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

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

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

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

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

i. The Tribes' consumptive use water right from Flathead system water is quantified in Article III.C.1.c., appendix 9. The Tribes have a diversion right in the amount of 229,383 acre-feet per year from Flathead Lake, the Flathead River, and the South Fork of the Flathead River. Water that may actually be depleted is limited to 128,158 acre-feet per year. Use of this water right must comply with various Endangered Species Act requirements, requirements for federal dams and reservoirs, and with filling criteria for Flathead Lake.

ii. The water right for the Flathead Indian Irrigation Project is quantified at Art. III.C.1.a., and appendices 3.2 through 3.7. The quantified water diverted into the Project is specified for each administrative area within the Irrigation Project, and varies depending on whether the water year is a wet, normal or dry year. These quantifications are termed River Diversion Allowances, or RDAs. The total RDAs for wet, normal, and dry years respectively are 302,250 acre-feet, 278,000 acre-feet, and 256,900 acre-feet. It is important to note that these numbers do not include pumped water available through the Flathead pumping station RDA, which is set at 65,000 acre-feet. This additional water is capable of being pumped directly or transported between administrative areas within the Mission and Jocko.

iii. The on-reservation instream river flow water right is quantified at Art. III.C.1.d., and appendices 10 through 14, and is measured in cubic feet per second at specific locations during specific times of the year. On-reservation instream flows were quantified, conditioned and/or located specifically to protect existing uses. For example, the natural instream flows have enforcement points located upstream of consumptive diversions, meaning they cannot be used to call other uses.

iv. The water right for "Other Instream Flows," is quantified at Art. III.C.1.d., appendix 12. These flow rates must accommodate existing uses. The "other" instream flows will not have an enforceable level set until after the adjudication is complete (although they are currently quantified), and that process for setting the enforceable level is 1) public and 2) requires it to be set to allow existing uses to continue. *See Unitary Management Ord.* § 2-1-115.

v. Other non-consumptive water uses within the reservation are quantified at Art.III.C.e – I, and accompanying appendices.

vi. The water right for off-reservation instream flows is quantified at Art. III.D and accompanying appendices.

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

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

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

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

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

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

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

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

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