Most Frequently Asked Questions/Assertions by Irrigators

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

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

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

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

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

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

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

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

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

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

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

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

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

-by recognizing more than the minimum instream flows which is what Stevens Treaty court decisions have recognized;

-by recognizing the Tribes' rights to the water necessary to revitalize the pre-Treaty natural environment of the reservation, which fits neither within the Winters Doctrine nor the Treaty rights related to fishing;

-by elevating the Tribes' treaty rights related to right to fish in common with other citizens "of the Territory" fishing above the rights of non-Indians (which improperly gives Tribes control of nearly all the waters west of the Continental Divide).

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

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

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