	3200	3200	3200
22	3200	3200	3200	4040	12700	12700	5000	3200	3200	3200	3200	3200
23	3200	3200	3200	4160	12700	12700	4800	3200	3200	3200	3200	3200
24	3200	3200	3200	4280	12700	12700	4600	3200	3200	3200	3200	3200
25	3200	3200	3200	4400	12700	12700	4400	3200	3200	3200	3200	3200
26	3200	3200	3200	4520	12700	12700	4200	3200	3200	3200	3200	3200
27	3200	3200	3200	4640	12700	12700	4000	3200	3200	3200	3200	3200
28	3200	3200	3200	4760	12700	12700	3800	3200	3200	3200	3200	3200
29	3200	3200	3200	4880	12700	12700	3600	3200	3200	3200	3200	3200
30	3200		3200	5000	12700	12700	3400	3200	3200	3200	3200	3200
31	3200		3200		12700	12700	3200	3200		3200		3200