Report on the Proposed Water Rights Compact

Between the State of Montana and The Confederated Salish and Kootenai Tribes of the Flathead Reservation

WATER POLICY INTERIM COMMITTEE. 2013-14

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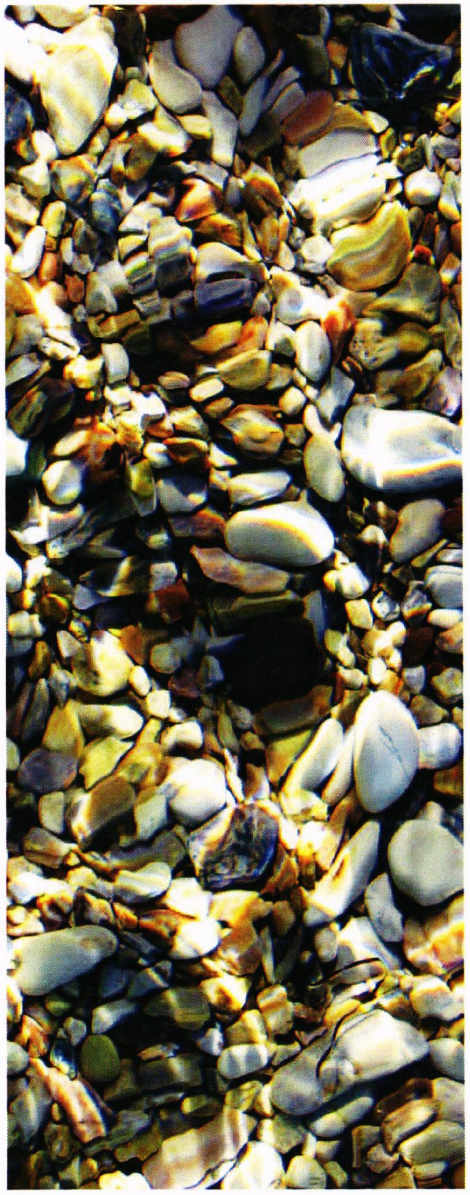

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Glossary of Terms and Abbreviations

AF: acre-feet

Avista Corporation: the company that owns the Cabinet Gorge and Noxon Dams on the Lower Clark Fork River

BDRP: Blackfoot Drought Response Plan, the drought response plan developed by the Blackfoot Challenge and Implemented by the Blackfoot Drought Committee, which uses a shared shortage approach to manage flows in the Blackfoot River during periods of scarcity.

BIA: Bureau of Indian Affairs

Call: under the law of prior appropriation, the water user with the most senior priority date may "call" a junior user, forcing him to curtail use until the senior's right is satisfied.

CERCLA: Comprehensive Environmental Response, Compensation, and Liability Act.

cfs: cubic feet per second, a measurement of stream flow.

CME: Cooperative Management Entity, the body responsible for management and operation of the Flathead Indian Irrigation Project. The CME is comprised of eight members, four chosen by the FJBC and four by the Tribal Council.

CSKT: Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation.

DCMI: Domestic, Commercial, Municipal and Industrial uses.

DFWP: Montana Department of Fish, Wildlife & Parks

DNRC: Montana Department of Natural Resources & Conservation

FERC: Federal Energy Regulatory Commission

FIIP: Flathead Indian Irrigation Project

FJBC: Flathead Joint Board of Control, the entity that represents the three irrigation districts on the Reservation, which are the Flathead, Jocko Valley, and Mission districts.

FTA: Farm Turnout Allowance

gpm: gallons per minute

Hellgate Treaty of 1855: The treaty by which the Tribes ceded more than 20 million acres of aboriginal homeland to the United States in exchange for the land comprising the Flathead Indian Reservation and the retention of certain other rights. The treaty was signed on July 16, 1855.

Measured Water Use Allowance: the allocation of additional water over and above the FTA that an irrigator who demonstrates efficient use and need may obtain under the FIIP Water Use Agreement.

MRWRCC: Montana Reserved Water Rights Compact Commission, or the "Commission."

Montana Water Court: The judicial entity responsible for the adjudication of all pre-1973 water rights claims in Montana.

Murphy Right: The instream flow rights held by Montana DFWP pursuant to 1969 legislation authorizing appropriations for fisheries maintenance on twelve blue ribbon trout streams. The rights are named after the bill's sponsor, James E. Murphy.

Nodes (Natural & FIIP): Natural nodes are the measurement points located above any man-made stream diversions where the Tribes' on-Reservation instream flows would be monitored. FIIP nodes are the measurement points for instream flows on streams used by the Flathead Indian Irrigation Project) on which the Tribes also have instream flow rights.

PPL Montana: Pacific Power and Light Corporation Montana, which currently owns a number of hydroelectric projects in the State, including Kerr Dam on the Reservation. The Tribes have the option to purchase Kerr Dam in 2015.

Project Operator: the entity with the legal authority and responsibility to operate the Flathead Indian Irrigation Project, currently the CME.

UMO: Unitary Administration and Management Ordinance

Water Management Board: The five member joint State-Tribal board that would administer the UMO on the Reservation under the Compact.

Water Use Agreement: The agreement between the FJBC, Tribes, and United States stipulating how the FIIP is to be managed so as allocate water between Tribal instream flow rights and Project irrigation deliveries.

Introduction

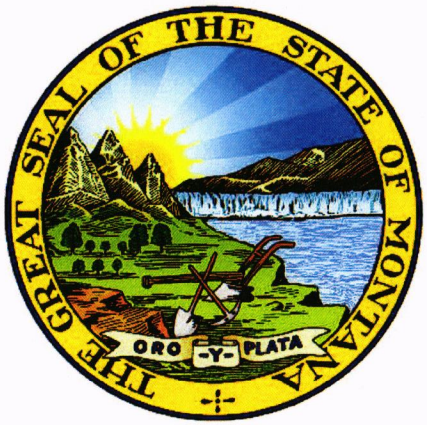
Governor Bullock directed the Montana Reserved Water Rights Compact Commission to prepare a report "addressing the questions raised about the Compact during the 2013 legislative session." In response to the Governor's directive, the Commission presents the following report.

Approval of the Compact will result in significant benefits to Montanans. It will provide future protections for state water users, contribute to a quicker resolution of the ongoing water rights adjudication, provide economic certainty and protect property values, provide access to a new supply of water for the region that will fuel economic growth in one of the State's fastest-growing areas, and result in an infusion of money that will not only create jobs and boost the local economy, but will accomplish much needed repairs and upgrades to irrigation project facilities. Ultimately, the Compact will provide to all of Montana certainty, finality, and the ability to plan for the future.

This Compact resolves the uncertainty regarding the existing and legally recognized water rights of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation. These water rights have a priority date of either July 16, 1855, or "time immemorial"[1] and the Montana Supreme Court has already recognized the existence of these rights, noting that they are likely to be "pervasive."[2] The rights must be quantified—either through negotiated settlement or through litigation.

Because of their early priority date and large geographic scope, the Tribes' water rights have the potential to negatively impact existing state-based water rights and future water availability throughout western Montana and possibly well east of the Continental Divide. The Compact is a negotiated agreement that settles these rights for all time and in a way that not only minimizes negative impacts to existing state water users, but also clears the path for future economic development.

This report is structured to address the most frequently asked questions about the Compact, Unitary Administration and Management Ordinance (UMO), and Flathead Indian Irrigation Project (FIIP) Water Use Agreement that were raised during negotiations and the 2013 Legislative Session.[3] Appendices A and B contain detailed analyses of the technical and legal foundations of the Compact. Appendix C provides a comprehensive set of responses to all of the questions and comments received by the Commission in response to its June 4, 2013 request for comments. ■



1 July 16, 1855, is the date of the Treaty of Hellgate, which established the Flathead Indian Reservation. "Time immemorial" is the priority date recognized by courts for treaty-based "aboriginal" claims to water for fisheries.

2 *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner*, 278 Mont. 50, 923 P.2d 1073, 1079 (Mont. 1996).

3 All of the referenced documents and all comments received in response to the Commission's June 4, 2013 request letter, may be viewed at: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/default.asp

Report

Frequently Asked Questions

1. What does the Compact Commission Do?

The Montana Reserved Water Rights Compact Commission (Commission) was established by the Legislature in 1979 to negotiate on behalf of the Governor to represent the interests of state water users in negotiations with tribes and the federal government for the equitable division and apportionment of the waters of the State of Montana. The Commission has completed seventeen compacts with six tribes and five federal agencies in Montana. *See Map 1: Federal and Tribal Compacts Negotiated by the Compact Commission*

2. Would the proposed Compact protect existing uses?

Yes. The Compact would completely protect all existing non-irrigation water rights from call[4] by the Tribes, completely protect all groundwater irrigation uses less than 100 gallons per minute (gpm) from call by the Tribes, and would put in place substantial protections for all other irrigation uses both on and off the Reservation.[5]

3. Would any of the settlement documents affect the ownership of water?

No. Under the Montana Constitution, the State of Montana owns all the water in the state. Montana provides water rights for the use of water. Water rights have priority dates that are established by the Montana Water Court. Under the prior appropriation system, which has been the practice in Montana since before statehood, a senior water user with an earlier priority date is entitled to the last drop of his water right before a junior water user is entitled to the first drop of his. The only effect the Compact would have on this system would be to limit the Tribes' ability to call junior water rights in some situations.

4. Would the proposed Compact close basins to new appropriations?

No. This Compact would not institute basin closure in any of the affected Water Court basins. In fact, by providing a large supply of potential mitigation water as part of the Tribal water right, the Compact would allow new development to occur in many basins that are functionally closed due to lack of legally available water.

5. What are the advantages of a Compact over litigation?

See Table 1: Advantages of Negotiated Settlement

6. What happens if the Compact fails?

The legal requirement that the Tribes file their claims in the statewide general stream adjudication was stayed pending resolution of the Tribes' claims through the negotiation process. This stay expired on July 1, 2013, after the Montana Legislature failed to ratify the Compact. As a result, the Tribes must file their claims no later than June 30, 2015. The Tribes have notified the Commission that they are preparing claims for filing in the event that the Montana Legislature does not ratify a negotiated settlement in 2015.

Courts have already upheld the Tribes' interim instream flows against the Flathead Joint Board of Control (FJBC), finding that the instream flow rights have a priority date of "time immemorial" and must be satisfied before

TABLE 1: Advantages of Negotiated Settlement

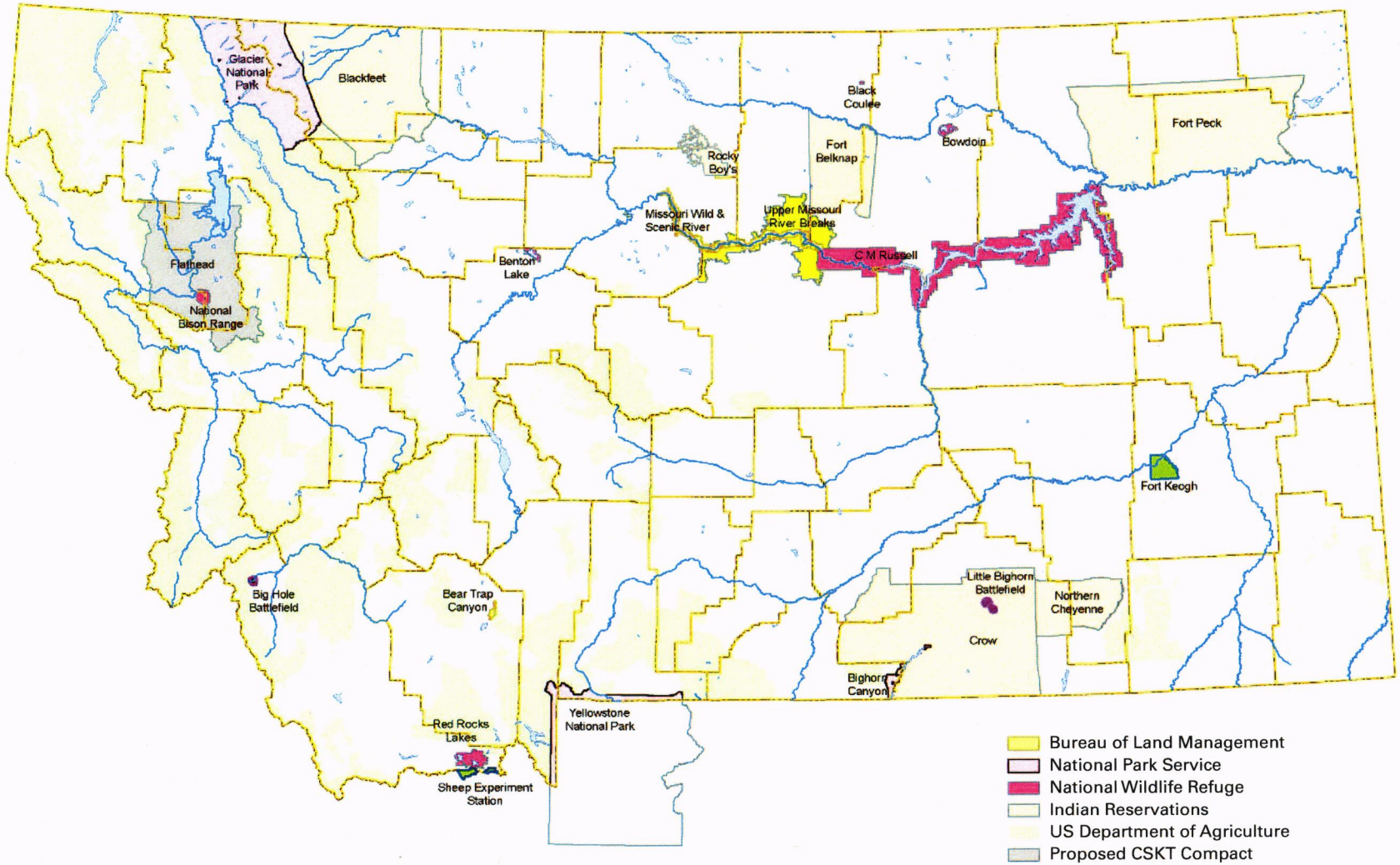
Compact	Litigation of Tribal Claims
The moratorium on new water development would be lifted when the Compact goes into effect. Post-1996 domestic wells would be protected as valid existing rights.	The moratorium on new permitting and changes of use will continue until the Tribes' claims are resolved through the adjudication process. Post-1996 wells will remain in limbo.
The Compact and Water Use Agreement would allow the entire irrigation project to benefit from the Tribes' 1855 priority date.	Ownership of the Project water right will be litigated between the FJBC, BIA, and Tribes. Water may have to be delivered according to different priority dates on the Project.
The Compact would make up to 90,000 AF of water potentially available for mitigation of existing and future water uses in the Flathead and Clark Fork basins, of which 11,000 AF would be available for off-Reservation use.	There will be no mitigation water available from Hungry Horse Reservoir in the absence of a compact. The lower Clark Fork and Swan basins will be effectively closed to new uses due to lack of legally available water.
The Compact would recognize no off-Reservation water rights for the Tribes east of the Continental Divide. The Tribes would agree to relinquish all such claims in the future.	The Tribes have expressed the intention to file extensive claims throughout the western half of the state, which would require all affected water users to file objections.
Both on and off-Reservation instream flows would be quantified by the Compact in a way that accommodates existing uses of water. The Tribes have agreed not to call ANY non-irrigation water rights.	The Tribes are likely to file larger and more numerous claims in western Montana and east of the Continental Divide; the Water court lacks any discretion to institute call protections such as those included in the Compact.
A settlement would bring both State (55 million) and federal dollars to the reservation economy and to the irrigation project for much needed repairs and upgrades that would allow both project deliveries and tribal instream flows to be met.	There will be no state or federal contribution to settlement if the Tribes litigate their claims. The federal government is likely to settle its claims with the Tribes in a separate proceeding, but the Tribes will have no obligation to allocate any of these monies to the Project.

4 Under the law of prior appropriation, the water user with the most senior priority date may "call" a junior user, forcing him to curtail use until the senior's right is satisfied.

5 Compact Article III.G.1-5. See Report Appendix A for details about protections for irrigation rights.

MAP 1: Federal and Tribal Compacts Negotiated by the Compact Commission

*All compacts depicted on this map have been ratified by the Montana Legislature with the exception of the proposed CSKT Compact.



Project deliveries.[6] In addition to these "time immemorial" instream flow rights, the Tribes have significant on-Reservation water rights with an 1855 priority date.[7]

Although the Tribes' claims for off-Reservation treaty-based instream flow rights are less certain, the Tribes have indicated that their claims in the adjudication to such rights will be far more extensive and widespread than the eight individual and fourteen co-owned rights that would be decreed under the Compact. Such claims constitute prima facie proof of their contents, meaning that they will be accepted as claimed by the Water Court unless other water users successfully object. This places the burden of objecting squarely on the shoulders of individual water users. The Commission believes, based on its legal analysis, that some of the claims will be found valid, and will have accompanying "time immemorial" priority dates.

To summarize, the most significant consequences of failure to ratify the Compact are:

- Protections for existing junior water rights contained in the Compact will be lost;
- State water right holders will be required to defend their water right claims, which is time-consuming, costly, and uncertain;
- DNRC may be unable to legitimize domestic uses developed on the Reservation since August 1996;
- The ensuing Montana water adjudication process could result in different priority dates for different water users on the Flathead Indian Irrigation Project, which could require expensive modifications to the canals and irrigation ditches and result in calls being made both by the Tribes for instream flows and by more senior irrigation users;
- The Montana water adjudication process will not include funding to fix the irrigation project infrastructure or improve water supplies on the Reservation;
- Basin closure is a likely outcome.

7. How many claims will the Tribes file if the Compact fails?

The Tribes do not intend to share the details of their claims before filing. They have indicated, however, that there are likely to be substantial claims for instream flow water rights throughout their aboriginal subsistence range, both on- and off-Reservation. *See Map 2: CSKT Subsistence Range*[8]

8. What is the legal basis for the Tribes' claims to water?

The Treaty of Hellgate established the Flathead Indian Reservation on July 16, 1855. Through the same document, the Tribes ceded to the United States more than 20 million acres of aboriginal homeland. In addition to creating the Flathead Indian Reservation, the Treaty reserved to the Tribes "[t]he exclusive right of taking fish in all the streams running through or bordering said reservation . . . as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Although this language does not mention water rights, courts have repeatedly held that the language gives rise to more than a simple right to access fisheries at "usual and accustomed places."[9] Treaties represent a grant of right from the Tribes to the United States, the Tribes reserve all rights not explicitly granted,[10] and reservations of land by the federal government carry implied reservations of water to fulfill the purposes of the reservation.[11] The legal foundation for the Tribes' claims stems directly from the Hellgate Treaty and is based upon this legal precedent.

9. Does the Commission have authority to negotiate an agreement that covers both "reserved" and "aboriginal" rights?

Yes. The Commission has the clear legal authority to negotiate all of the Tribes' water rights that derive from federal law.[12] The Commission's authority to negotiate on behalf of the State to quantify federal and tribal reserved rights is contained in § 85-2-701, MCA et. seq. The intent was that the Commission's work would contribute to resolution of these claims through "unified proceedings." By resolving the Tribes' claims to off-Reservation instream flow rights, the Compact carries out this legislative mandate. The Montana Supreme Court has confirmed that there is no distinction between "reserved" and "aboriginal" rights in this context.[13] To create one would undermine the Legislature's directive that the Commission conduct "unified proceedings" and is not otherwise warranted or justified by statute or caselaw.

10. Does the Compact quantify the Tribes' water rights?

Yes. One of the primary purposes of the Compact is to quantify the Tribes' rights. The rights quantified by the Compact fall into three broad categories:

- On-Reservation consumptive uses including the Flathead Indian Irrigation Project (FIIP) water right; existing uses by the Tribes, Tribal members, and Allottees; and the Flathead System Compact Water Right for the Flathead River, which includes an allocation of stored water from Hungry Horse Reservoir.
- On-Reservation non-consumptive uses would be allocated primarily to hydropower and fisheries purposes. The Compact recognizes two on-Reservation hy-

6 *Joint Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. U.S.*, 832 F.2d 1127, 1132 (1987).

7 *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner*, 278 Mont. 50, 58, 923 P.2d 1073, 1079 (Mont. 1996).

8 Source: Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution 1896-1897 and Deposition of Deward E. Walker, Ph.D., October 12, 2010, WC-2010-01.

9 See, e.g. *U.S. v. Winans*, 198 U.S. 371 (1905); *Washington v. Washington State Com. Passenger Fishing Vessel Ass'*, 443 U.S. 658, 675 (1979) modified sub nom *Washington v. U.S.*, 444 U.S. 816 (1979).

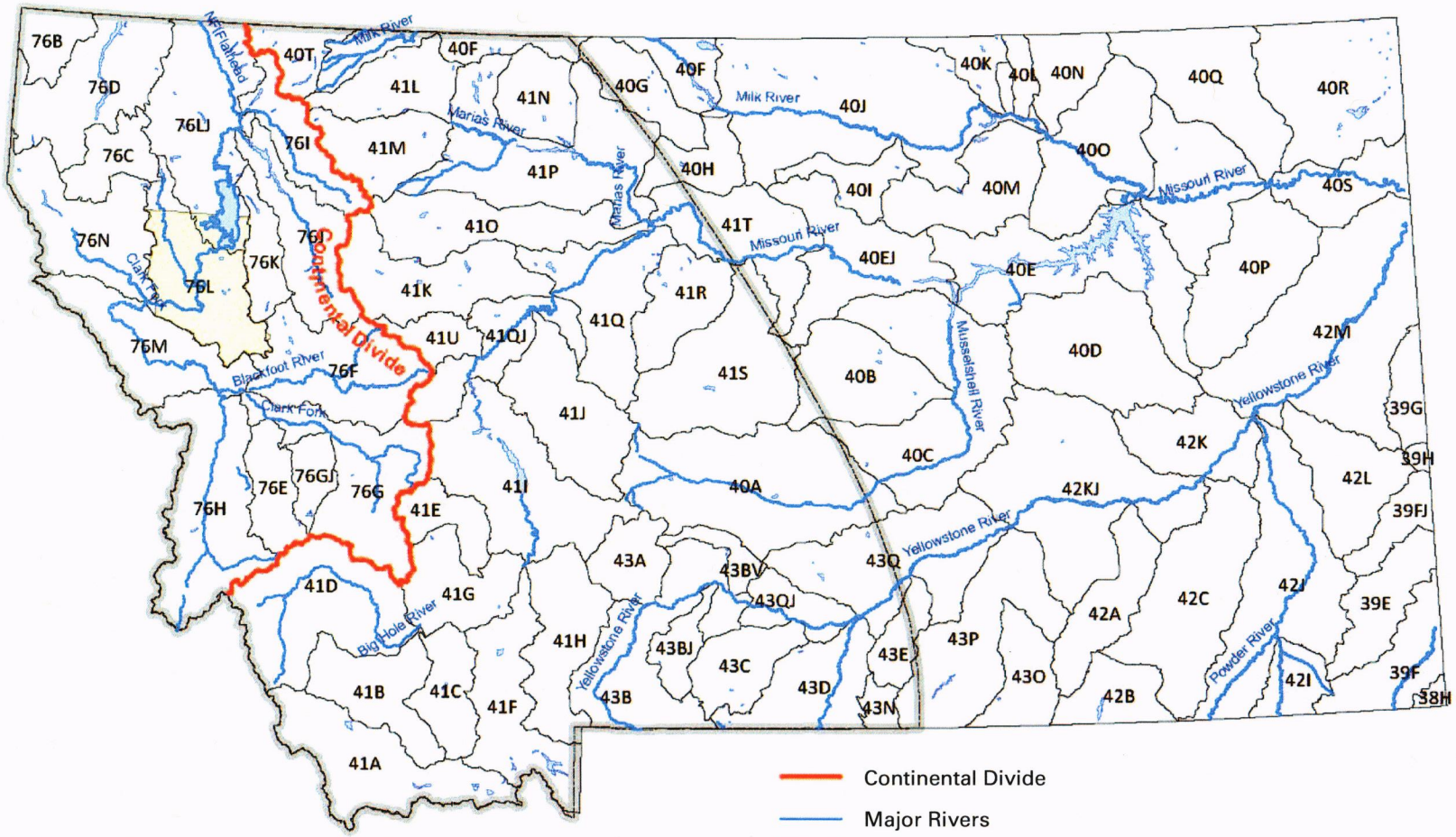
10 See *Winans*, 198 U.S. at 381; *State ex. rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 90, 712 P.2d 754, 763 (1985).

11 *Winters v. United States*, 207 U.S. 564 (1908).

12 See § 85-2-701(2), MCA; *Greely*, 219 Mont. 76, 712 P.2d 754. *The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 312 Mont 420, 432, 59 P.3d 1093, 1100, 2002 MT 280, ¶39 (Mont. 2002)

13 *Greely*, 219 Mont. at 95-96; 712 P.2d at 766.

MAP 2: Confederated Salish Kootenai Tribes Subsistence Range



Continental Divide

Major Rivers

Water Court Basins

CSKT Subsistence Range

Flathead Indian Reservation

* Data Source: Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution 1896 - 1897.

dropower rights. The on-Reservation instream flows for fisheries fall into three categories: those associated with the Flathead Indian Irrigation Project (FIIP Nodes—which are measurement points on streams used by the FIIP), Natural Nodes (which are measurement points located above any man-made stream diversions), and "Other" instream flows (which don't fall into either of the former categories). Of these, only the "Other" instream flows have not been assigned an enforceable level. The Unitary Administration and Management Ordinance provides the mechanism by which these "other" enforceable flows would be set, and requires that they be quantified in a way that protects existing uses. Other non-consumptive uses on-Reservation include minimum reservoir levels, high mountain lake water rights, wetland water rights, and a minimum pool right for Flathead Lake.

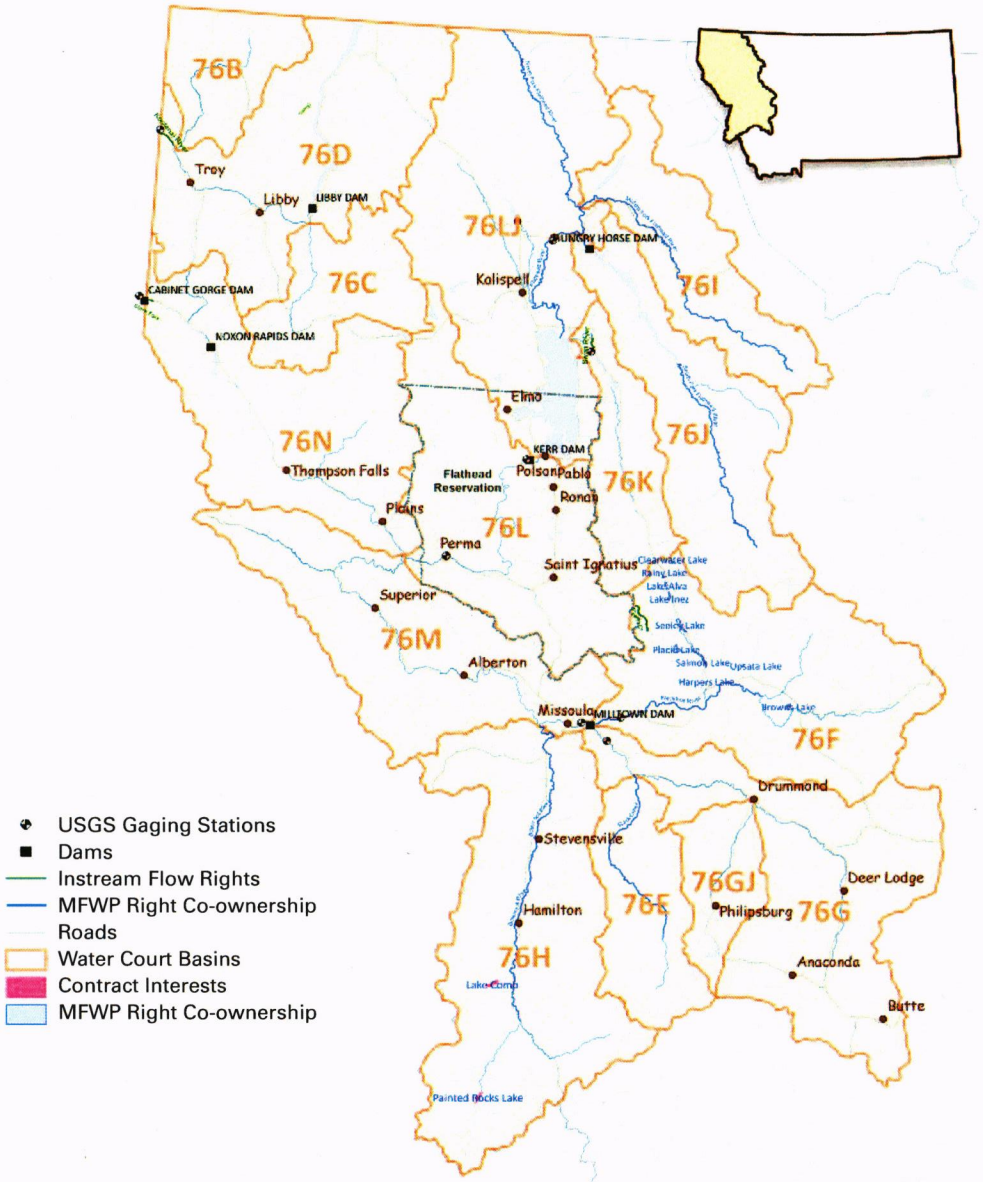
- Off-Reservation non-consumptive uses satisfy the Tribes' claims to off-Reservation instream flow rights under the Hellgate Treaty. The Compact quantifies eight off-Reservation instream flow rights to be held by the Tribes, and fourteen additional rights for instream flows or the delivery of stored water for instream use to be co-owned by the Tribes and Montana Department of Fish, Wildlife and Parks (DFWP). *See Table 2: Proposed Off-Reservation Instream Flow Rights.* In exchange, the Tribes would give up all other claims to off-Reservation rights throughout western Montana and likely extending east of the Continental Divide. *See response to Question 7 above and Maps 2 and 3.*

The Compact would also provide that DFWP must take reasonable steps to add the Tribes as co-owners to six additional instream flow rights that it currently holds. However, these rights would go through the adjudication process like any other state water right claim and would not be included in the Compact.

TABLE 2: Proposed Off-Reservation Instream Flow Rights

Location	Priority Date	Owner	Call Protections
Kootenai River	Time Immemorial	Tribes	This right cannot be enforced as long as Libby Dam exists and is in compliance with federal requirements. If this right is ever called, it may only be enforced on the mainstem, not tributaries of the Kootenai.
Kootenai Tributaries • Big Cr. • Boulder Cr. • Steep Cr. • Sutton Cr.	Time Immemorial	Tribes	All Rights would be located in tributaries that occur on public land and there is no effect on existing state-based water rights.
Swan River	Time Immemorial	Tribes	This right could be enforced against junior surface water irrigators and ground water irrigators pumping 100 gpm or more. Its attributes minimize the likelihood of junior rights being called.
Lower Clark Fork	Time Immemorial	Tribes	As long as Avista complies with the FERC license for Cabinet Gorge and Noxon Dams, this right may not be enforced. If it is ever called it could only be enforced against junior surface water irrigators, and ground water irrigators pumping 100 gpm or more.
N. Fork Placid Creek	Time Immemorial	Tribes	Only one right exists upstream. That right has been historically operated to accommodate this claim, so there would be no change in the status quo.
DFWP Instream Rights • MF Flathead River • SF Flathead River • Rock Creek • Ward Creek • Upsata Lake • Harpers Lake • Owl Creek • Clearwater/Salmon L. • Clearwater/Seeley L. • Clearwater/L. Inez • Clearwater/L. Alva • Clearwater/Rainy L. • Clearwater Lake	 12/22/1970 12/22/1970 1/6/1971 5/14/1928 5/37/1958 5/24/1933 9/15/1928 9/13/1928 9/20/1928 8/7/1928 9/5/1928 7/5/1931 9/30/1936	Tribes and DFWP	All co-ownership rights currently exist and therefore have already been taken out of the available water supply. Addition of Tribes as co-owners would change nothing about the enforceability of these rights. Quantification, place of use, period of use, priority date, and all other attributes would remain unchanged.
Former Milltown Dam Hydropower Right	12/11/1904	Tribes and DFWP	This right would be split into a 500 cfs minimum flow for the Upper Clark Fork and 700 cfs minimum flow for the Blackfoot. This right would not be enforced for ten years from the Effective Date of the Compact, while stakeholder drought response planning is conducted to minimize impacts to existing water users. This right would be taken over by DFWP in the absence of a Compact.

MAP 3: Compact Off-Reservation Instream Flow Rights



11. Why would the Compact give off-Reservation rights to the Tribes?

Language in the Hellgate Treaty provides the Tribes with the right to "take fish" at "usual and accustomed" locations (the only tribes in Montana with this treaty language). This language constitutes more than a mere opportunity to fish, and includes a right of access and a right to harvest a calculable share of the fishery.[14] Courts have clarified that similar language establishes an instream flow right with a time immemorial priority date.[15] While no court has yet considered whether this Hellgate Treaty language necessarily confers instream flow rights off the Reservation, both Supreme Court and Ninth Circuit caselaw strongly indicate that this treaty provision implicitly includes the right to the use of water outside the Reservation to maintain fisheries flows. The Montana Supreme Court has held that Montana must apply federal law in resolving Indian water rights. Because of this legal analysis, the solution proposed by the Compact—to recognize a limited number of instream flow rights off-Reservation with limitations and protections to ensure that all existing State water rights are protected—seems far preferable to having the Tribes file numerous claims as far east as the Upper Musselshell and lower Yellowstone rivers. In exchange for recognizing the limited number of off-Reservation rights set forth in the Compact, the State was also able to ensure that areas of the State that are particularly vulnerable to such claims, such as the Bitterroot Valley, are protected from them in perpetuity.

12. Why would the Compact give the Tribes co-ownership in DFWP rights?

Recognizing Tribal co-ownership with DFWP of fourteen instream flow rights was done to satisfy significant Tribal claims to off-Reservation instream flows (*see response to question 11*) while protecting junior State-based water rights. Recognizing Tribal co-ownership does not further reduce the supply of water available for future de-

14 *U.S. v. Winans*, 198 U.S. 371, 381-82 (1905).

15 *U.S. v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983).

velopment. Other than adding the Tribes as owners, none of the other attributes of these rights is changed, so the Tribes would have the same priority date as that currently held by DFWP. These co-owned rights represent a compromise by both parties that recognizes Tribal instream flow claims while ensuring that State water users will not be harmed.

13. What would prevent other Tribes from claiming off-Reservation rights?

None of the other Tribes in Montana have treaty language supporting such claims. Moreover, all other tribal compacts require that the tribe relinquish all claims for water not recognized in that compact, and it would violate those compacts for a tribe to make such demands. This settlement specifically provides that it cannot be used as precedent for the resolution of the water rights claims of any other tribe.

14. Would it be possible to obtain a new water right once the Compact is in place?

Yes. Under Montana Law, an applicant must make a showing of actual physical water availability and demonstrate that water is legally available—i.e. it is not already spoken for by other users—in order to obtain a new permit to use water. The Compact would not alter this basic framework, nor would the Compact recognize any water rights that are likely to result in additional impediments to legal availability. By resolving all of the Tribes' claims for off-Reservation water rights, and ensuring the availability of water for off-Reservation mitigation, the Compact would facilitate future growth and development in western Montana.

15. Would the Compact "take" private water rights?

No. Neither the Compact nor the Water Use Agreement would take private water rights. The Compact quantifies the Tribal water rights and would implement restrictions and limitations on the use of those rights to protect existing water rights under State law. The Water Use Agreement would assign the Project water rights to the Tribes

but would not require any individual holder of a water right to convey it to the Tribes. Allocating the Flathead Indian Irrigation Project rights to the Tribes in exchange for the protections for irrigation deliveries offered by the Water Use Agreement would resolve an existing ownership dispute over these rights, and would not be a taking of individual water rights. Any individual who has filed claims in the adjudication will have those rights as the Montana Water Court decrees them. Nothing in the Compact would change that.

Indeed, the Montana Supreme Court determined that Judge C.B. McNeil erroneously and improperly determined that the Water Use Agreement was an unconstitutional taking of irrigator water rights and was beyond the irrigation districts' or Flathead Joint Board of Control's authority to ratify. The Supreme Court recognized that the Compact and Water Use Agreement attempted to resolve an issue of disputed ownership over the FIIP rights and determined that "no grounds exist for the conclusion that the Water Use Agreement will take away those water rights."[16]

16. How would the Compact protect non-irrigation rights from call by the Tribes?

Under the Compact, the Tribes and United States would relinquish their ability to call non-irrigation rights, including domestic, commercial, municipal, industrial, and stock water rights.

17. How would the Compact protect irrigation rights from call by the Tribes?

Under the Compact, the Tribes and United States would relinquish their ability to call groundwater irrigation rights totaling less than 100 gpm.

- **Flathead Indian Irrigation Project (FIIP):** Irrigators within the Project would be protected from call by the Tribes' recognized senior instream flow rights through the terms of the FIIP Water Use Agreement negotiated on their behalf by the Flathead Joint Board of Control (FJBC), the Tribes, and the United States.
- **Project Influence Area:** The Compact would allow irrigators within the Project Influence Area[17] to enter into a consensual agreement whereby the Tribes, the

16 *W. Montana Water Users Ass'n, LLC v. Mission Irr. Dist.*, 299 P.3d 346 , 2013 MT 92, ¶ 22 (Mont. 2013).

17 See Compact Appendix 2 for map of FIIP Influence Area.

United States, the Project Operator and the FJBC agree not to call water rights arising under state law for an amount that is equal to either the quantity of the Farm Turnout Allowance or the historic use of the water right, whichever is less.

- **Non-Project:** In addition to the blanket protection from call for all groundwater irrigation water rights less than 100 gpm, the Compact would quantify the tribal water rights in a way that would significantly limit the possibility of call for non-project irrigation users who might otherwise be affected. Existing state law rules governing enforcement of a call, such as the provision preventing "futile" calls, remain in place as well. The Compact also contains no-Call provisions for certain tributaries of rivers on which the Tribes would have instream flow rights.

18. Why would the Compact give the Tribes title to the Project Water Rights?

The Bureau of Indian Affairs and the FJBC have filed identical claims to the FIIP rights. In addition, the Tribes have expressed their intention to file claims to those same rights if there is no negotiated settlement. These multiple claims to ownership create a great deal of uncertainty. From the State's perspective, it is more important to ensure that the Project rights continue to be exercised for the benefit of Project irrigators, and that Project deliveries are not curtailed by the Tribes' legally recognized senior instream flow rights, than to obtain judicial resolution of this dispute. Recognition of Tribal ownership of the FIIP rights in exchange for the protections contained in the Water Use Agreement represents a practical solution to these legal and technical disputes. Moreover, Tribal ownership of the Project right is consistent with how Indian irrigation project rights were treated in the Blackfeet and Crow Compacts, and reflects the fact that a single (early) priority date for purposes of Project administration has significant advantages for project irrigators.

19. What is the Flathead Indian Irrigation Project (FIIP) Water Use Agreement?

The FIIP Water Use Agreement would resolve the dispute over ownership of the water right for the irrigation project (*see question 18*) and ensure that all Project lands can be served equally without needing to determine which lands are entitled to an 1855 date and which have a 1910 date or later date (all Project lands would have the 1855 priority date under the Compact). The Compact recognizes Tribal water rights for purposes of serving the FIIP's approximately 130,000 irrigated acres; the Water Use Agreement conditions the use of those FIIP water rights to ensure that use benefits the Project irrigators, the vast majority of whom are not tribal members. The Water Use Agreement allocates water between irrigation and instream flows within the Project delivery area to ensure that the Project continues to have access to irrigation water despite the fact that the Tribes' instream flow rights are senior to the Project rights as a matter of settled law.[18]

20. How would the Water Use Agreement vary from the existing system of allocating Project water?

The Water Use Agreement would provide irrigation deliveries through a Farm Turnout Allowance (FTA), which would replace the current quotas. The minimum FTA would be calculated based on the specific hydrologic and climatic variations of the different districts within the Project and would be capped at 1.4 acre-feet/acre. The FTA was calculated taking into consideration the efficiencies that would result from the project updates, repairs, and improvements that must be completed before the shift from the current quota system to the FTA system could occur. The Measured Water Use Allowance (*see Question 21*) would replace extra duty water deliveries.

21. What if an irrigator needs more water than the FTA provides?

Users who demonstrate efficiency and need more water than the minimum FTA would be able to apply to the Project Operator for the Measured Water Use Allowance, up to a total allocation of 2 acre-feet/acre. In the unlikely event an irrigator needs more water, he may be able to lease water from the Tribes or approach the FIIP Operator, who would retain significant internal flexibility in delivering water among FIIP users according to need.

22. When would the Water Use Agreement go into effect?

The Water Use Agreement would go into effect upon the Effective Date of the Compact, which is when it has been ratified by the State, the Tribes, and the United States.

23. What is the Unitary Management Ordinance?

The Unitary Management Ordinance (UMO) would apply only on the Reservation, and is a joint State-Tribal system for water management that provides for a single set of rules and less duplication of effort and potential for delay and error. It also ensures that all new water rights and changes of use, regardless of whether they occur on Tribal or non-Tribal land, would be processed consis-

18 See *Joint Bd. of Control v. United States*, 832 F.2d 1127 (9th Cir. 1987).

tently with the DNRC's record keeping system. There is a large amount of non-Tribal land within the Reservation, and a relatively large amount of available water supply, which makes joint State-Tribal management of the water resources on the Reservation the most practical and efficient approach. The alternative is dual administration, where an applicant for a new water right would likely need to comply with two different sets of rules for each piece of Tribal or non-Tribal land likely to be impacted by their application.

24. What is the Water Management Board?

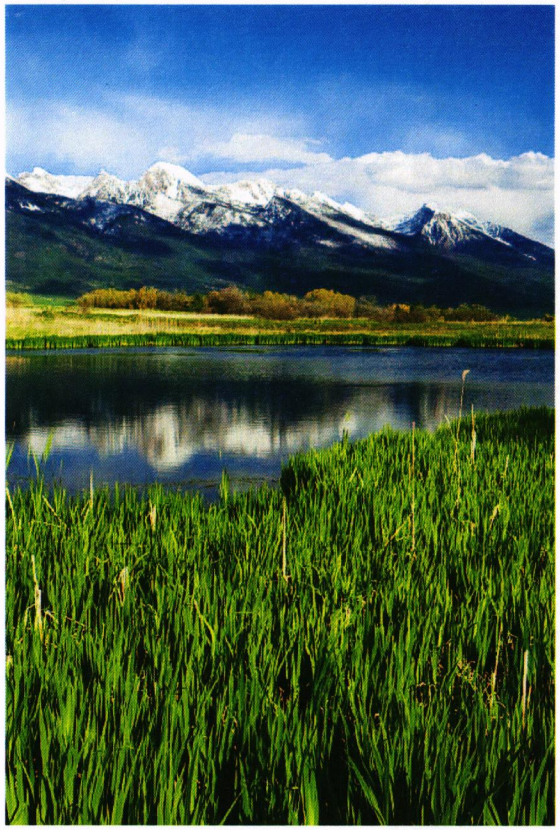
The Water Management Board would administer the Unitary Management Ordinance and fulfill the role the DNRC plays outside the Reservation. The Board would be composed of two members appointed by the Governor of Montana, two members appointed by the Tribal Council, a fifth voting member appointed by the other four, and a non-voting member appointed by the Secretary of the Interior.

25. How would Unitary Management work?

The Board would administer the Unitary Management Ordinance, which would apply only on the Flathead Reservation. The UMO would protect existing uses of water that are not currently recognized under State law (those uses developed after August 22, 1996), would regulate new uses and changes of use, and would ensure that new water uses do not have an adverse effect on existing water rights. The UMO would not apply to the FIIP. Water use within the Flathead Indian Irrigation Project would not be governed by the UMO or the Board but would be subject to existing administration by the Project Operator and the terms of the Water Use Agreement.

26. Would the Tribes have control over water rights on the Reservation?

No. The Board is a joint State-Tribal body. Anyone aggrieved by a decision of the Board could appeal that decision to a court of competent jurisdiction. The Board



would not have control over the adjudication of water rights claims on the Reservation. That would remain with the Montana Water Court.

27. Would the State have a say in new permitting under Unitary Management?

Yes. Because of the UMO, the State would have direct input and involvement in the issuance of new permits and changes of use on the Reservation, regardless of whether those new uses occur on Tribal or non-Tribal land. Under a dual administration system, the State would not have input on new uses of water on Tribal land, and the Tribes would retain authority over new permitting on both Tribal and fee land within the Reservation.

28. Would existing uses be protected under the UMO?

Yes. All existing claimed or permitted uses would be protected as they are ultimately adjudicated by the Water Court or as they were permitted by the DNRC. Nothing about the Compact would change any of the attributes of those uses. The intent of the Compact is to protect those uses from being harmed by the exercise of the Tribes' senior rights. The UMO would provide for registration of certain previously unrecorded existing uses—particularly uses that do not have a valid permit—and would protect those rights with their original priority dates.

29. What about uses that are currently exempt from permitting under State law?

Small domestic and stock uses that are currently not required to go through the DNRC permitting process would be treated similarly under the UMO. Stock and domestic uses 35 gallons per minute (gpm) and 2.4 acre-feet (AF) or less per year would be subject to a streamlined application and approval process.

30. Would the UMO affect project irrigators?

No. Under the UMO, the Project Operator would determine the management of Project operations consistent with the terms of the FIIP Water Use Agreement. Unless there is a dispute over water between a Project and a non-Project irrigator, the UMO would have no impact on Project irrigators.

31. Could the Unitary Management Ordinance be amended?

The Water Management Board could not amend the UMO. The UMO could only be amended if the Tribes and the State, acting through the Legislature, both agree to the amendment. ■

Appendix A

Overview of Compact: Key Provisions and Protections for State Water Users

The Compact Commission's goal in negotiating a settlement for the Confederated Salish and Kootenai Tribes' water rights is to protect state water users from the exercise of the Tribes' recognized senior water rights,[1] and to ensure that these protections exist both on and off the Flathead Indian Reservation. The key provisions of the Compact would completely protect *all* existing[2] non-irrigation water rights from call[3] by the Tribes, completely protect all groundwater irrigation uses less than 100 gallons per minute (GPM) from call by the Tribes, and would put in place substantial protections for all other existing irrigation rights both on and off the Reservation. These protections take several different forms: express limitations on call, quantification of the Tribal water rights on and off the Reservation at hydrologic levels that allow for the continuance of existing uses, delayed and contingent implementation provisions for some instream flow rights, and set-asides of mitigation water to facilitate the development of new uses on and off the Reservation. Unlike many other settlements negotiated by the Commission, this Compact would not institute basin closure in any of the Water Court basins affected by the Compact.

Articles I and II outline standard recitals and definitions used in the Compact. Article III structures the Tribal water right[4] and describes the limitations that are designed to protect non-tribal water users from call by the senior Tribal Water Right. Article III also quantifies eight off-Reservation instream flow rights to be held by the Tribes, and several additional rights for instream flows or the delivery of stored water for instream use to be co-owned by the Tribes and Montana Department of Fish, Wildlife and Parks (DFWP). The on-Reservation rights quantified by Article III include the Flathead Indian Irrigation Project (FIIP) water right, existing uses by the Tribes, Tribal members, and allottees; the Flathead System Compact Right for the Flathead River, including an allocation of storage water from Hungry Horse Reservoir; on-Reservation instream flow rights, minimum reservoir levels, wetland, and high mountain lake water rights; and hydroelectric project rights. Article IV describes how the Tribal water rights will be administered and outlines further protections for non-Tribal water users both on and off the Reservation. Following is a brief outline of the quantified rights and the measures put in place for the protection of non-Tribal water users from the exercise of those rights.

On-Reservation Rights

1. The Flathead Indian Irrigation Project (FIIP) Water Right

The first rights quantified by Article III are the Flathead Indian Irrigation Project (FIIP) irrigation rights.[5] The Compact provides that the exercise of the FIIP water rights are subject to the terms of the separate FIIP Water Use Agreement attached to the Compact as Appendix 3. The Water Use Agreement was crafted as a result of negotiations between the Flathead Joint Board of Control (FJBC), the Tribes, and the United States.

The quantification of the FIIP water right and the terms of the Water Use Agreement represent the parties' recognition of the importance of protecting project deliveries while ensuring that legally recognized Tribal instream flows are satisfied. The Water Use Agreement would balance the Tribes' senior instream flow rights and the irrigators' rights to delivery of Project water by providing for a delayed implementation period during which State and federal funding would be used to institute water measurement systems and to complete some of the needed repairs and upgrades to FIIP infrastructure. Until certain of these improvements and upgrades are completed, the FIIP water rights would remain subject to the current delivery system.

Though management under the Water Use Agreement would vary from the current system of quota and extra duty water, it would provide instead for implementation of a Farm Turnout Allowance for all Project irrigators, and a Measured Water Use Allowance to ensure that irrigators who demonstrate efficient use and a need for more water could obtain it.[6]

The parties recognized from the outset that ownership of the FIIP water rights is likely to be bitterly contested in the absence of a negotiated settlement. The Flathead Joint Board of Control (FJBC) and the BIA have filed identical and competing claims to these rights. These claims have serious deficiencies that will require

1 See *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 712 P.2d 754 (Mont. 1985); *Joint Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. U.S.*, 832 F.2d 1127 (9th Cir. 1987).

2 As used in this Report, "existing" with reference to a water right means that the right (1) existed prior to July 1, 1973, and will be finally decreed by the Montana Water Court; (2) existed prior to 1973, and was exempt from the requirement that it be filed in the statewide water adjudication proceeding; or (3) was initiated after July 1, 1973, and is represented by a valid permit or certificate of water right issued by DNRC.

3 Under the law of prior appropriation, the water user with the most senior priority date may "call" a junior user, forcing him to curtail use until the senior's right is satisfied.

4 There is no single Tribal water right. The phrase "Tribal Water Right" is used to describe the totality of individually quantified rights described by the Compact as the full and final settlement of all the Tribes' claims to water within the State. Each of these rights is quantified in the Compact appendices, which may be viewed at: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/Default.asp.

5 Compact Article III(C)(1)(a).

6 Compact Appendix 3, Water Use Agreement VIII.22(e).

substantial legal and technical work to resolve. The Tribes have also indicated that they intend to file claims to these rights on their own behalf. The Compact's solution to this problem is to recognize ownership of the FIIP water rights as being held by the United States in trust for the Tribes in exchange for binding provisions in the Water Use Agreement that would protect irrigation deliveries from call by the Tribes' senior instream flow rights.[7] The Water Use Agreement would also allow the entire Project to benefit from the Tribes' 1855 priority date, which is considerably earlier than the dates claimed by the BIA and FJBC for the FIIP rights.[8] Tribal ownership of the right also would facilitate expenditures of federal funds made available through Congressional ratification of the agreement for rehabilitation and improvement of the Project's infrastructure.

2. The Flathead System Compact Water

The Compact would quantify for the Tribes a right from the Flathead River in the amount of 229,383 acre-feet per year diverted, 128,158 acre-feet per year consumed, to be supplied from the Flathead River, Flathead Lake,[9] and the South Fork of Flathead River including Hungry Horse Reservoir.[10] A portion of this right could be satisfied by an allocation of 90,000 acre-feet of stored water from Hungry Horse Reservoir, 11,000 acre-feet of which is earmarked, by the State of Montana, for the mitigation of net depletions arising from new or existing domestic, commercial, municipal and/or industrial (DCMI) uses of water at any point in the Flathead or Clark Fork Basins. Because of large hydropower rights in these basins, there exist legal demand limitations on the development of new uses of water in the Clark Fork Basin that often require the applicant to show a source of mitigation water to offset any possible adverse effects to these senior rights.

The Tribal Water Right quantified in Article III would also include all existing uses by the Tribes, their members, and allottees, which are not otherwise quantified by the Compact.[11] Such uses, in order to be recognized as part of the Tribal water right carrying the Tribes' 1855 priority date, must be registered according to the terms of the Unitary Management Ordinance that is attached to the Compact as Appendix 4. These uses primarily include stock water and domestic, commercial, municipal, and industrial (DCMI) uses. Once registered, they would have a priority date of 1855.

The Tribes would be able to lease any portion of these rights on or off the Reservation, subject to the terms of the Compact, Unitary Management Ordinance, and Montana law.[12] Portions of the Flathead System Compact Water right, including the stored water in Hungry Horse Reservoir, could be leased independently by the Tribes to provide mitigation water for new uses on and off the Reservation in the Flathead and Lower Clark Fork basins. The Tribes must make available 11,000 acre-feet of their Hungry Horse storage water for lease as mitigation water for DCMI purposes off the Reservation.[13] The DNRC will administer the allocation of this mitigation water off the Reservation according to State law. The Compact would not allow the Tribes to lease any water outside the State of Montana.

3. Non-Consumptive Rights

The Tribes would have rights under the Compact to minimum levels of instream flows on the Reservation as set forth in Article III and the abstracts appended to the Compact.[14] These instream flow rights would consist of Natural Nodes and FIIP Nodes,[15] which would be enforced according to the terms set forth in the Compact abstracts and Water Use Agreement. In addition, the Compact would recognize rights to other on-Reservation instream flows subject to delayed enforcement provisions to allow the establishment of an enforceable flow schedule that would mandate the protection of existing irrigation uses.[16] [17]

Other non-consumptive rights under Article III would include minimum reservoir pool levels for FIIP reservoirs, wetland and high mountain lakes water rights on Tribal Trust lands, a minimum lake level right for Flathead Lake set to the natural minimum lake level (without Kerr Dam in place),[18] and co-ownership water rights that sustain wetlands owned by DFWP and the U.S. Fish and Wildlife Service.[19] The non-consumptive rights for instream flows, minimum pool elevations, wetlands, and high mountain lakes would share a priority date of "time immemorial" reflecting the Tribes' aboriginal use of these water bodies for subsistence purposes. The wetland water rights could not be used to call any other water rights. The Tribes additionally would have rights to water necessary to operate the Boulder Creek and Hellroaring hydroelectric projects.

a. Off-Reservation Instream Flow Rights

Under Article III of the Hellgate Treaty, the Tribes would have claims to off-Reservation instream flow water rights to sustain traditional fishing grounds stemming from the

7 These concessions are enumerated in the Water Use Agreement and Compact, which also provide that the United States and FJBC would withdraw their competing claims to the FIIP rights on issuance of a final decree by the Water Court. Compact Appendix 3, Water Use Agreement III.3.

8 The claims made by the BIA and FJBC to the FIIP rights list multiple priority dates for different parts of the project, ranging from 1909 to 1920.

9 The Tribes may not draw the lake down to a level that violates the United States Bureau of Reclamation's Final Flathead Basin Depletions Study.

10 Compact Article III.C.1.c.

11 Compact Article III.C.1.b.

12 Compact Article IV.B.6.

13 Compact Article IV.B.7.

14 Compact Article III.C.1.d, Compact Appendices 10-13.

15 Compact Article III.C.1.d.i.-ii. "Nodes" refer to the measurement points of the rights.

16 All non-irrigation water rights would be protected from call under Compact Article III.G.

17 Compact Appendix 4, Unitary Administration and Management Ordinance § 2-1-115.

18 The natural level of Flathead Lake is approximately ten feet below the maximum lake level regulated by Kerr Dam and is maintained by a bedrock sill that occurs near the Polson Bridge and sets the protectable elevation of the water right. The water right does not include the upper portion of the lake that is regulated by Kerr Dam. This is a minimum pool level that the Tribes could enforce to prevent dewatering of the Lake. It does not confer on the Tribes the right to drain the Lake to or below the minimum pool level.

19 Compact Article III.C.1.l.

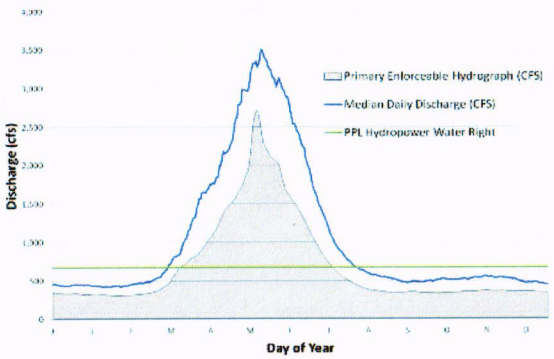
off-Reservation hunting, fishing, and gathering rights they retained under the Treaty.[20] Based on the strength of these claims and in light of existing legal precedent,[21] the State agreed to recognize a limited number of off-Reservation instream flow rights with a priority date of "time immemorial." The State also agreed to recognize Tribal co-ownership of additional instream flow rights currently held by Montana Department of Fish, Wildlife and Parks (DFWP), and to add the Tribes as a beneficiary to DFWP's management of the contracts for stored water from Lake Como and Painted Rocks reservoirs. None of the priority dates, uses, or amounts on these co-owned rights would change from those currently held by DFWP.[22] The State proposed this limited off-Reservation collection of rights in exchange for the Tribes' relinquishment of all other claims to off-Reservation instream flows throughout Montana.[23]

The first of the off-Reservation instream flow rights would be in the Kootenai River with a time-immemorial priority date for instream use to sustain fisheries.[24] The maximum flow rate of the Kootenai River right would be 38,573 cubic feet per second (cfs), with lower enforceable daily flows throughout the year.[25] However, the Kootenai River instream flow right *could not be enforced as long as Libby Dam remains in existence*, and the Army Corps of Engineers is in compliance with the 2008 Federal Columbia River Power System Biological Opinion. In the unlikely event that the right ever becomes enforceable, the Tribes have agreed under the Compact not to call any rights to satisfy it other than surface water irrigation and ground water irrigators pumping 100 gallons per minute (gpm) or more that are sourced from the mainstem of the Kootenai River.[26]

The Compact would also quantify instream flow rights on four tributaries to the Kootenai River with the following maximum flow rates: Big Creek, 1,471 cfs; Boulder Creek, 259.4 cfs; Steep Creek, 108.1 cfs; and Sutton Creek, 446.4 cfs.[27] These instream flow rights would be located wholly within Forest Service land and there are no existing consumptive use rights that would be subject to call.

The Tribes would have an instream flow right in the Swan River with a time-immemorial priority date and a maximum flow rate of 2,716 cfs.[28] Like the Kootenai right, the Swan right would have an enforceable daily flow schedule based on seasonal water supply under dry year conditions.[29] The Tribes could make a call to enforce the Swan right only against surface water irrigators and ground water irrigators pumping 100 gallons per minute (gpm) or more. However, the measurement point and quantification of this right minimizes the likelihood of call, as the river flow is measured near the confluence of the Swan with Flathead Lake at Bigfork Bay.[30] The right was quantified based on the 20th percentile flows at the USGS Gage near Bigfork. This quantification has the effect of allowing new development to occur, as the quantified level is always lower than the legal availability threshold specified for DNRC permitting purposes.

Figure 1. Proposed Swan River Instream Flow Water Right
Below Swan Lake near Big Fork, Montana at USGS gauge #12370000
(1923-2010 Period of Record)



The Compact would also recognize an instream flow right on the mainstem of the Lower Clark Fork River.[31] The continuous flow rate of this right would be 5,000 cfs. The maximum level of this right would be coupled to the FERC license for the Cabinet George and Noxon dams, so that if the conditions on the license were reduced, the enforceable level of the right would likewise be reduced. The enforceable level of the right could not be increased.[32] This means that as long as Avista Corp. remains in compliance with the FERC license conditions for these dams, the Tribes could not make a call to enforce the right. If a situation arose in which the Tribes could make a call, they have agreed under the Compact not to call any non-irrigation water uses, groundwater irrigation uses less than 100 gpm, or any surface (irrigation or otherwise) rights on tributaries of the Lower Clark Fork.[33]

20 See Report Table 2 for a summary of off-Reservation rights recognized under Compact.

21 For a discussion of the legal basis of the Tribes' claims to off-Reservation instream flow water rights, see Report Question 11 and Report Appendix B, p. 24.

22 Compact Article III.D.4.-5.

23 See, *Treaty of Hellgate*, Article III; *Detailed Explanation of the State of Montana's Proposal for the Resolution of the Confederated Salish & Kootenai Tribes' Claims to Off-Reservation Water Rights for the Kootenai, Swan and Clark Fork Rivers*, January 30, 2012; Compact Article III.D.

24 Compact Article III.D.1.

25 Compact Appendix 25.

26 Compact Article III.D.1.e.-g. Note: there are currently only twenty four irrigation rights that could be impacted if the Kootenai instream flow right were ever enforced.

27 Compact Article III.D.8. and Appendix 36.

28 Compact Article III.D.2. and Appendix 26.

29 Compact Appendix 26.

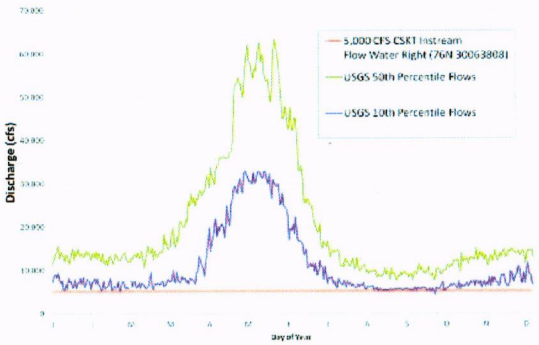
30 Compact Article III.D.2. and Appendix 26.

31 Compact Article III.D.3. and Appendix 27.

32 Compact Appendix 27.

33 Compact Article III.D.3.e.

Figure 2. Proposed Lower Clark Fork River Instream Flow Water Right below Cabinet Gorge Dam, Idaho, at USGS Gauge #12391950 (1995-2012 Period of Record)



The final off-Reservation instream flow right that would be wholly owned by the Tribes under the Compact and would have a time-immemorial priority date is on the North Fork of Placid Creek in the amount of 10 cfs. One FIIP right exists upstream of the protected reach, but inclusion of this right in the Compact would not change the status quo, as the FIIP right has been operated historically to accommodate this 10 cfs instream flow. No other existing water right would be affected by the Placid Creek water right.

The Compact would add the Tribes as co-owners with DFWP to thirteen additional instream/recreation rights in the Middle and South Fork Flathead basins, Rock Creek Basin (tributary of the Clark Fork River), and the Blackfoot Basin.[34] These rights would be decreed as part of the Tribes' compacted right, but none of their attributes, such as priority date or quantification, would change from those currently held by DFWP. Additionally, six instream flow and recreation rights currently held by DFWP in the Bitterroot, Middle and North forks of the Flathead River, and in the Blackfoot River would see the Tribes added as co-owners but would not be decreed as part of the compacted right and would continue to exist as wholly State-based water rights.[35] None of these rights would have their current attributes changed, *and therefore represent no new appropriation of water or reduction in the supply of available water.*[36]

The last off-Reservation water right is the former Milltown Dam hydropower right. The State acquired this right in 2008, with the expectation that it would be changed to an instream flow right for fisheries, to be administered by DFWP. The hydropower right currently has a continuous flow rate of 2,000 cfs as measured below the confluence of the Blackfoot and Clark Fork rivers. Because the Tribes, as a natural resources trustee under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) at the former Milltown site, are next in line after the State to obtain ownership of this right, the idea of co-ownership was proposed by the State during Compact negotiations as another component of the settlement of the Tribes' off-Reservation claims. Under the terms of the Compact, the Tribes and DFWP would co-own the right, which would be split into two water rights with lower daily enforceable flow schedules and minimum flow values of 500 cfs and 700 cfs on the Clark Fork River and Blackfoot River respectively.[37] For purposes of asserting future legal demands, the historic maximum flow rate of this right would be 2000 cfs as measured below the confluence, but the daily enforceable levels would be based on the prescribed flow schedule.[38] As with the other rights to be co-owned by the Tribes and DFWP, this right would retain its original priority date of December 11, 1904, and would not constitute a new use of water or a diminution of the available water supply for potential future uses.[39] This right could only be enforced after a five-consecutive-day period in which four of five average daily flows fall below the enforceable level. Moreover, the right could not be enforced at all for ten years from the date of Compact ratification. During this deferral period, the Tribes and DFWP would have to engage stakeholders to determine how the right would be exercised in relation to existing rights on the Upper Clark Fork, and to engage in drought planning.[40]

Finally, in consideration for the Tribes' agreement to make no additional instream flow claims in the Bitterroot Basin, the State agreed to add the Tribes as intended beneficiaries of DFWP's management of stored water from the Painted Rocks Reservoir and Lake Como.[41] DFWP currently has contract rights to stored water for fisheries purposes from both reservoirs. Under the Compact, the Tribes would be an intended beneficiary[42] of DFWP's management of this water. Should DFWP obtain the water rights associated with these contracts in the future, the agency would add the Tribes as co-owners of those rights. The addition of the Tribes as beneficiaries to existing contract rights was intended to ensure that the Compact have no impact on the available water supply in the Bitterroot Basin.

b. Protections From Call

The Tribes agreed during negotiations not to call any State-law based, non-irrigation water rights.[43] Thus, all domestic, commercial, municipal, industrial, stock, and other non-irrigation water rights existing on the Effective Date[44] of the Compact would be entirely protected from call by the Tribes' senior rights, both on and off the Reservation. The Tribes also agreed not to call any

34 Compact Appendix 28.
35 Compact Appendix 29
36 Compact Article III.D.4.
37 Compact Article III.D.5.a.
38 Compact Appendix 31.
39 Compact Article III.D.5; Appendix 30.
40 Compact Article III.D.5.c.
41 Compact Article III.D.6.
42 This means that DFWP must "manage the Painted Rocks and Como contract rights, in a prudent, biologically based and environmentally sound manner" (something that they are required to do already) and that the Tribes may challenge DFWP's management decisions in a court of competent jurisdiction. Article III.D.6.c.
43 Compact Article III.G.1.
44 "Effective Date" means the date on which the Compact is finally approved by the Tribes, by the State, and by the United States, and on which the Law of Administration has been enacted and taken effect as the law of the State and the Tribes, whichever date is latest. Compact Article II.24.

groundwater irrigation right with a flow rate less than 100 gpm on or off the Reservation.[45]

Irrigation rights would be protected from call by the Tribes' senior rights through different mechanisms depending on where the right is located. For FIIP irrigators, the primary protections are contained within the FIIP Water Use Agreement, and would include the protection of irrigation deliveries through the Farm Turnout Allowance (FTA), the Measured Water Use Allowance, the continued provision for a low-cost block of power, and the contribution of State and federal funds to accomplish needed repairs and upgrades to Project infrastructure, allowing for increased project efficiency to allow the needs of both Tribal instream flow rights and Project deliveries to be met.[46] Additionally, the Water Use Agreement would allow for adaptive management to manage the allocation of irrigation and instream flow water based on specific water year considerations. The Water Use Agreement would also provide for re-evaluation of targets after a period of monitoring. Neither of these adaptive management strategies or the funding for measuring devices necessary to implement them would be possible through the adjudication process.

For non-Project irrigators within the area affected by the FIIP, the Compact would provide a mechanism by which irrigators could enter into a voluntary agreement with the Tribes, the United States, the Project Operator, and the FJBC that would allow the irrigator to receive an equivalent amount of water to the FTA in exchange for protection from call by the Tribes.[47] These agreements are purely voluntary. The state-based water right holders would have the option to continue their historic operations with their water rights being subject to a call by the senior Tribal water rights. In addition, the Tribes would be subject to limitations on the exercise of their instream flow rights that would serve to protect irrigators.

For non-Project irrigators outside of the FIIP influence area, including those off the Reservation, the Tribes' rights would be quantified at levels that would allow existing rights to be satisfied and without the need for changes in irrigation practices or additional regulation. The limited subset of on-Reservation instream flows not enforceable at the time of Compact ratification[48] would be set at enforceable levels that would accommodate existing uses.[49] Off-Reservation instream flow rights would be limited and conditioned to minimize the likelihood of call as described in Section a. above and in Report Questions 10 – 12.

In basins 76H (the Bitterroot), 76I (Middle Fork Flathead), 76J (South Fork Flathead), 76L (Flathead below the Lake), and 76 LJ (Flathead above the Lake), the Tribes would agree to forego any claims to off-Reservation/time-immemorial instream flow rights in exchange for their being added as co-owners or beneficiaries to existing DFWP rights. None of the attributes of these DFWP rights—including priority date, purpose, or quantification—would be changed, so the addition of the Tribes as co-owners would have no impact on the water supply in those basins that is available for new appropriations.

In basins 76M (Middle Clark Fork), 76E (Rock Creek), 76F (Blackfoot, and 76GJ (Flint Creek), the Tribes would also agree to relinquish potential claims to off-Reservation aboriginal treaty rights in exchange for co-ownership of the former Milltown Dam hydropower right with DFWP. The enforceable level of that right would be reduced from its current year-round 2000 cfs level to a shaped hydrograph with minimum flows of 500 and 700 cfs in the Clark Fork and Blackfoot respectively. This right, moreover, could not be enforced for the first ten years following Compact ratification, during which time the Tribes and DFWP would be required to consult with upper Clark Fork water users as to its implementation and to formulate a drought management plan. Following the deferral period, strict limits on when a call could be made would reduce the likelihood that irrigators' rights would be adversely affected by the Tribal/DFWP right.[50]

4. Compact Implementation – Unitary Management

Article IV of the Compact addresses implementation, including general provisions relating to the federal law based attributes of the Tribal rights,[51] as well as more specific provisions addressing registration of unrecorded existing uses, new developments and changes of use, leasing of the Tribal water right, and the administration of water rights on the Reservation.[52]

The central piece of Article IV is the enactment of the Unitary Administration and Management Ordinance (Unitary Management Ordinance or UMO) for joint State-Tribal administration of all water rights on the Reservation through a Water Management Board. Unitary management addresses the unique challenges posed by the complex land ownership and water use patterns resulting from the Flathead Allotment Act of 1904 and its 1908 amendments that opened the Reservation to homesteading.[53] These patterns make a dual administration system like those used in the other six tribal compacts difficult to implement.[54] The Montana Supreme Court's decisions divesting the State of regulatory jurisdiction to permit uses or process change applications on the Reservation until the Tribes' rights are quantified highlights the difficulties that arise from dual administration.[55]

45 Compact Article III.G.2.

46 Compact Appendix 3, FIIP Water Use Agreement VIII.22, 25; XII; XIII.

47 Compact Article III.G.3; Appendix 2.

48 Compact Appendix 12.

49 Compact Article III.C.1.d.iii; Compact Appendix 4, Unitary Management Ordinance § 2-1-115.

50 Compact Article III.D.5.vi.

51 Compact Article IV.B.1-2.

52 Compact Article IV.B.3-7.

53 33 Stat. 302; 35 Stat. 444. For a discussion of these acts and the status of the Flathead Indian Reservation, see Report Appendix C, question 8 and Report Appendix B, p.24.

54 See Mont. Code Ann. §§ 85-20-201, 301, 601, 901, 1001, and -1501, et. seq.

55 See *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner*, 278 Mont. 50, 923 P.2d 1073 (Mont. 1996); *Confederated Salish and Kootenai Tribes v. Clinch*, 297 Mont. 448, 992 P.2d 244, 1999 MT 342 (Mont. 1999).

For this reason, the State agreed to jointly develop a unitary management approach with safeguards to retain State oversight and protections for State-based users. The unitary management approach would allow the State to have a continuing say in the permitting of new uses on the Reservation once the Compact is implemented. The Ordinance was modeled heavily on the Montana Water Use Act. The UMO would provide—like the Water Use Act—standards for new permit applications and issuance, exempt uses, abandonment, change of use, and enforcement proceedings.[56]

The unitary management approach would not give jurisdiction over water rights on the Reservation to a tribally controlled body. Rather it would ensure that a joint State-Tribal entity (the Board) oversees all rights on the Reservation, rather than preserving a duplicative and potentially conflicting dual management approach. Another advantage from the State's perspective to unitary management is that it would retain for the State a role in the development of new uses of water on the Reservation. This is not the case on every other Indian reservation in Montana, where the tribes have sole jurisdiction over all future on-reservation developments under tribal water code.[57]

The Ordinance and Compact would also provide for registration of unrecorded uses in existence on the Effective Date of the Compact.[58] This would resolve a major issue for State-based water users in the wake of the Montana Supreme Court's Ciotti decisions. Following institution of the moratorium on the issuance of new water appropriations imposed by those decisions, the DNRC received, but was unable to process, more than 900 permits for small domestic and stockwater uses excepted from permitting under § 85-2-306(3), MCA. These uses would not need to be registered under the Ordinance but would automatically be recorded with their original priority dates.

The Ordinance would allow for registration of an even greater number of groundwater certificates that have likely been developed without a DNRC filing. These uses could be registered under the terms of the UMO as existing valid uses of water. In the absence of a Compact, they could be considered illegal uses of water. The UMO would also provide for registration of certain previously unrecorded uses, including those stock instream surface water rights and small groundwater appropriations considered "exempt from filing" under § 85-2-222, MCA. This process is less burdensome on the registrant than the new requirements for obtaining Water Court examination of such uses throughout the rest of the State under SB 355, which was passed during the 2013 legislative session.

The Commission was particularly concerned during negotiations with ensuring that rules for new appropriations and changes in use would be consistent with the Montana Water Use Act. The UMO accomplishes this goal. Its variations from the Montana Water Use Act largely reflect suggestions from the DNRC gleaned from their experience implementing the Act. These include a streamlined permitting process for small domestic and stock uses.[59]

As with the new permitting and change of use provisions, enforcement under the UMO is modeled on the Montana Water Use Act, in that enforcement would be a user-driven and locally centered process.[60] Complaints would be filed with the Water Management Board's Engineer, who would hold a hearing to allow the complainant and respondent to explain their positions. The Engineer would be required to render a written decision that could be appealed to the Board. Either party to such an appeal could request that the Board hold oral argument prior to resolution of the issue. The Board would render a decision on the appeal in writing sustaining, overturning, or remanding the Engineer's decision for further proceedings.[61] Either party could appeal the decision of the Board by filing a petition for judicial review to a court of competent jurisdiction.[62] A reviewing court would apply the same standards of review to the Board's decision as it does to the state agency in the case of a dispute off the Reservation.[63] If the dispute were solely between FIIP irrigators, they would be subject to the dispute resolution provisions in the FIIP Water Use Agreement.[64] Thus the UMO *would have no impact on FIIP irrigators* except in the case of a dispute between a FIIP irrigator and a State-based right holder or user of the Tribal Water Right.

The Ordinance could not be amended unilaterally by the Board or a party. Amendments could only occur if the State, acting through the Legislature, the Tribes, and the United States concur in the amendment. In pursuance of the permitting requirements under the UMO and the Montana Constitution's requirement that the Legislature provide for a "system of centralized records,"[65] the Board would have to provide all water rights and changes in use it has processed to the DNRC in a format agreed by both the Board and the DNRC.[66]

The Unitary Management Ordinance would be administered by a six-member Water Management Board. Two Board members would be selected by the Governor in consultation with holders of State-based water rights, two would be selected by the Tribal Council, and the fifth voting member would be selected by the other four. The

56 Compact Appendix 4, Unitary Management Ordinance § 2-2-101 et. seq.

57 Four of six other tribal compacts in Montana have closed basins or portions of basins to new permitting, meaning that the only water available for new development is the tribal water right quantified under the compact. See Mont. Code Ann. §§ 85-20-301, 901, 1001, and -1501, et. seq.

58 Compact Article IV.C.1; Compact Appendix 4, Unitary Management Ordinance § 2-1-101 et. seq.

59 Compact Appendix 4, Unitary Management Ordinance §§ 2-2-116, 117.

60 Compact Appendix 4, Unitary Management Ordinance § 3-1-101 et. seq.

61 Compact Appendix 4, Unitary Management Ordinance § 3-1-104(7); 2-1-111.

62 Compact Appendix 4, Unitary Management Ordinance § 2-2-112.

63 Compact Appendix 4, Unitary Management Ordinance § 2-2-112; Mont. Code Ann. § 2-4-704.

64 Compact Appendix 3, FIIP Water Use Agreement Article XXVI.

65 Mont. Const. Article IX, § 4 (4).

66 Compact Article IV.E.

sixth, non-voting member would be selected by the United States.[67] All members must be Reservation residents or persons who regularly do business on the Reservation, and must have education and experience relating to one of the fields of administration, law, science, or policy that fall under the Board's purview.[68]

The Board would have jurisdiction over the issuance of permits for new appropriations and changes in use, enforcement, and water rights records on the Reservation, as the DNRC does elsewhere in the State. The Board would employ an engineer and appoint water commissioners to assist in the enforcement of water rights, resolution of disputes, and application of the UMO on a day-to-day basis.[69] The Board would also have authority to conduct hearings analogous to contested case hearings before the DNRC, and would have the authority to perform all legal and ministerial tasks associated with that authority, including administration of oaths, taking of evidence, and issuance of subpoenas.[70]

The Board would treat Tribal and non-Tribal water rights holders equally and would have to comply with the terms of the Unitary Management Ordinance in conducting its business. Moreover, like any State entity, the meetings, work product, and decisions of the Board would be open and accessible to the public, and would be subject to State and Tribal open meetings laws such that the law providing greater openness to public participation and more stringent public notice requirements would govern in the case of a conflict of laws.[71]

5. Protection of Flathead Indian Irrigation Project (FIIP) Irrigation Deliveries Under the Water Use Agreement

The FIIP Water Use Agreement would provide a resolution to the conflict between the FIIP rights and the Tribes' instream flow rights in streams supplying the Project. The Water Use Agreement was negotiated between the Tribes, the United States (as the owner of the Project), and the Flathead Joint Board of Control (FJBC). The latest draft of the Water Use Agreement is attached to the Compact as Appendix 4, and the terms of the Compact would make the Water Use Agreement binding on the parties.[72] [73]

The Water Use Agreement would protect irrigators through two primary mechanisms: the Farm Turnout Allowance (FTA) and the Measured Water Use Allowance. The FTA is a volume of water that would be available to all irrigated lands supplied by the FIIP. The FTA would be slightly different for each irrigation district and would fluctuate annually based on water supply, but would be capped at a maximum value of 1.4 acre-feet/acre/year under the current iteration of the Agreement. FTAs would be phased in for each district as installation of measurement devices, management improvements, and Project rehabilitation funded by the settlement occur. The current quota and duty systems would remain in place until that time.[74] The Measured Water Use Allowance would allow individual irrigators who demonstrate efficient use and need in excess of the FTA to obtain additional water.[75] The Measured Water Use Allowance was added to the Water Use Agreement late in negotiations in response to irrigators' concerns about the adequacy of the FTA and the loss of extra duty water.

The Water Use Agreement would also allow for pumping of up to 65,000 acre-feet of water through existing FIIP Flathead River pumps, an amount considerably in excess of historic levels.[76] An irrigator needing more water than the Measured Water Use Allowance and FTA could provide would have the option to purchase additional water from this source or from the Tribes' allocation of Flathead System Compact Water on a willing buyer-willing seller basis.[77]

The Water Use Agreement would be subject to a deferral period during which rehabilitation and betterment of FIIP infrastructure as well as operational improvements would be instituted to allow satisfaction of both FIIP deliveries and Tribal instream flow rights through increased Project efficiency. The deferral period would be five years for operational improvements and seven years for rehabilitation and improvement projects.[78] Given that federal approval and funding would be required to fully institute these improvements, the deferral period would not even begin to run until federal ratification of the Compact occurs, leaving the status quo in place for a considerable period.[79]

Nothing in the Water Use Agreement would affect any private water rights claim filed by a water user in the statewide adjudication. The Water Use Agreement would pertain only to the Project's water rights and the Tribes' instream flow rights. Private claims would be as they are finally decreed by the Water Court, with or without a compact in place. Contrary to a repeated misunderstanding, nothing in the Water Use Agreement would require any individual to turn a private water right over to the Tribes. Moreover, nothing in the proposed agreement would authorize new or additional access to or an easement across private property, or would change the legally enforceable rights of individual irrigators under the Project to receive irrigation water.[80]

67 Compact Article IV.C.2.a.
68 Compact Article IV.C.2.d.
69 Compact Article IV.C.4.-5.
70 Compact Article IV.C.5.b.
71 Compact Article IV.C.7.b.
72 Compact Article III.C.1.a.
73 If the FJBC is dissolved, the parties to the Agreement and Compact will have to revisit the issue of how the Agreement or an equivalent set of Project irrigator protections will be incorporated into the Compact.
74 Compact Appendix 3, FIIP Water Use Agreement Arts. XV, XVI.
75 Compact Appendix 3, FIIP Water Use Agreement Article VIII.25.
76 Compact Appendix 3, FIIP Water Use Agreement Article XIX.54.
77 Compact Article III.C.1.c.
78 Compact Appendix 3, FIIP Water Use Agreement Article XVII.46, 48.
79 By contrast, in the absence of a negotiated settlement, the Tribes have indicated that they will seek to re-evaluate the interim instream flows with the objective of obtaining increased flow levels, which could result in an immediate reduction in FIIP deliveries.
80 Compact Appendix 3, FIIP Water Use Agreement Article VI.6, 7.

Finally, the Water Use Agreement would prioritize necessary updates, repairs, and improvements to the Project and would provide a framework for the use of State and federal contributions to settlement to make those repairs.[81] These are funds that assuredly would not be available in the absence of a negotiated settlement. The Water Use Agreement or an equivalent mechanism to protect Project deliveries from the exercise of the Tribes' senior instream flow rights is an essential part of the negotiated settlement.[82]

81 Compact Appendix 3, FIIP Water Use Agreement Article XIII, XIV; Appendix C of FIIP Water Use Agreement.

82 This is because the 9th Circuit Court of Appeals has already held that the Tribes' instream flow rights are senior to and must be satisfied before the FIIP irrigation right. *Joint Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. U.S.*, 832 F.2d 1127 (9th Cir. 1987), cert. denied, *Joint Bd. of Control of Flathead, Mission, and Jocko Irr. Districts v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 486 U.S. 1007 (1988).

Appendix B

Legal Authority for Compact

This appendix discusses the legal basis for the Compact, with particular focus on the Commission's legal authority to negotiate tribal reserved and treaty rights, and the legal basis of the off-Reservation water rights quantified in the Compact.

1. History and Legal Authority of Montana Reserved Water Rights Compact Commission

In contrast to many states that resorted to litigation to quantify federal reserved rights, the Montana Legislature in 1979 opted instead to establish the Reserved Water Rights Compact Commission "in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state."[1] A reserved water right is created under federal law and is a right to use water accompanying a federal reservation of land in a quantity sufficient to satisfy the purpose(s) for which the land was set aside.[2] Sometimes the document withdrawing the land explicitly reserves sufficient water to satisfy the purpose or purposes of the reservation. More often, however, the reservation of water is implied from the document creating the reservation of land. These types of implied rights are known as "Winters rights" in tribute to the 1908 U.S. Supreme Court Case that first recognized them.

Unlike water rights arising under state law, federal reserved rights cannot be abandoned through non-use. The priority date allocated to federal reserved rights is not the date water was first put to use (as with state-based rights), but the date on which the reservation of land was created by treaty, act of Congress, or executive order. The quantification of the right, as mentioned above, is based not on actual use but on the amount of water necessary to satisfy the purpose or purposes of the reservation, a standard that can be difficult to articulate with legal or hydrologic precision.

The Montana Legislature intentionally created a bipartisan body to negotiate on behalf of the State and quantify federal reserved and tribal treaty rights, stipulating that the Commission be composed of four members selected by the Governor, two members by the Speaker of the House, two members by the President of the Senate, and one by the Attorney General.[3] The Commission negotiates on behalf of the Governor and the compacts must be ratified by the State Legislature (as well as the relevant tribal or federal government entities).[4] The Legislature's goal in creating the Commission was to avoid the expensive, protracted, and divisive litigation almost universally characteristic of reserved water rights resolution in other states.

In 1985, the State petitioned the Montana Supreme Court for a determination of the adequacy of the Water Use Act to adjudicate federal and tribal reserved rights and the Water Court's jurisdiction to do so. The Court determined that the Water Use Act was adequate on its face to adjudicate tribal and federal reserved water rights, and that the McCarran Amendment, 43 U.S.C. § 666(a), granted concurrent jurisdiction to the states, allowing the Water Court to assume jurisdiction over these claims.[5] The Court has recognized only two state-law mechanisms for the resolution of tribal and federal reserved water rights: (1) the statewide general stream adjudication within the jurisdiction of the Water Court; and (2) negotiated settlement through the Compact Commission.[6] Thus both the Court and Legislature have recognized the Commission as the sole body possessing legislative authority to negotiate and conclude compacts with tribes and the United States for the resolution of federal reserved and tribal treaty rights.

The Commission has negotiated the final settlement of seventeen compacts: eleven with the federal government for non-tribal reservations and six tribal compacts. Each of these settlements has been ratified by the Montana Legislature by substantial margins.

2. Legal Underpinnings and History of Confederated Salish and Kootenai Tribes (CSKT) Compact Negotiations

The Flathead Indian Reservation was reserved by the Tribes through the Treaty of Hellgate on July 16, 1855. Through the same document, the Tribes ceded to the United States more than 20 million acres of aboriginal homeland. In addition to establishing the 1.3-million-acre Flathead Indian Reservation, the Treaty reserved to the Tribes "The exclusive right of taking fish in all the streams running through or bordering said reservation . . . as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory."

1 Mont. Code Ann. § 85-2-701(1) (Mont. Code Ann. § 85-2-703 grants the Commission the ability to negotiate to conclude compacts over non-tribal reservations of land.)

2 *Winters v. U.S.*, 207 U.S. 564 (1908).

3 Montana Code Ann. § 2-15-212.

4 Mont. Code Ann. § 85-2-702(2).

5 *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76,99, 712 P.2d 754, 768 (Mont. 1985). For a more detailed discussion of these acts, see Report Appendix C, Question 8.

6 *The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 312 Mont. 420, 432, 59 P.3d 1093, 1100, 2002 MT 280, ¶39 (Mont. 2002)
(citing *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner*, 278 Mont. 50, 61, 923 P.2d 1073, 1080 (1996)).

Unlike the federal reserved rights created as appurtenances to the federal reservation, these "aboriginal" treaty-based claims were never ceded by the Tribes but instead were held apart under the Treaty and retained by them when they ceded the remainder of their homeland outside of the Reservation to the United States.

The General Allotment Act of 1887 and Flathead Allotment Act of 1904 opened the Reservation to Allotment and later to homesteading. In 1975 the City of Polson sued the Tribes, seeking a judicial declaration that the Reservation had been terminated by the 1904 Act. On appeal, the Ninth Circuit Court of Appeals determined that neither the 1887 nor 1904 Acts had evidenced the expression of congressional intent necessary to terminate or otherwise diminish the Reservation.[7] The Court further held that the Tribes owned the southern half of Flathead Lake and had the jurisdiction to regulate the riparian rights of non-Indians owning fee land along the lakeshore. It is clear from this decision that these acts, subsequent to the establishment of the Flathead Indian Reservation, did not abrogate or terminate the Reservation.

The negotiations that culminated in the Compact that was brought to the 2013 Legislature began in earnest in 2001 with the presentation of the Tribes' proposal to the Commission. A key element of the Tribes' initial proposal was recognition of ownership by the Tribes of all waters "on and under the Flathead Indian Reservation."[8] Negotiations stalled and restarted over the next several years with the primary points of disagreement being the Tribes' demand for ownership of all the water on and under the Reservation (a position inconsistent with the State's claim to ownership of all the waters of the State under the 1972 Constitution) and the parties' inability to agree to the terms of an interim water use management agreement with the Tribes and United States.

Negotiations resumed in 2007. Apart from the Compact negotiations, between 2008 and 2010 the Tribes, federal government, and Flathead Joint Board of Control (FJBC) negotiated to form the Cooperative Management Entity (CME) to which management of the Flathead Indian Irrigation Project (FIIP) would be transferred by the BIA.[9] Following creation of the CME, the parties agreed that the needs of Project irrigators would be addressed under the Compact through an ancillary agreement negotiated between the Tribes, the FJBC, and the United States. The State would not be a party to this negotiation, but the agreement would be included as an essential part of the settlement. That negotiation resulted in the FIIP Water Use Agreement, which is currently attached to the Compact as Appendix 3.

Compact negotiations continued between 2008 and 2011, and the parties released to the public portions of the draft Compact as they conditionally agreed to them. A largely complete draft compact was released for public comment in October of 2012. In response to public comment, further negotiations with the Tribes produced the final Compact and UMO that were released on November 8, 2012. The Commission voted 8-1 to approve the Compact on February 26, 2013.

3. Tribal Off-Reservation Claims

Many of the comments and questions received by the Commission concerned the Compact's recognition of Tribal ownership of eight off-Reservation instream flow rights to support fisheries. Many comments have pointed out that none of the other six tribal compacts negotiated by the Commission include such off-reservation rights.

Each compact negotiated by the Commission is unique in one or more of its attributes, depending on the location, purpose of the reservation, text of the enabling document, and concessions made by the negotiating parties. For example, four of the six Tribal compacts previously negotiated included closures of some or all of the water court basins in the compact area to new appropriations.

The reason that off-reservation rights were not recognized in other tribal compacts in Montana is that the CSKT are the only tribes whose treaty with the United States includes claims to such rights. Along with a group of other tribal treaties in Washington and Idaho, the Hellgate treaty was negotiated by Isaac Stevens, the territorial governor of Washington at the time. Many of the Stevens Treaties share language that reserves to the Tribes the right "of taking fish at all usual and accustomed places, in common with citizens of the Territory."[10]

Courts have interpreted this language to constitute retention by tribes of continuing interests in tribal fishing grounds, whether located on or off the reservation.[11] While questions remain about the scope and extent of such rights, there is well established legal precedent for the principle that this language can form the basis of a water right claim to preserve treaty-based fishing rights.[12] Such rights arise out of the Tribes' historic "uninterrupted use and occupation of land and water," which "created in the Tribe aboriginal or 'Indian title' to all of its vast holdings."[13] When translated to a water right, such title carries with it a priority date of "time immemorial" because the rights were not created by the treaty that established the reservation "rather, the treaty confirmed the continued existence of these rights."[14]

This rationale follows from the long accepted principle that "the treaty is not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[15] The Montana Supreme Court has likewise held that "[t]reaties do not implicitly diminish aboriginal

7 *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951, 960 (9th Cir. 1982).

8 *A Proposal for Negotiation of Reserved and Aboriginal Water Rights In Montana*, June 2001.

9 These negotiations culminated with the signing of the Cooperative Agreement creating the CME and the Transfer Agreement vesting the CME with management authority over the Project, both of which occurred in the spring of 2010.

10 Hellgate Treaty, Article III; The Blackfeet Treaty of Fort Benton is the only other Stevens treaty concluded in Montana, but lacks the "usual and accustomed" language found in the Hellgate and other Stevens treaties, reflecting the fact that the Blackfeet were not a tribe dependent on fisheries for their subsistence.

11 See, e.g., *Washingon v. WA. State Commercial Passenger Fishing Vessel*, 443 U.S. 658 (1978).

12 *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied, Oregon v. U.S., 467 U.S. 1252 (1984).

13 *Id.* at 1413.

14 *Id.* at 1414.

15 *United States v. Winans*, 198 U.S. 371, 378 (1905).

holdings. Uninterrupted use and occupation of land can create 'aboriginal title.'"[16] The geographic range that constituted the CSKT's historic "subsistence range" includes approximately half of Montana and extends as far east as the upper Musselshell and Yellowstone rivers.[17]

This is not to say that the Tribes have valid claims to instream flow rights for fisheries on every body of water throughout this entire area. Any claims the Tribes bring for off-Reservation instream flow rights would doubtless be examined closely for a demonstration that these claims were located in areas where the Tribes had a strong argument for asserting aboriginal title. Litigation of the issue would depend on extensive expert historical testimony regarding the Tribes' ancient cultural practices. Nonetheless, the extremely large subsistence range of these Tribes gives some indication of the potential extent of off-Reservation claims they might file in the adjudication.

This factor, combined with the judicial recognition of such treaty rights outlined above, demonstrated to the Commission that the Tribes have substantial and potentially valid off-Reservation claims to instream flow rights to sustain fisheries. The Commission cannot predict what a court would do when faced with making a determination on the validity of such claims. It is, however, the Commission's duty to evaluate the strength of Tribes' claims to water and to negotiate a settlement that minimizes the impacts of those claims on state water users. The Commission's legal analysis has concluded that based on existing legal precedent, recognition of at least some of the Tribes' claims to off-Reservation instream flow rights to sustain fisheries is likely. Given that consideration, the Commission's conclusion was that a negotiated recognition of a limited number of off-Reservation rights designed to protect existing uses was far preferable to litigation of a much broader array of claims to such rights in court.

In exchange for the inclusion of eight off-Reservation claims[18] with accompanying restrictions on quantity, location, and limitations on call to protect state water users, the Tribes have agreed to relinquish all other claims to off-Reservation instream flow rights in the State. These potential claims included areas where the Tribes have very strong evidence of traditional fisheries use, including the Little Bitterroot River, the Bitterroot River, the Clark Fork, and the Yellowstone River, which would—if decreed—have substantial adverse impacts on junior state water rights.

Assertions that recognition of off-Reservation claims in the CSKT Compact will result in other Tribes within the State seeking such water rights are patently false. Not only do the other six reservations have no treaty-based claim to such rights but all six prior tribal compacts constitute final and binding resolutions of the Tribes' rights, recognized in exchange for the Tribes' relinquishment of any additional claims to water within the State.

Questions have also been raised about the Commission's legal authority to negotiate such "aboriginal" claims, as distinguished from federal reserved claims which accompany the Reservation and have a priority date of 1855. The argument has been made that these are two distinct kinds of water rights and that § 85-2-701, MCA, and the McCarran Amendment only confer authority on the Commission (and jurisdiction on the State) to negotiate reserved rights, not aboriginal treaty rights.

The Montana Supreme Court has answered this question conclusively by recognizing in *State ex. rel. Greely* that the term "reserved rights" encompasses both reserved rights with a priority date as of the date of the reservation and treaty rights with a time immemorial priority date.[19] This settles, for purposes of Montana law, that there is no difference between "aboriginal" and "reserved" rights as far as the Montana Water Use Act is concerned. The Court also recognized that the Montana Water Use Act charges the Compact Commission with reaching agreements on "the extent of the reserved water right of each tribe."[20] The Court did not—in determining that the Act was sufficient to determine tribal water rights—find any inconsistency with the language of the McCarran Amendment.

The Commission's Statutory purpose is consistent with that of the McCarran Amendment: "to prevent piecemeal water rights adjudications by requiring determination of all water rights in a given river system in a single proceeding."[21] It would not be in the interests of the State or state water rights holders to negotiate an agreement that excludes these off-Reservation claims, because the Tribes will not agree to a settlement that would require them to relinquish their right to file these claims in the adjudication. Failing such a provision, a settlement that did not include off-Reservation claims would allow the Tribes to reap the benefits of a negotiated settlement while also filing a much more sweeping array of off-Reservation claims in the statewide adjudication. This approach would in no way constitute a "unified proceeding" resolving finally and for all time the rights of the Tribes.

16 *State ex. rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 90-91, 712 P.2D 754, 763 (1985) (quoting *United States v. Klamath Indians*, 304 U.S. 119, 122-123 (1938).

17 Source: Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution 1896-1897 and Deposition of Deward E. Walker, Ph.D., October 12, 2010, WC-2010-01.

18 These are the number of rights recognized by the Compact in the sole name of the Tribes with a time immemorial priority date. As explained earlier, the Tribes have also been added to a number of existing DFWP claims, the attributes of which would not be changed by the Compact.

19 *Greeley*, 219 Mont. at 91-92, 712 P.2D at 763-764.

20 *Id.* at 91, 763.

21 *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 312 Mont. 420, 431, 59 P.3d 1093, 1100, 2002 MT 280, ¶ 38 (2002).

Appendix C

Questions, Comments, and Responses

The following questions and comments were received by the Commission in response to the Commission's June 4, 2013, solicitation letter[1] and are followed by the Commission's response. **Note that both the comments and questions are phrased as they were received,[2] and do not represent statements of fact by the Commission.** Where a subject has already been addressed in the body of the Report or Appendices, that response is referenced. The references to the Compact are to the article and section or to the relevant Compact appendix.[3]

Comments and questions are organized under the following broad categories. While there is considerable overlap between categories, they have been arranged according to primary topic. For example, a question concerning the constitutionality of the Unitary Management Ordinance would be listed under "Legal Authority and Constitutionality," while a question about the specific terms of the Ordinance would be listed under "Unitary Management Ordinance and Water Management Board."

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1 The comments received in response to the June 4, 2013 letter are posted at: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/2013/compact_comments.pdf

2 Numerous comments presented the same question or issue, and these were consolidated for brevity.

3 Compact appendices are numbered and are referenced in this report as "Compact Appendix 1." Report Appendices are lettered and are referenced in this report as "Report Appendix A."

General Questions

1. Question: What is this negotiation all about?

This negotiation concerns the Confederated Salish and Kootenai Tribes' (Tribes) federal reserved and treaty-based water rights in Montana. United States Supreme Court cases have established that an executive order, Act of Congress, or treaty that withdraws land from the public domain simultaneously withdraws sufficient water to satisfy the present and future needs of the reservation. The Supreme Court has determined that this withdrawal of water is implicit in the withdrawal of land from the public domain, meaning that the water rights are created even if the treaty, Act of Congress, or executive order did not mention water rights. The 1855 Treaty of Hellgate, which established the Flathead Indian Reservation, also created a basis for Tribal claims to off-Reservation in-stream flows to sustain fisheries. This Compact is intended to quantify and settle all of the Tribes' existing but unquantified water rights in Montana. The alternative is for the Tribes to file their claims in the statewide general stream adjudication and for these claims to be litigated along with all other state-based water rights. The Montana Legislature in 1979 decided that negotiated settlements were preferable to litigation, as they allow for stronger protection of existing users, increased flexibility, and greater local control than do litigated outcomes. This is why the State is attempting to resolve these claims out of court.

2. Question: What entity is negotiating on behalf of the State and its water users?

See Report Question 1.

3. Question: Under the Compact, who owns the water on and off the Reservation?

The State's position is that under Article IX, Section 3 of the Montana Constitution, all water on and off the Reservation is owned by State, and the Compact is consistent with this position. Article III quantifies the Tribes' rights. The State's perspective is that these rights constitute rights of use similar to the rights of use enjoyed by State-based water right holders on the Reservation and throughout Montana. It should be noted, however, that the Tribes emphatically disagree with the State as to ownership of the water. In their initial 2001 proposal, the Tribes requested ownership of all of the surface and underground water within the exterior boundaries of the Flathead Indian Reservation. The State was unwilling to concede this point and over the course of negotiations the Tribes ultimately accepted a right of use, rather than title to the water, as this position is consistent with the language in other tribal compacts negotiated by the Commission. Federal and tribal reserved rights do have special characteristics that set them apart from State-based water rights. For example, they cannot be abandoned through non-use and they do not have to be put to beneficial use. These qualities are undisputed rules of federal law.

4. Question: What happens if there is not a settlement? Can't we leave things just the way they are? What are the advantages of a negotiated settlement?

See Report Questions 5 and 6.

Legal Authority and Constitutionality

5. Comment: The Compact Commission has exceeded its authority: It only has legal authority to negotiate reserved rights, not aboriginal treaty rights; the Compact transfers control over state water rights on the Reservation to a Tribally controlled entity; it improperly requires holders of State water rights to file their rights with this entity, and it gives State water users' rights to the Tribes.

These allegations are incorrect for the following reasons:

- See Report Question 9 and Appendix B for an explanation of the Commission's legal authority.
- The proposed Water Management Board is not tribally controlled. The Board is a joint state-tribal entity with an equal number of representatives (two) appointed by both the State and the Tribes, with a fifth member selected by the other four.[4] Moreover, the Board must act within the framework of the Unitary Administration and Management Ordinance, its decisions are reviewable by courts of competent jurisdiction, and its work must comply with the State's water rights administration system.
- Only water users whose rights are not presently recorded in the DNRC water rights database, primarily owners of small domestic and stock uses developed after August 22, 1996,[5] are required to register, which is in furtherance of Article IX, Section 3 of the Montana Constitution, which requires the State to maintain a system of centralized records for water rights.
- Nothing in the proposed Compact would relinquish or give State-law based water rights to the Tribes. These rights would be as they are finally decreed by the Montana Water Court. The point of the negotiated settlement is to protect these rights from the Tribes' senior claims. The Compact does recognize tribal ownership of the Flathead Indian Irrigation

4 Compact Article. IV.C.2.

5 These are not valid water uses under Montana law because of the Montana Supreme Court's decisions in the Ciotti line of cases.

Project water rights, resolving a conflict over the ownership of these rights between three quasi-governmental entities. These do not constitute State-based rights held by individual users. See Report question 18.

6. Comment: The proposed Compact violates the Montana Constitution and State law.

The Proposed Compact not only complies with the Montana Constitution and State law but is in furtherance of specific legal mandates set forth therein:

- The proposed Compact is a rational way for the Montana Legislature to provide for the administration, control and regulation of water rights on the Flathead Indian Reservation in connection with a settlement of the Tribes' existing federal law-derived water rights.[6]
- Incorporating a Flathead Indian Irrigation Project (FIIP) Water Use Agreement into the proposed Compact does not violate the Montana Constitution, particularly since any such agreement would not "take" irrigator water rights but rather would protect irrigation deliveries from the Tribes' exercise of their senior instream flow rights.[7]
- The proposed Compact does not take private water rights. Under Montana Law, a senior water user is entitled to the last drop of his water right before a junior water user is entitled to the first drop of his. If these rights were adjudicated, the Tribes would likely be decreed the senior water right, while all existing filed rights would be valid but junior to the Tribes' rights. Instead, the proposed settlement protects state water rights from the harshness of this rule of law by incorporating significant restrictions on the exercise of the Tribes' senior water rights for the protection of those junior users.
- Article IX, Section 3(1) of the Montana Constitution provides that "all existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed"; the proposed Compact formally recognizes and quantifies the Tribes' existing water rights in a manner that emphasizes the protection of existing State-based water rights.
- Article IX Section 3(2) of the Montana Constitution provides "that the use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use." The proposed Compact quantifies rights to the Tribes for existing and future distribution and retention infrastructure both for beneficial use by the Tribes and non-Tribal users (for example through use of the FIIP water right for Project irrigators and provision of Hungry Horse mitigation water for future Domestic, Commercial, Municipal, and industrial (DCMI) uses).
- Article IX Section 3(3) of the Montana Constitution establishes 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." The proposed Compact does not relinquish ownership of the water to the Tribes but recognizes only rights to use of the waters quantified as part of the Tribal Water Right.
- Article IX, Section 3(4) of the Montana Constitution requires the legislature to "provide for the administration, control, and regulation of water rights" and to "establish a system of centralized records." As a result of a series of Montana Supreme Court decisions in the late 1990s and early 2000s, there is currently no such system of administration, regulation, or recordkeeping within the Reservation boundaries. The proposed Compact provides for the administration, control, and regulation of water rights on the Reservation and does so in a way that is consistent with and maintains all centralized records within the existing DNRC Water Rights Database.

7. Comment: The Unitary Management Approach is unconstitutional; it gives up State control over the administration and management of State law-based water rights on the Flathead Reservation.

The Unitary Management approach does not relinquish State control over the administration of water rights on the Flathead Reservation. Rather, it is in furtherance of the constitutional directive to the legislature to provide for the administration and management of water rights in Montana. (See question 6 above.) As a result of a series of Montana Supreme Court decisions, there is a regulatory void concerning the management and administration of water rights on the Flathead Reservation. By ratifying the Compact, including the Unitary Management Ordinance, the Legislature would fill that void. Under the Ordinance, State and Tribal water rights on the Reservation would be administered according to the same set of rules by a joint State-Tribal management entity. The proposed Water Management Board is not "tribally controlled" but is rather a joint State-tribal entity.[8]

The other six tribal Compacts in Montana have employed a dual administration system under which the State administers the existing state law-based uses and the tribes administer both the existing uses of the tribal water rights and *all* future development on those reservations. Because of the demographics of the Flathead Reservation, and the fact that this Compact does not institute a basin closure, the State wanted to maintain a role in future development of water on the Reservation, which it would not have under the dual-administration approach used in Montana's other tribal water rights compacts.

6 See *State v. Shook*, 313 Mont. 347, 67 P.3d 863, 2002 MT 347 (2002).
7 See *Joint Bd. of Control v. United States*, 832 F.2d 1127 (9th Cir.1987).
8 Compact Article IV.C.2.

8. Question: Have the following acts or decisions diminished the Tribes' rights and status of the reservation?

- Dawes Act, also known as the General Allotment Act or the Dawes Severalty Act of 1887: Neither the General Allotment Act nor the Flathead Allotment Act of 1904 terminated or diminished the validity of the Flathead Indian Reservation. The Ninth Circuit Court of Appeals held in 1982 that neither of these Acts terminated or diminished the Reservation or precluded the Tribes from holding title to the south half of Flathead Lake or having power to regulate non-Indian owners of fee land bordering the Lake. This question has been conclusively decided by the federal court of appeals.[9]
- Indian Reorganization Act of June 18, 1934, sometimes known as the Indian New Deal: This Act was intended to reverse the process of fragmentation and abrogation of tribal sovereignty started by the General Allotment Act of 1887. It is a re-institution of Tribal sovereignty and self-government. Nothing in the Act in any way abrogates the legal validity of the Flathead Indian Reservation or the sovereignty of the Tribes.
- *Winters v. United States,* 207 U.S. 564 (1908): A United States Supreme Court case establishing that reservations of tribal land by way of a treaty carried with them a concurrent implied reservation of water sufficient to fulfill the purposes of the Reservation. Winters serves as the basis for the federal reserved water rights doctrine, and supports the proposition that the Tribes are entitled to a federal reserved water right for on-Reservation waters sufficient to fulfill the purposes of the Reservation with an 1855 priority date. Winters is silent as to the issue of treaty-based aboriginal hunting and fishing rights. These rights were confirmed in cases such as *U.S. v. Winans*, 198 U.S. 371 (1905), *U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1983), and *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76 (1985).
- *U.S v. Powers*, 305 U.S. 527 (1939): The United States Supreme Court construed language in the Crow Treaty guaranteeing an equal interest in lands and interpreting this language to likewise guarantee an equal interest in waters necessary to cultivate those lands. The Court determined that when the Reservation was allotted, this equal share of water became alienable and passed with the land. The treaty language at issue is not present in the Hellgate Treaty, and this case has no bearing upon the continued validity of the Flathead Indian Reservation. There is no argument that allotted land with appurtenant water rights carries those water rights unless they are explicitly severed. The lands referred to in *Powers* were those allotted lands outside of the irrigation project. In fact, the Court in *Powers* specifically distinguished between individually held water rights and irrigation project rights.
- *Colville Confederated Tribes vs. Walton*, 647 F.2d 42 (9th cir. 1981): The Ninth Circuit Court of Appeals determined that when an allottee sells his or her land, the non-Indian purchaser obtains the appurtenant water right, which carries a priority date of the date of the reservation. Nothing in Walton abrogates the existence or validity of the Flathead Indian Reservation; it simply provides that a successor in interest to a tribal allotment is likewise entitled to the tribal water right that is appurtenant to the land.

Impact to Communities and Individual Property Rights

9. Question: How does the proposed Compact affect municipal rights of cities in the Compact area? Does it limit the ability to acquire new rights in the future?

The Tribes have agreed under the Compact to relinquish their right to call ANY existing non-irrigation uses. These include domestic, municipal, commercial, industrial, and stock uses. Therefore, existing municipal rights of these communities would be completely protected from call under the Compact.

The Compact would make available 11,000 of the 90,000 acre-feet of water from Hungry Horse Reservoir for mitigation of new domestic, commercial, municipal, and industrial (DCMI) uses. This mitigation water must be made available for lease off-Reservation and may be used anywhere in the Flathead and Lower Clark Fork basins where it is capable of being delivered, which would potentially allow new uses to be developed in all of the municipalities within these basins. In addition, the Tribes may lease any part of the remainder of their Flathead System Compact Water right on or off the Reservation for mitigation of new uses.

See also Report Question 14, and questions 60-63 of this Appendix C.

10. Comment: The Compact fails to consider future growth and undermines the family farm.

The quantifications of the Tribes' rights in the proposed Compact would allow for future development and protect existing uses. By providing a large pool of potential mitigation water, described in question 9 above, the Compact would allow for development of new uses that might not otherwise be possible in the Flathead and

9 *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951 (9th Cir. 1982).

Lower Clark Fork basins because mitigation is currently required for new uses due to the senior hydropower rights held by Avista Corp. and PPL Montana.[10] The Compact does not undermine the family farm but rather protects irrigators—whether they are served by the FIIP or otherwise—and all other existing water users from the exercise of the Tribes' senior rights. These protections are detailed in Compact Article III.G.2-.6.

11. Question: What impact would the Compact have on the local economy?

The Compact would help the regional economy in several ways. The settlement would bring in federal and state funding that would boost the Reservation economy. In addition there would be allocations of money specifically dedicated to improve the Flathead Indian Irrigation Project (FIIP) infrastructure.[11] The certainty and finality provided to property and water rights owners both on and off the Reservation is also critical. By accomplishing a final and binding resolution of all of the Tribes' claims to water within the State, the Compact would remove the cloud of uncertainty that currently affects state-based water rights and the ability to develop new uses of water on and off the Reservation due to the Tribes' existing but unquantified water rights. Currently no new appropriations or changes of use can occur on the Reservation as a result of the series of Montana Supreme Court decisions beginning with *Matter of Beneficial Water Use Permit*, 278 Mont. 50, 923 P.2d 1073 (1996). Wells drilled since 1996 do not possess valid permits, which could adversely affect real estate transactions on these properties by creating a cloud on title. The Compact would allow new development to occur and changes to be processed. In addition, all existing state water rights on the Reservation and a number of rights off the Reservation may be subject to curtailment by the Tribes' senior rights, a situation that would not be resolved until the Tribes' rights are finally decreed. By quantifying all of the Tribes' claims to water in Article III and the appendices, the Compact would resolve this issue years and perhaps decades before resolution could be gained from the Water Court, and would do so in a way that protects existing uses and allows for new development.

12. Question: What impacts would the Compact have on environmental issues such as recharge of the aquifers, and on wetlands, as well as the needs of the fish?

The Compact would strike a balance between providing for improved fishery flows (which would be phased in over time as irrigation and infrastructure improvements allow) and protecting existing consumptive water uses.[12]

13. Question: How would groundwater development be affected by the Compact for permit level developments in the Flathead Valley upstream of the Reservation?

The existence of a large supply of new potential mitigation water is likely to make new groundwater developments upstream of the Reservation easier than they would be without the Compact in place. This is especially true for non-irrigation uses upstream of the Reservation as the 11,000 acre-feet of water stipulated for Domestic, Commercial, Municipal, and Industrial uses must be made available for lease off the Reservation. See also Report Question 14.

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

The Tribes' acquisition of Kerr Dam and its water rights is unrelated to the Compact. Those water rights are state law-based water rights, not federal reserved water rights, and the Tribes' right to purchase them was established in the Federal Energy Regulatory Commission's most recent (1985) license for the dam. Those rights would be as they are finally decreed by the Montana Water Court in the regular course of the adjudication. The Water Use Agreement does commit the Tribes to continue to supply a low-cost block of power from Kerr Dam for the Flathead Indian Irrigation Project. Moreover, the potential mitigation water made available by the Tribes' Flathead System Compact Right could allow new uses out of Flathead Lake and the Flathead River north of the Reservation that might not otherwise be possible because of the large water right associated with the Kerr Dam.

15. Question: How would the settlement agreement potentially affect individual lands and rights?

One of the goals of the Reserved Water Rights Compact Commission in negotiating a settlement is to protect existing water users. The Compact would do this by quantifying the Tribes' rights at levels that allow existing uses to continue and providing for blanket call protection for all non-irrigation rights (such as domestic, stock, commercial and municipal), as well as for groundwater irrigation rights less than 100 gpm.[13] For new domestic and stock water uses the Ordinance provides a simple permitting process.[14] A separate permitting process for new, larger water uses would also be provided.[15]

10 Compact Article IV.B.6, 7.

11 For example, the 2013 legislation would have dedicated $42 million of the State's $55 million contribution to settlement to repairs, upgrades, pumping costs, and measuring devices for the FIIP.

12 Compact Article III.G., Article III(C)(1)(f); Appendix 4, Unitary Management Ordinance §§ 1-1-112(3), 2-2-123 – 124.

13 Compact Article III.D, G.

14 Compact Appendix 4, Unitary Management Ordinance, § 2-2-116 – 117.

15 Compact Appendix 4, Unitary Management Ordinance, § 2-2-118.

16. Question: Would the Compact allow condemnation of private property?

No. The Tribes, the State, and the Water Management Board would not have the ability to condemn private property under the Compact or Unitary Management Ordinance.

17. Question: How would the Compact affect Secretarial rights on fee land?

If a claim was filed in the statewide adjudication, the right would be as it is finally decreed by the Montana Water Court. This is true with or without a Compact. The Water Use Agreement addresses Secretarial rights by defining them and providing for their continued access to water even though they, too, are junior to the Tribes' instream flow rights.

Unitary Management Ordinance and Water Management Board

18. Question: What is unitary administration, what is the Unitary Administration and Management Ordinance, what is the Water Management Board?

Unitary administration is a system of management under which the State of Montana and the Tribes would jointly govern new water rights appropriations, changes in use, and water rights enforcement actions for all areas within the external boundaries of the Flathead Indian Reservation. Unitary administration would not include jurisdictional control over the adjudication of statements of claim within the exterior boundary of the Flathead Indian Reservation, which would remain within the jurisdiction of the Water Court. The Unitary Administration and Management Ordinance contains the rules for administration of water on the Flathead Reservation and is modeled on and designed to be consistent with the Montana Water Use Act. The Water Management Board stands in the shoes of the DNRC off the Reservation and the Tribal Natural Resources Department on the Reservation as the body tasked with implementation of the Ordinance. See Report Questions 23-25.

19. Question: How would water be administered under the Compact?

See response to question 18 above and Report Question 25 and Appendix A. Off the Reservation, water would be administered as it currently is, by the DNRC.

20. Question: Why a new water administration system or new "rule" (the Unitary Administration and Management Ordinance, or UMO) that enables Tribal jurisdiction over non-members within reservation boundaries, on an open reservation with a majority population of non-Indians? Won't this result in duplicative management?

It is precisely because of the large amount of fee land within the Flathead Reservation that unitary management makes more sense than dual management, which would indeed be duplicative. The UMO does not authorize Tribal jurisdiction over non-members. The UMO creates a joint State-Tribal body to administer all the water rights on the Reservation under a water code that the State and Tribes have jointly drafted.[16] This would fill the regulatory vacuum that presently exists on the Flathead Indian Reservation because of the Montana Supreme Court decisions beginning with *Matter of Beneficial Water Use Permit*, 278 Mont. 50, 923 P.2d 1073 (1996). Under Montana law, it has not been possible to legally obtain a new water right permit or to develop an exempt use (such as a small domestic well or stock pit) anywhere on the Flathead Reservation since August 22, 1996. The Water Management Board and the UMO would allow for new development of water rights on the Reservation in a manner similar to the system administered off the Reservation by the DNRC, which may include the requirement to mitigate net depletions to offset their adverse effects on existing water users. The UMO also would allow for legal recognition of small domestic and stock uses that have been developed since 1996 and are currently in legal limbo.[17] In the absence of a negotiated settlement, there would be no legal way to develop new uses of water or to change existing uses on the Reservation until the water rights claims of the Tribes are resolved through the statewide adjudication. The other six Indian compacts in Montana have allowed the State to administer only the existing state law-based uses, leaving the tribes to administer both the existing uses of the tribal water rights and all future development on those reservations. Because of the demographics of the Flathead Reservation, which has a much larger non-Indian population than any of Montana's other reservations, the State wanted to maintain greater authority over future development of water, which the Unitary Management process provides for.[18]

21. Comment: The creation of a Water Management Board would give non-elected individuals the ability to control how all water and water rights are administered on the Reservation. There are not enough protections to ensure that non-Tribal interests would be represented equally with Tribal interests.

Under the current system of water management outside of the Reservation it is non-elected executive branch employees (the DNRC and tribal natural resources depart-

16 Compact Article I; IV.C.1, 4.

17 Compact Appendix 4, Unitary Management Ordinance § 2-1-106.

18 Compact Article IV.C

ments on the Reservation) who administer water rights. Checks and balances were built into the Board's operating rules to insure that Tribal and non-Tribal members are treated equally under the proposed Compact. All Board decisions could be appealed to a court of competent jurisdiction, providing judicial review for any individual who is dissatisfied with a decision of the Board.[19] Moreover, the Board would have limited discretion and could only act within the confines of the Unitary Management Ordinance (UMO). To be valid, the UMO must be enacted by both the Tribes and the Montana Legislature, and no changes could be made to it unless both the Tribes and the Legislature agree.[20] One of the key principles embedded in the UMO is that both Tribal and non-Tribal users of water on the Reservation must be subject to the same rules.[21]

22. Question/Comment: The Tribe[s] are basically asking for control of water in all of western Montana. Isn't this an overreach by the Tribes and federal government?

The Tribes are not seeking, nor is the State offering, nor does the Compact allow, for Tribal control over all water in western Montana, or even of all water on the Reservation. Because of the limited nature of the Tribes' off-Reservation rights, the call protections built into the Compact, and the shared jurisdiction of the Board, the Tribes actually would have much less control over water in western Montana under the Compact than they could very well have if they were to litigate their claims. The Compact does not quantify rights to anything approaching all the water on the Reservation, much less all the water in western Montana. For example, the largest right quantified in the Compact is the Flathead System right, which is 229,383 acre-feet. This constitutes approximately 3% of the water flowing into Flathead Lake from the Flathead River. The Water Management Board's jurisdiction would only operate *on* the Reservation, not outside of it.[22] The scenario posed by this question is much more likely in the absence of a negotiated settlement as the Tribes do have significant legal claims to water rights throughout western Montana, and is precisely why the State is seeking to resolve for all time the Tribes' claims to water in a way that protects existing users off—as well as on—the Reservation.

23. Question: Will Tribal members be treated differently from non-tribal water users with regard to water rights administration, permitting, enforcement, or penalties on the Reservation?

No. One of the fundamental principles of unitary administration is that everyone—Tribal member or not—stands on equal footing before the Water Management Board for all matters related to the administration and enforcement of water rights, including the issuance of new water rights.[23]

24. Question: Why does the Unitary Management Ordinance provide a process for registering existing uses of water?

In order to protect valid but unrecorded uses. If a use is not recorded, it cannot be protected.[24] If a use is permitted or has a filed claim, it does not need to be registered.[25]

25. Question: If I have a water right from the State of Montana, do I need to register the use?

No. Existing State-based water rights constitute recorded water uses and are not required to be registered.[26]

26. Question: What if my well fails and I need to drill a new one?

The Unitary Management Ordinance allows for a substitute well to replace an existing well that is no longer functioning properly. The substitute well must be drilled to a depth similar to the well being replaced and the flow rate and volume are limited to the rates of the well being replaced. The failed well must be properly abandoned.[27]

27. Question: Will meters or gauges be placed on wells? Can head gates be pulled?

No. The Tribes, the State, and the Water Management Board would not have the authority to meter domestic wells or pull headgates. As the DNRC does off the Reservation,[28] the Water Management Board and the Office of the Engineer would have the authority to require metering or other measuring devices of new permitted appropriations, but only where needed to prevent waste or to respond to water rights disputes that are brought before it by another water user.[29] A developer applying for a Development Domestic Allowance (up to 10 acre-feet per year) would be required to meter his/her well.[30] This is part of striking the balance of allowing for streamlined development of small uses and protection of existing uses so that the senior rights are not adversely affected. Applicants for Individual or Shared Domestic Al-

19 Compact Article IV.C.6; Appendix 4, Unitary Management Ordinance § 2-2-112.
20 Compact Article IV.D; Appendix 4, Unitary Management Ordinance § 1-1-101(2).
21 Compact Article I.
22 Compact Article IV.C.1, 4.
23 Compact Article IV.C.4; Appendix 4, Unitary Management Ordinance.
24 Compact Article II(25); III(C)(1)(b)(iii); Appendix 4, Unitary Management Ordinance § 2-1-101.
25 Technically, existing but unregistered uses under § 85-2-222, MCA do not have to be registered under the Ordinance, although optional registration may be advisable in order to ensure that the uses are protected.
26 Compact Appendix 4, Unitary Management Ordinance § 2-1-101.
27 Compact Appendix 4, Unitary Management Ordinance §§ 1-1-104(60), 1-1-107(1)(a), 2-2-115.
28 Mont. Code Ann. § 85-2-113.
29 Compact Appendix 4, Unitary Management Ordinance §§ 2-1-113, 3-1-109, 3-1-110.
30 Compact Appendix 4, Unitary Management Ordinance § 2-2-117(6)(d).

lowances, however, (up to 2.4 acre-feet per year) would not have to meter their wells because the smaller size of these uses is considered unlikely to impact existing uses. The ability to require measurement is an important part of water rights administration and enforcement that protects senior water users throughout the State. The key point in response to the question is that neither the Tribes nor the State would have the unilateral ability to require metering or gauging, because they would not be granted unilateral control over the Board and the Board must comply with the limitations imposed by the UMO. Individual domestic wells would not be metered, but the Board, like the DNRC, would have the ability to require metering or other measurement of appropriations only where unique circumstances warrant it.

28. Question: Is the Unitary Management Ordinance currently in effect?

No. the UMO would not go into effect until the approval process for the Compact is complete.

29. Question: Under the Unitary Management Ordinance, will I be able to get a water right for a domestic well?

Yes, like the Montana Water Use Act, the UMO provides for streamlined authorization of individual and shared wells and wells for small developments without going through the water right permitting process.[31] While the development domestic allowance matches the State's current exception of up to 35 gpm and up to 10 acre-feet per year, the individual and shared domestic allowances provide for for up to 35 gpm and up to 2.4 acre-feet per year that is not subject to the permitting requirement. This is enough to serve an eight-person home and a 0.7-acre lawn and garden irrigation. These new standards were developed to ensure the ability to provide for domestic use, to install an interior fire-protection system, and to provide for sufficient lawn and garden irrigation to meet the defensible space recommendations for wildfire protection.

30. Question: Do the flow rate and volume limits included in the Domestic Allowance provision of the UMO apply to my existing well?

No. The limits in the Ordinance apply only to new appropriations.[32]

31. Question: Why is there a limit on the amount of area that I can irrigate with my well authorized under the Domestic Allowance provisions?

Lawn and garden irrigation is the primary consumer of domestic water. Under the domestic allowance, a user would be able to maintain approximately 0.7 acres of lawn and garden[33] in addition to their domestic use. The limitation is prescribed to limit the consumptive use of individual wells and the cumulative effect of multiple wells, thereby protecting existing senior water rights.[34]

32. Question: If I have an existing State-based water right on the Flathead Indian Reservation, do I have to re-apply under the requirements of the Unitary Management Ordinance?

No. The ordinance applies only to new applications for water use after the effective date of the Compact.[35]

33. Question: Do I have to have a meter on my Domestic Allowance well to measure my water use?

No. Metering is not required for Individual or Shared wells. Because users of a Development Domestic Allowance have no restrictions on how they choose to allocate their water, a measurement device does have to be installed on this category of new wells to ensure that use does not exceed the limit.[36]

34. Question: What is it going to cost to apply for a Domestic Allowance?

The UMO provides that the Board's filing fees must be the same as those fees charged by the DNRC for the equivalent application.[37] The DNRC's application fee for the equivalent of a domestic allowance is currently $125.

Call Protection

35. Question: If ground water and surface water are connected as stated in the compact, how do you know existing wells won't be impacted in low water years?

As a matter of law, the Tribes have agreed to give up their right to call any domestic, stock, municipal, commercial, or industrial well, or any other well (or surface right) whose purpose is not irrigation, as well as irrigation wells with a flow rate below 100 gpm.[38] Thus the Tribes would not be able to call those wells to satisfy their senior rights, irrespective of stream conditions.

31 Compact Appendix 4, Unitary Management Ordinance § 2-2-117.
32 Compact Appendix 4, Unitary Management Ordinance § 1-1-101(4); 2-2-101.
33 The area required for viable defensive space against wildfire in the wildland-urban interface.
34 Compact Appendix 4, Unitary Management Ordinance § 2-2-117(4)(h).
35 Compact Article IV.B.5.; Unitary Management Ordinance § 2-2-101 et. seq.
36 Compact Appendix 4, Unitary Management Ordinance § 2-2-117 (6)(d).
37 Compact Appendix 4, Unitary Management Ordinance § 1-2-113.
38 Compact Article III.G.1, 2.

36. Question: What protections do non-Project, on-Reservation irrigators have?

Within the Flathead Indian Irrigation Project (FIIP) influence area (which includes all lands within the area served by FIIP diversions, regardless of whether a particular piece of ground is actually served by the FIIP[39]), State-based water users have two options: 1) they can continue to operate the way they have in the past with the understanding that they are subject to call within the prior appropriations system, or 2) the Compact would provide irrigators with the option to enter into a voluntary agreement that allows them to use either the amount of water equivalent to the Farm Turnout Allowance (FTA) provided for Project irrigators under the Water Use Agreement or their historically used amount, whichever is less. Outside of the FIIP influence area, protections are provided through stream-specific limitations and call protections on the enforceable levels of Tribal instream flow rights to ensure that existing irrigation rights can be satisfied.[40]

37. Question: Will I be able to continue to water my stock?

Yes. All existing stock-water rights, both on and off the Reservation, would not be subject to call by the Tribes.[41] If you currently use FIIP water for purposes of watering your stock, infrastructure upgrades under the Compact would eventually result in stock-water tanks being installed throughout the FIIP, which would replace stock-water deliveries via the ditches and canals. These types of developments would be a substantial improvement over current operations, as the higher quality water provided by groundwater sources via tanks can substantially increase stock health and productivity; furthermore, these types of development can be more strategically placed so that stock are more likely to evenly utilize the entire range.

38. Question: How will the off-reservation provisions of the compact affect frequency of call on the Flathead River upstream of the Reservation?

The compact would recognize no water rights that are likely to affect existing users for purposes of making a call upstream of the Reservation:

- Many of the other rights recognized for the Tribes in the Compact are existing uses that have consistently been exercised with no conflict with users upstream of the Reservation. Nothing in the Compact would change that balance.
- Water rights issued under the Compact could not be used to call any existing water users on tributaries of the Flathead mainstem or its forks. On the mainstems, these rights could only be used to call surface water irrigation and groundwater irrigators pumping 100 gpm or more that are proven (burden of proof on the Tribes) to be associated with depletions directly tied to surface water.[42]
- There are 96 surface water rights on the mainstem of the Flathead River upstream of the Reservation that could in theory be called by the FIIP water right through the Flathead Pumping Station, but the lowest recorded water level since 1984 (when the period of record began) is more than three times as much as the maximum amount to be diverted through the Flathead pumping station. In the absence of a settlement, those water rights would still be subject to call by the FIIP water right after that water right goes through the standard adjudication process, but theoretical call potential would not be limited to the mainstem and its forks as it would under the Compact.
- Constraints on the use of the Flathead System Compact Water require the water right to be used in a manner that ensures impacts associated with the exercise of the water right yield flow conditions that comply with:
  - Bureau of Reclamation modeling for compliance with Columbia River Treaty requirements;
  - Minimum instream flow schedules at Columbia Falls, Polson, and Perma;
  - Ramping Rates for Kerr and Hungry Horse Dams;
  - Flathead Lake filling criteria;
  - Biological constraints.

Because of these required flow rates and their timings, existing uses could continue to draw their water supplies without risk of call under the Compact. The existing use flow rates and volumes are minor compared with the flow dynamics of this reservoir-dominated system. All non-irrigation users have blanket protection from even the possibility of call.[43]

Quantification

39. Comment: The Tribe[s] have not disclosed the amount of water they use. How can the Compact be negotiated fairly if the Tribe[s] have yet to quantify their water?

Quantification of the Tribes' rights is precisely what the Compact does. Unlike State-based rights, federal reserved rights are not measured by the amount put to beneficial use. Rather, they are measured by the standard of how much water is needed to fulfill the purposes of the Reservation, and can include future uses. As a result, the amount of water presently used by the Tribes is not the measure of their rights. That said, technical staff from the State, the Tribes and the US have worked very hard

39 Compact Appendix 2: www.dnrc.mt.gov/rwrcc/Compacts/CSKT/2013/Appendix2FIIP_InfluenceAreaMap.pdf.
40 Compact Article III.D.; III.G. 3, 4, 5.
41 Compact Article III.G.1.
42 Compact Article III.G.1, 2, 4.
43 Compact Article III.G.1.

to develop a comprehensive picture of current water use on the Reservation, which was critical to negotiating the balance between recognition of the Tribes' rights and protection of existing users. The Tribes' water rights are most certainty being quantified through the settlement—that is why all the water rights abstracts are appended to the proposed Compact.[44] See also question 40 below and Report Question 10.

40. Question: Does the compact quantify the Tribes' water rights?

Yes. The Compact quantifies the Tribes' water rights in great detail in Article III of the Compact and the appendices. See Report Question 10 for a general overview of the rights quantified by the Compact. Listed is a sample of Appendix numbers and descriptions:

- Appendix 5 – FIIP Abstracts in 76L and 76LJ
- Appendix 9 – Flathead System Compact Water
- Appendix 10 – Natural Instream flow
- Appendix 11 – FIIP Instream Flow Abstracts
- Appendix 18 – Flathead Lake Abstract
- Appendix 26 – Swan Mainstem Abstract

These abstracts are in the same format as those of other consumptive and non-consumptive water rights in the DNRC's record system, and contain the quantification information for the Compacted rights, as well as other limits and conditions on how they may be exercised.

41. Question: How much water do the Tribes get from this settlement? 50 million acre feet annually?

In terms of consumptive use, the Compact would recognize the Tribes' Flathead System Compact Water Right (229,383 acre-feet diverted, 128,158 acre-feet consumed) and the opportunity for Tribal Members to register individual uses not otherwise claimed via a State based water right.[45] The Compact also reflects the Tribes' commitment of 11,000 acre-feet of their Flathead System Compact Water toward the off-Reservation mitigation of domestic, commercial, municipal, and industrial uses in the Flathead and Lower Clark Fork basins.[46] The Tribes must make this water available for lease off the Reservation in accordance with the DNRC's determination of timing, location, and quantity needed for such uses. At the discretion of the Tribes, any portion of the remainder of the Flathead System Compact Water that could be consumptively used may be used for future irrigation, leases to non-Indian water users, and any other legal purpose on or off the Reservation where it can be delivered (though not out of state).[47] Finally, the FIIP Irrigation right totals 179,539 acre-feet of Farm Turnout for purposes of serving the Project. This right to serve 130,000 irrigated acres is conditioned on the FIIP Water Use Agreement to ensure that it benefits the Project irrigators, the vast majority of whom are not Tribal members.[48]

The computation of a single volume quantification that includes both the consumptive rights and the non-consumptive instream flow rights by converting continuous flow rates to volumes and then simply adding them up is incorrect. The instream flow water rights recognized in the Compact are to be enforced concurrently with one another, meaning that these values are not cumulative. For this reason, simply adding the instream flow rights together results in counting the same water multiple times, as many of the instream flow rights occur on tributaries of the same river or stream. This principle is the same for all instream flow water rights across the State. Although there is some historic precedent for assigning volumes to non-consumptive instream flow water right claims, this information is not used for purposes of enforcement, assessments of legal availability, or depictions of long-term water planning—for all of those purposes, only the flow rates are used.

42. Question: Will this Compact close basins? What will that mean to future growth and development throughout western Montana?

No. The State's goal in negotiating this settlement was not to close basins in the Compact Area. By providing a large supply of potential mitigation water for use on and off-Reservation, the Compact would ensure that future growth and development is not stalled in western Montana. In fact, because of the mitigation water, the Compact would actually contribute to growth in this area. See also Report Questions 4 and 14.

43. Question: Does the compact give the CSKT a time immemorial water right to all the water in Flathead Lake?

No. The Compact recognizes a time-immemorial priority date for a right to a minimum pool level in Flathead Lake, not "all the water." This minimum pool level is the natural level of the Lake (before Kerr dam was built) and regulated by the natural bedrock outcropping located under Polson Bridge. This minimum level lies ten feet below the maximum operating level of the Lake which is impounded and managed by Kerr Dam. This right is not a consumptive right, meaning the Tribes would not have the right to drain the water out of the lake, or to lower the lake to this minimum level.[49] The Tribes could not divert or control any water to satisfy this right and the purpose of this right (maintenance and enhancement of fish habitat) cannot be changed to any other purpose. Nothing in this right would alter water supply in the Flathead River system or any of the operational constraints that govern lake levels, such as the Flathead Lake Drought Management Plan and the Biological Opinion governing the entire Federal Columbia

44 See abstracts in Compact Appendices 9-38: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/Default.asp.
45 Compact Article III.C.1.c; Compact Appendix 4, Unitary Management Ordinance § 2-1-101.
46 Compact Article IV.B.7.
47 Compact Article IV.B.6.
48 Compact Article III.C.1.a; Appendices 3 & 5.
49 Compact Article III.C.1.h; Appendix 18.

River Power System, which would all remain in place. The recognition of this right protects water in Flathead Lake from ever being pulled out to satisfy out-of-state, downstream interests at the expense of Montana.

Flathead Indian Irrigation Project and Water Use Agreement

44. Question: Why is the Water Use Agreement necessary? What does it do?

See Report Questions 18 – 20.

45. Comment: The Water Use Agreement is unconstitutional because it takes private water rights and gives them to the Tribes.

The Compact would not not take private water rights. See Report Questions 15 and 18.

46. Comment: The Irrigation districts should maintain their water rights for the Flathead Indian Irrigation Project because they have been filed with and adjudicated by the State.

The three irrigation districts do not have individually filed claims in the adjudication. None of the rights for the Project have been adjudicated. The District's rights are represented by the FJBC claim filings, which are duplicates of the BIA's filings for the FIIP rights. Both the FJBC and BIA filings have substantial legal and technical deficiencies and will likely need to be significantly modified through amendment, withdrawal, and/or termination before they can be adjudicated by the Water Court. DNRC's adjudication staff examined these claims in accordance with current Water Court and Supreme Court Water Rights Claim Examination Rules. DNRC communicated the claim examination results to the FJBC in January of 2010.

47. Comment: The 1.4 acre-foot Farm Turnout Allowance is Insufficient. The Project should retain a quota system.

The FTA is a quota system. The parties to the Water Use Agreement agreed that the FTA is a sufficient allocation of water to meet the irrigation needs on the Project. Those irrigators who can demonstrate efficient irrigation and that the FTA is insufficient, may apply for a Measured Water Use Allowance up to a total of 2 acre-feet per acre.[50] Moreover, the Water Use Agreement includes adaptive management provisions that allow the FTA to be adjusted if measurements required under the Water Use Agreement demonstrate that the FTA is insufficient.[51] If the FJBC ceases to exist on December 12, 2013, the parties to the Water Use Agreement and the Compact will have to explore options for incorporating the Agreement or an equivalent set of Project irrigator protections into the Compact.

48. Question: What happens if I need more water than is allotted?

See Report Question 21.

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

Judge McNeil's ruling was invalidated in its entirety by the Montana Supreme Court. See *Western Montana Water Users Association v. Mission, Jocko, and Flathead Irrigation Districts*, 2013 MT 92, DA 13-0154. The Water Use Agreement is constitutional. Anyone who has a water rights claim filed in the adjudication will have that same claim in the adjudication after the settlement is approved, and will be entitled to have that water right as it is finally decreed by the Water Court. The Water Use Agreement does not take individual water rights.

Off-Reservation Provisions

50. Question: Why does this compact include off-reservation water rights for the Tribes?

See Report Questions 11 and 12 and Report Appendix B.

51. Question: How were the off-reservation instream flow rights quantified?

To arrive at the instream flow levels identified in the Compact, the State started with what was a biologically healthy flow level for fish (using Fish Wildlife and Parks data) on streams to which the Tribes have strong Treaty-based claims. Those flow numbers were comparatively high, so the State sought through the negotiations to reduce those flows to ensure that existing and future consumptive uses could continue to be exercised while still providing biologically-based benefits for fisheries. The Tribes agreed. The instream flow numbers in the Compact therefore represent a substantial compromise on the part of the Tribes.

52. Question: What impacts would the proposed Compact have on off-Reservation residents that live in areas where water rights are currently being negotiated?

From an administrative standpoint, it would have no im-

50 Compact Appendix 3, FIIP Water Use Agreement Article VIII, #25.

51 Compact Appendix 3, Article XXIV, #77; FIIP Water Use Agreement; Appendix B of Water Use Agreement.

pact. The Water Management Board would only have jurisdiction *on* the Reservation.[52] Off the Reservation, the Montana Water Use Act controls. From a priority date perspective, the off-Reservation claims of the Tribes have the potential to disrupt existing users, which is why the State is seeking to settle those claims through negotiation so that we can find a balance between recognizing the Tribes' legitimate water rights and protecting existing users. The impacts of the off-Reservation rights are as follows:

a. Swan River. Other than the Swan River instream flow, there would be no water rights being recognized for the Tribes that would affect existing users for purposes of making call in the Swan River Basin. The Swan River instream flow targets the 20th percentile flow rates, meaning that call could only be made during the driest 20 percent of years and that call could only be made on irrigation water rights. It is statistically unlikely that such a call would compromise crop viability. The Swan River instream flow would not affect future off-Reservation applications for new permits as the 20th percentile statistic is well below the 50th percentile statistic the DNRC uses for purposes of determining the legal availability of water (one of the criteria a permit applicant must satisfy before obtaining a new water right).[53] All existing non-irrigation users have blanket protection from even the possibility of call. [54]

b. Kootenai River. The Tribes' right on the mainstem of the Kootenai is not enforceable as long as Libby Dam is in existence and in compliance with the Federal Columbia River Power System Biological Opinion.[55] Nothing in the Compact contemplates the decommissioning or removal of Libby Dam, which is integral to water management and flood control throughout the Columbia basin. All non-irrigation users have blanket protection from even the possibility of call.[56]

c. Lower Clark Fork River. The enforceable level of the Tribes' right on the Lower Clark Fork is set to be identical to the minimum flow that Avista Corp. must pass through the Cabinet Gorge Dam under its license from the Federal Energy Regulatory Commission (presently 5,000 cfs). If the FERC license condition changes, the right's enforceable level changes along with it. Thus there is no prospect of a call in the Lower Clark Fork.[57] In addition, all non-irrigation users have blanket protection from even the possibility of call.[58]

d. Bitterroot River. The Compact recognizes no new water rights that would affect existing users for purposes of making call on the Bitterroot River.[59] The Compact does recognize tribal co-management of some DFWP recreation rights and allocations out of Painted Rocks Reservoir and Lake Como, but does not change the available water balance in the Bitterroot. The Tribes' agreement to no new instream flow rights in the Bitterroot was an extremely important concession for the State as the Bitterroot Valley forms part of the original intended Reservation, and Tribal claims there are particularly strong. All non-irrigation users have blanket protection from even the possibility of call.[60]

e. Upper Clark Fork and Blackfoot Rivers. The Compact makes the Tribes co-owners with DFWP of the right the State has acquired for the former Milltown Dam, as well as granting Tribal co-ownership on existing DFWP instream and recreation rights in the Blackfoot.

f. Milltown Dam water right. The Compact includes conditions on the exercise of the former Milltown Dam right that would not bind DFWP in the absence of the Compact. These conditions would reduce the impacts of the exercise of this right on existing users junior to the 1904 priority date. This right will be changed to an instream flow for fisheries regardless of whether it is included in the Compact, and there will be no ten-year deferral period on enforcement as the Compact contemplates. Although there is no way to predict the final outcome of changing the former Milltown Dam water right through the standard DNRC process, there is potential that the enforceable flow value could be as high as the water right's historic value of 2,000 cfs. Without a settlement, there would be nothing to prevent the water right owner from making a disproportionate call up one tributary. By contrast, the Compact would bifurcate the water right, moving enforceable flow values up each tributary that are proportionate to their natural drainage flow contribution.

53. Question: Why are the Tribes interested in water in the Blackfoot and what are their rights to it?

The Hellgate Treaty of 1855, which established the Flathead Indian Reservation, serves as the basis for the Tribes' legal claim to off-Reservation water rights for instream flow in the upper Clark Fork Basin based on amply documented historic and cultural use of that region. In the Blackfoot, the Tribes' stated goals are to maintain instream flows for the enhancement of fish habitat and maintenance of cultural connections. For this reason, co-ownership of existing rights makes practical sense and does not reduce the available water supply.

54. Question: What has been proposed in the negotiations with regard to the Blackfoot?

After the Milltown Dam was removed in 2008, the State of Montana took ownership of the hydropower water right in the Clark Fork River as part of a consent decree entered

52 Compact Article IV.C.1.
53 Compact Article III.D.2; Appendix 26.
54 Compact Article III.G.1.
55 Compact Article III.D.1; Appendix 25.
56 Compact Article III.G.1.
57 Compact Article III.D.3; Appendix 27.
58 Compact Article III.G.1.
59 Compact Article III.G.5; Appendices 32,33,34.
60 Compact Article III.G.1.

into by the State, ARCO, Northwestern Energy, and the Tribes. If the State had not assumed ownership of the right, the Tribes were next in line to acquire it. This is how the idea of co-ownership arose during negotiations.

When the State took ownership, there was an expectation that the hydropower water right would be changed to an instream flow right, which would likely be held and managed by DFWP in the absence of a Compact. The hydropower water right has a priority date of December 11, 1904, and a maximum protected flow rate of 2,000 cubic feet per second (cfs). However, as part of the settlement, it has been proposed that enforcement of the new instream flow right be based on a hydrograph with a minimum combined flow rate of 1,200 cfs; this right would be split into minimum instream flows of 500 cfs in the Clark Fork River as measured at Turah and 700 cfs as measured in the Blackfoot River near Bonner. The 1904 priority date would not change. The minimum instream flow for the Blackfoot is slightly higher as the Blackfoot River provides 52% of the Clark Fork's total flow at Milltown and because a minimum instream flow value of 700 cfs for the Blackfoot was established through the 1971 Murphy Right. This bifurcation is important because it ensures that there would not be a disproportionate impact on one tributary or the other if a call were to be made.

55. Question: If a settlement is reached as currently proposed, how would it affect my water right and water management in the Blackfoot?

First, the Tribes have stated that they wish to preserve the current workings of the Blackfoot Drought Response Plan (BDRP), which is based on concepts of shared shortage and more aggressive water management in periods of short water supply. Second, the current proposal includes a 10-year "deferral period" during which enforcement of the Milltown right would be suspended and stakeholders could work with the State and the Tribes on any management issues that might arise from settlement requirements.[61] Third, the DFWP-owned 700 cfs Murphy Right that is the current trigger for the BDRP and the Milltown Right are concurrent (that is, whenever the Milltown right is satisfied, the more junior Murphy Right is also satisfied). The State and the Tribes cannot add these rights together and make calls for water based on a minimum instream flow of 1,400 cfs in the Blackfoot River.

Any water right with a priority date after December 11, 1904, remains junior to the Milltown right. This holds true with or without the proposed Compact. From a drought management perspective, this would most likely mean that individual drought management plans may need to be modified in order to avoid a call for water when flows fall below 700 cfs at Bonner. That said, many participants in the Blackfoot Drought Response have already incorporated their water rights into the drought plans and may not see significant changes to their water management practices.

Non-irrigation water uses (stock water, domestic, etc.) are unaffected by the proposed settlement as the State, the Tribes, and the United States have relinquished their right to make a call against existing water rights whose purpose does not include irrigation (a protection that would not exist in the absence of the Compact).[62] Under the settlement, calls to satisfy instream flow rights must be made exclusively against water rights whose purpose(s) include irrigation. Calls for water can be made against all surface water irrigation rights with junior priority dates, regardless of flow rate. Calls for water against irrigation from groundwater sources are limited to junior water rights with flow rates 100 gallons per minute or more.[63]

56. Question: How would Tribal co-ownership affect the Murphy Rights currently administered by DFWP?

Aside from the addition of the Tribes as co-owners, the attributes of the Murphy Rights (and all other co-owned rights) would not change. The Murphy Rights in the Blackfoot would proceed through the regular Montana General Stream Adjudication for Basin 76F as though they were not included in the Compact.[64]

57. Question: What about other Tribes with aboriginal territory outside of their reservation boundaries? Will this compact open the door for them to go after those off-reservation treaty rights too?

No. No other Tribes in Montana have legal claims to such off-Reservation rights. See Report Question 13.

58. Question: How would adding the Tribes as a co-owner to DFWP rights affect the management and implementation of those rights?

Each owner would have an independent right to make a call, but the priority date and all other elements of the right would remain as they currently exist.[65]

Mitigation Water

59. Question: What is mitigation and how would it impact water use and economic development on the Reservation?

Mitigation is the requirement that an applicant for a new use of water in a basin where water is either legally or

61 Compact Article III.D.5.c; Appendices 30, 31.
62 Compact Article III.G.1.
63 Compact Article III.G.2.
64 Compact Appendices 28 & 29.
65 Compact Article III.D.4.

physically unavailable must show that any potential adverse effects to other users are offset by another source of water. The availability of some alternative source of water to mitigate potential adverse impacts on senior water rights must be demonstrated currently in the Lower Clark Fork and Swan river basins adjacent to the Reservation because of large non-consumptive rights for hydropower held by Avista Corporation and PPL Montana Corporation. This is likely to be true on the Reservation for the Flathead Basin due to the Kerr Dam water right if the moratorium on new uses is ever lifted. This situation exists with or without the Compact. With the Compact in place, a large source of potential new mitigation water could be available from the Flathead System Compact Water Right, which would include up to 90,000 acre-feet of stored water from Hungry Horse Reservoir. See also Report Question 14.

60. Question: Is there a requirement to provide Mitigation Water to offset the effects of my Domestic Allowance well?

No. There are no mitigation requirements for any Domestic Allowances, including Development Domestic Allowances.

61. Question: Why allow leasing of parts of the Tribes' water rights off the reservation if it can be used and is needed on-reservation?

Leasing rights are recognized in other Indian compacts in Montana. They allow for flexibility in management, which is an advantage to off-Reservation users who may want to lease water, including for mitigation purposes, and is something the State negotiated for in securing protections for existing users from the exercise of the Tribes' senior water rights.[66] The State specifically negotiated to ensure that the 11,000 acre-feet of water from the Tribes' Hungry Horse allocation must be made available for off-Reservation leasing to facilitate development in some of the Flathead's fastest growing cities, including Kalispell and Whitefish.

62. Question: What if the Tribes are not willing to lease the Hungry Horse water that is supposed to be dedicated to off-Reservation mitigation?

Under the Compact, the Tribes would have no ability to decline to enter into a lease for any of the 11,000 acre-feet of water the Compact dedicates to off-Reservation mitigation uses in western Montana[67] The Compact specifies the price per acre-foot for the water (which is $40/acre-foot plus an inflation adjustment factor to account for changes over time), which removes price as an obstacle to concluding a lease transaction.[68] The Compact contains very specific provisions to ensure that the Tribes cannot unreasonably thwart a lease.

Environmental Review

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

The Ratification of the Proposed Settlement by the Legislature and Congress does not trigger the Montana Environmental Policy Act (MEPA) or the National Environmental Policy Act (NEPA): MEPA applies to actions by state agencies, not the Montana Legislature,[69] so the ratification of the settlement by the Legislature is not a MEPA triggering event. A vote by the Compact Commission to recommend taking the settlement to the Legislature for ratification has no independent force under State law and thus also is not a MEPA triggering event. The implementation of the settlement, which may require action by state agencies, could be subject to MEPA.

Similarly, congressional ratification of the settlement is not a federal action triggering NEPA,[70] though the implementation of the settlement by federal agencies is likely to require environmental review under NEPA.

The Legislature has voted on 17 previous compacts over the last 28 years without having specific economic or environmental impact studies done because such studies do not and cannot provide relevant information about the ratification of the settlements themselves, which are concerned with settling the existing legal claims of the Tribes in a manner that will minimize adverse effects on state water rights. Approaching the issue from the legal perspective, an economic or environmental study is not necessary to demonstrate that a negotiated settlement that establishes with certainty and for all time the Tribes' legal rights to water within the State is preferable to years or decades of litigation costs and legal uncertainty.

66 Compact Article IV.B.6 – 7.
67 Compact Article IV.B.7.
68 Compact Article IV.B.7.e.i-iii.
69 see *Northern Plains Res. Council v. Mont. Bd. of Land Commrs.*, 366 Mont. 399, 288 P.3d 169, 2012 MT 234 (2012)
70 see, e.g., *Public Law* 111-291, Title IV, Sec 404 (124 Stat. at 3100).

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This report is available online at:
http://dnrc.mt.gov/rwrcc/Compacts/CSKT/WaterCompactReport.asp

The Compact and associated documents are available at:
http://dnrc.mt.gov/rwrcc/default.asp

For questions regarding the Compact documents or this report, or to request Commission staff to attend a meeting or Q and A session, contact Arne Wick or Melissa Hornbein at the numbers provided below:

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