

Montana Water Court  
PO Box 1389  
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1-800-624-3270 (In-state only)  
(406) 586-4364  
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IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER AND LOWER MISSOURI RIVER DIVISIONS  
SPECIAL FORT PECK COMPACT SUBBASIN

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IN THE MATTER OF THE ADJUDICATION )  
OF EXISTING AND RESERVED RIGHTS TO )  
THE USE OF WATER, BOTH SURFACE AND )  
UNDERGROUND, OF THE ASSINIBOINE )  
AND SIOUX TRIBES OF THE FORT PECK )  
INDIAN RESERVATION WITHIN THE )  
STATE OF MONTANA IN BASINS )  
40E, 40EJ, 40Q, 40R, & 40S )

CAUSE NO. WC-92-1

**FILED**

AUG 10 2001

**Montana Water Court**

**SUPPLEMENT TO  
ORDER DISMISSING OBJECTION OF PAUL B. TIHISTA**

On June 10, 1997, the Court issued an Order Dismissing the Objection of Paul B. Tihista, on grounds that Mr. Tihista did not have sufficient standing to pursue his objection to the Fort Peck-Montana Compact. However, in that Order, the Court advised Mr. Tihista that it would review Montana v. United States, 430 U.S. 544 (1981) prior to issuing a decision on the Compact.

Mr. Tihista's objection to the Compact was based largely on the Montana case and his general contentions that navigable waters belong to the State of Montana, and that "according to this compact, you are giving the Indians right to all the rivers in Montana except the Milk River."

March 14, 1997 letter from Paul Tihista to Attorney General Joseph P. Mazurek.

After reviewing Montana v. United States and similar cases, the Water Court concludes that these cases are not applicable to this proceeding. The United States Supreme Court has stated that although the State holds title to lands underlying navigable waters, such state

ownership "cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. *We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and property.*" Montana v. United States, 450 U.S. 544, 566 (1981), citing Arizona v. California, 373 U.S. 546, 597-598 (1963) (Emphasis added); see also United States v. District Court in and for the County of Eagle, 401 U.S. 520, 522-523 (1971).

A courtesy copy of the Court's Memorandum Opinion on the Fort Peck-Montana Compact and this Order shall be mailed to Paul B. Tihista.

DATED this 10 day of August, 2001.

  
\_\_\_\_\_  
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Chief Water Judge

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CAUSE NO. WC-92-1

**FILED**

AUG 10 2001

Montana Water Court

**ORDER APPROVING AND CONFIRMING  
FORT PECK-MONTANA COMPACT**

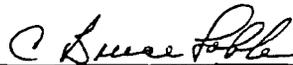
This matter came before the Court upon the motions of Jeff D. Weimer and Gladys Connie Flygt for summary judgment declaring the Fort Peck-Montana Compact void because it fails to conform with applicable federal law, and the cross-motion of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, supported by the State of Montana and the United States, for summary judgment dismissing the objections and approving and confirming the Compact.

Being fully advised of the premises, and for the reasons set forth in the accompanying Memorandum Opinion, the Court hereby **ORDERS** that:

1. The Weimer and Flygt motions for summary judgment declaring the Compact void are hereby **DENIED** and their objections **DISMISSED**; and
2. The Tribes' motion for summary judgment dismissing the objections and approving and confirming the Fort Peck-Montana Compact is hereby **GRANTED**.

The Fort Peck-Montana Compact, as codified in § 85-20-201, MCA, including the Tribal Water Right set forth therein, is hereby **APPROVED** and **CONFIRMED**.

DATED this 10 day of August, 2001.



\_\_\_\_\_  
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Chief Water Judge

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Assistant Attorney General  
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**FILED**

AUG 10 2001

Montana Water Court

MEMORANDUM OPINION

I. PROCEDURAL HISTORY

The Montana Reserved Water Rights Compact Commission was established in 1979 to negotiate agreements between the State, the United States, and Indian tribes for the federal and Indian reserved water rights in the State of Montana. Section 2-15-212, MCA. On April 10, 1985, the State and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (the "Compacting Parties") reached an agreement in accordance with § 85-2-702, MCA. The Fort Peck-Montana Compact ("the Compact") was subsequently ratified by the Montana Legislature, approved by the Governor of Montana, ratified by the Fort Peck Tribal Executive Board, and approved by the United States Departments of Justice and Interior.<sup>1</sup> The Compact is codified at

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<sup>1</sup> The Compact was filed with the Secretary of State on April 30, 1985. Copies were then submitted on June 12, 1985, to Montana's Congressional Delegation, the Committee on Indian Affairs of the United States Senate, and the Committee on Interior and Insular Affairs of the United States House of Representatives.

§85-20-201, MCA. The State petitioned the Court for the commencement of special proceedings to review and approve the Compact.

On April 6, 1994, the Court entered its Findings of Fact, Conclusions of Law and Order granting the State's motion. The Court ordered the Compact incorporated into a preliminary decree for those basins located in and around the Reservation. Those basins are Big Muddy Creek (Basin 40R), Poplar River (Basin 40Q), the Missouri River below Fort Peck Dam (Basin 40S), Milk River below Whitewater Creek including Porcupine Creek (Basin 40O), Missouri River between Musselshell River and Fort Peck Dam (Basin 40E), and Missouri River between Bullwacker Creek and Musselshell River (Basin 40EJ), collectively referred to as the Special Fort Peck Compact Subbasin.

As authorized by § 85-2-218(1) and (3), the Court also designated the Special Fort Peck Compact Subbasin as a priority subbasin for the purposes of the special proceedings. As authorized by § 85-2-231(3), MCA, the Court designated all of the water right claims of the Assiniboine and Sioux Tribes, and the United States as the trustee for such Tribes, which were subject to adjudication under Title 85, Chapter 2, MCA (and recognized by the Compact), as a single class within the Special Fort Peck Compact Subbasin.

On April 6, 1994, a Notice of Entry of Fort Peck Compact Preliminary Decree and Notice of Availability was mailed to approximately 6200 persons claiming water rights within the Special Fort Peck Compact Subbasin and to other interested parties. Additionally, the Notice was published once a week for three consecutive weeks in twelve newspapers of general circulation covering the Special Fort Peck Compact Subbasin and the Upper and Lower Missouri River Divisions. A public meeting on the Compact, attended by approximately one hundred people, was held in Wolf Point, Montana on April 27, 1994.

Jeff Weimer, Gladys Connie Flygt, and Paul B. Tihista filed objections to the Compact. The State of Montana, joined by the Tribes and supported by the United States, moved to dismiss the objections, and the hearing on the motion was held on June 3, 1997. At the close of the hearing, the Court granted the State's Motion to Dismiss the Tihista objection. The Court denied the State's motions to dismiss the Weimer and Flygt objections, and set a final discovery schedule.

On February 9, 1998, the Tribes moved the Court for summary judgment dismissing the remaining objections and approving the Compact. The State of Montana and the United States filed supporting briefs. On February 10, 1998, the Objectors filed cross-motions for summary and partial summary judgment. The Tribes, the State of Montana, and the United States filed opposing briefs. The Court held a hearing on the motions on October 1, 1998. This Memorandum Opinion addresses the cross-motions for summary judgment on the objections to the Compact, and reviews and approves the Compact pursuant to the State's petition.

## II. JURISDICTION

The Montana Water Court has jurisdiction to review the Compact under the authority granted by the McCarran Amendment of 1952 (43 U.S.C. § 666); §§ 85-2-231, 85-2-233 and 234, 85-2-701 and 702, MCA, and Article VII(B) of the Fort Peck - Montana Compact. *See also* Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 564 (1983), *reh. denied* 464 U.S. 874 (1983), and State ex rel. Greely v. Confederated Salish & Kootenai Tribes ("Greely II"), 219 Mont. 76, 89, 712 P.2d 754 (1985).

## III. ISSUES PRESENTED IN THE OBJECTIONS

As previously noted, after notice was provided in accordance with the law, three objections to the Compact were filed. The objection of Paul B. Tihista was dismissed for lack of standing. *See* Order of June 10, 1997 and Supplemental Order of August 10, 2001.

The two remaining Objectors argue the Compact should be declared void because certain provisions do not conform to federal law and violate established principles and limitations now part of the Indian Reserved Water Right Doctrine. Specifically, the Objectors argue in their briefs that the Compact is void because it:

1. quantifies the Tribal Water Right according to the Practicable Irrigable Acreage standard (“PIA”), which is inappropriate for this reservation;
2. recognizes instream water rights, which are not supported by federal law;
3. grants reserved rights in groundwater, which are not supported by federal law;
4. authorizes diversion of the Tribal Water Right from sources that are not appurtenant to the reservation, which is contrary to federal law;
5. authorizes use of the Tribal Water Right outside the boundaries of the reservation, which is contrary to federal law;
6. authorizes alienation of the Tribal Water Right without Congressional approval, which is contrary to federal law; and
7. violates the Equal Protection Clause of the United States Constitution, because Article IV(A)(2) irrationally discriminates between certain water users and certain watersheds.

In responding to the objections, the Tribes, the United States, and the State of Montana argue that the Objectors essentially have no standing to raise these issues.

#### IV. STANDARD OF REVIEW

##### A. The Montana Water Court’s Standard of Review in deciding whether to approve a compact or declare it void

The Montana Water Court may only approve a compact or declare it void. Section 85-2-233, MCA. In determining whether a compact should be approved or declared void, the Court has concluded that a compact is closely analogous to a consent decree and should be reviewed under the

same or a similar standard. A consent decree is "essentially a settlement agreement subject to continued judicial policing." Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. Ohio 1983). It is not a decision on the merits or the achievement of the optimal outcome for all parties, but is the product of negotiation and compromise. See United States v. Armour & Co., 402 U.S. 673, 681-82, (1971).

Objector Weimer contends that the Court should not apply the "consent decree" standard of review in its consideration of this Compact because there are objectors to the Compact, and consent decrees are not binding on third parties. Objector Weimer asserts that the Court should instead treat the Compact as a statement of claim, like any other statement of claim in the adjudication.

A properly filed statement of claim constitutes prima facie proof its content. Section 85-2-227, MCA. Once an objection to the claim is filed, the objector then has the initial burden of producing evidence that contradicts and overcomes one or more elements of the prima facie claim. Memorandum Opinion, Water Court Case 40G-2, p. 13 (March 11, 1997).

Sections 85-2-221 and 85-2-224, MCA set forth the filing deadlines and requirements for statements of claim. The Compact is not technically a statement of claim pursuant to these statutes. The Compact is an agreement negotiated between governments. It was negotiated and reviewed in open, public forums and approved by the U.S. Departments of Justice and Interior, and by the State and Tribal executive and legislative authorities. A statement of claim does not receive such a rigorous review when it is filed. Therefore, the standard of review between a statement of claim and a Compact is different. However, even if the Court accepted Objector Weimer's contention and treated the Compact as a statement of claim, the result in approving the Compact would be the same, because Objectors did not present evidence sufficient to contradict and overcome the prima facie Compact.

Before approving a consent decree, a court must be satisfied that the settlement is at least fundamentally fair, adequate and reasonable, and because it is a form of judgment, a consent decree must conform to applicable laws. United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990), *cert. denied sub nom. Makah Indian Tribe v. United States*, 501 U.S. 1250, (1991). The purpose underlying this judicial review is not to ensure that the settlement is fair as between the negotiating parties or to give the negotiating parties more time, but to ensure that other unrepresented parties and the public interest are treated fairly by the settlement. United States v. Oregon, 913 F.2d at 581; Davis v. City and County of San Francisco, 890 F.2d 1438, 1445 (9th Cir. Cal. 1989); SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. Cal. 1984); Collins v. Thompson, 679 F.2d 168, 172 (9th Cir. Wash. 1982); and Norman v. McKee, 431 F.2d 769, 774 (9th Cir. Cal. *supra cert. denied*, 401 U.S. 912 (1971). While the settlement must be in the public interest, it need not necessarily be in the public's *best* interest, if it is otherwise reasonable. SEC v. Randolph, *supra* at 529.

In Officers for Justice v. Civil Service Comm'n, the Ninth Circuit Court of Appeals nicely summarizes the extent and limitations inherent in this kind of review:

[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be *limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned*. Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators. (Citations omitted) Ultimately, the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.' City of Detroit [v. Grinnell Corp.], 495 F.2d [448], 468 [2d Cir. N.Y. 1974)].

688 F.2d 615, 624-625 (9th Cir. Cal. 1982), *cert denied*, Byrd v. Civil Service Commission, 459

U.S. 1217 (1983).<sup>2</sup> The Ninth Circuit further explained that:

The district court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a government participant; and the reaction of the class members to the proposed settlement. (Citations omitted) This is by no means an exhaustive list of relevant considerations, nor have we attempted to identify the most significant factors. The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claims advanced, the types of relief sought, and the unique facts and circumstances presented by each individual case.

Officers of Justice, 688 F.2d 615 at 624.

The Ninth Circuit has suggested that once a court is satisfied that the decree was the product of good faith, arms-length negotiations, a negotiated decree should be *presumptively* valid and the objecting party then "has a heavy burden of demonstrating that the decree is unreasonable." United States v. Oregon, 913 F.2d at 581. The First Circuit similarly observed:

This [deference] has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement. . . . Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sits at the table. That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance. United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1<sup>st</sup> Cir. Mass. 1990).

The Court also agrees with the suggestion of the United States found at page 5 of its Response to Objector Jeff D. Weimer Motion for Summary Judgment brief that the Court's level of

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<sup>2</sup> See also United States v. Armour & Co., 402 U.S. 673, 681-682 (1971) and Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574 (1984).

inquiry into a Compact depends on whether Objectors can establish the Compact will result in material injury to their claimed rights. If the answer is no, then the Court should apply a "fundamentally fair, adequate, and reasonable and conforms to applicable law" test. If by a preponderance of the evidence, Objectors can demonstrate that their claimed right is materially injured by the Compact, the level of inquiry employed by the Court into the basis of the reserved water rights should be commensurate with the degree of injury.

B. The "Consent Decree" Standard of Review applies only to compact review, and the specific provisions of this Compact and this review have limited precedential value for reserved water rights litigated before the Water Court.

Consent decrees do not generally establish precedents for unrelated proceedings. See e.g. Davis v. N.Y.C. Housing Authority, 839 F. Supp. 215, 225 (1993); Kelly ex rel. Michigan DNRC v. FERC, 321 U.S. App. D.C. 34 (1996); Office of Consumer Counsel v. FERC, 783 F.2d 206, 235 (D.C. Cir. 1986). A proposed settlement agreement or consent decree is not to be judged against a hypothetical or speculative measure of what might (or might not) have been achieved by the negotiators. Officers for Justice v. Civil Serv. Comm'n, 688 F.2d at 625. The United States Supreme Court has stated:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation... [T]he parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. United States v. Armour & Co., 402 U.S. 673, 681-82, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971).

The Standard of Review set forth in Part A, above, only applies to the Court's review of this Compact, and similar consent decree compacts. The results achieved in this Compact are not necessarily the results that would have been reached had these reserved water right claims proceeded

through litigation on the merits.

This Compact is the unique negotiated agreement which defines the reserved water rights of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, its use, development, and administration. Every other compact which may be presented to this Court will in turn be unique and specific to the history of the reserved right, resource availability, and its own negotiation tone and process. The parties to this Compact, and the negotiators to compacts generally enjoy considerable freedom in reaching the compacted results, and may achieve results through the compact process that are more favorable to their interests than would be achieved through litigation. If other parties claiming reserved water rights proceed to litigation on the merits before the Montana Water Court, the Court will have to draw hard lines and resolve ambiguous legal precedent on many of the issues which are given a broad brush in this Compact review.

#### IV. DISCUSSION

##### A. Standing to Object

The Tribes, the United States, and the State of Montana argue that the Objectors essentially have no standing to object to the Compact because the likelihood of actual harm to the Objectors caused by the enforcement of the Compact is remote.

The standing to object to a claim in the general adjudication process in Montana during the 1994 Compact objection period was established by statute and rule. Section 85-2-233, MCA (1993) provides that:

- (1) *For good cause shown* a hearing shall be held before the water judge on any objection to a temporary preliminary decree or preliminary decree by:

...

- (iii) any person within the basin entitled to receive notice under 85-2-232(1). . .”<sup>3</sup>

Rule 1.II(7) of the Montana Supreme Court Water Right Claim Examination Rules defines “good cause shown” to mean

a written statement showing that one has a substantial reason for objecting, which means that the party has a property interest in land or water, or its use, that has been affected by the decree and that the objection is made in good faith, is not arbitrary, irrational, unreasonable or irrelevant in respect to the party objecting.

It is undisputed that Weimer and Flygt have claimed existing water rights within the Fort Peck Compact Subbasin.<sup>4</sup> Although their junior state-based water rights have not yet been finally adjudicated or actually affected by the enforcement of the Compact, the Court recognizes the *potential* for displacement or diminution of their rights in the future. The goal of Montana’s statewide adjudication is to provide stability and certainty for water users by quantifying and adjudicating water right claims, including those of the Tribes, in a unified proceeding. Article I of the Compact states that one of the “basic purposes” of the Compact is “to settle existing disputes and *remove causes of future controversy* between the . . . Indians of the Fort Peck Reservation and other persons concerning waters of the Missouri River, its tributaries, and groundwater. . . .”

Given the Compact's stated purpose, the potential for future conflict, and the goal of the

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<sup>3</sup> Section 85-2-232(1) (1993) provides in relevant part that “the water judge shall serve by mail a notice of availability of the temporary preliminary decree or preliminary decree to *each person who has filed a claim of existing right within the decreed basin . . .*”

<sup>4</sup> Flygt filed statement of claim 40EJ-W-202424-00 in Basin 40EJ (Missouri River between Bullwhacker Creek and Musselshell River) for the use of 160 miners inches of water (280 acre feet), for a reservoir and system of collection ditches, on an unnamed tributary to Dry Armelles Creek, which is tributary of the Missouri River well above Fort Peck Dam. The priority date claimed is 1942.

Weimer’s predecessor-in-interest filed statement of claim 40E-W-122279-00 in Basin 40E (Missouri River between Musselshell River and Fort Peck Dam), for the use of 30 gallons per day per animal unit, for a small onstream reservoir designed to catch spring runoff, on an unnamed tributary of Seven Blackfoot Creek, which is tributary to the Missouri River well above Fort Peck Dam. Weimer’s predecessor-in-interest was also issued Permit to Appropriate 40E-P-041261 in the same basin for the use of 8.0 acre feet per year, for another small onstream reservoir designed to catch spring runoff, on an unnamed tributary to Big Coulee Creek, which is also tributary to the Missouri well above Fort Peck Dam. The priority dates of these two claims are 1965 and 1982, respectively.

statewide adjudication, this Court concludes that for purposes of this review, the Objectors have sufficient standing to file objections to the Compact.

### B. Validity of Compact

The Objectors have not claimed, nor does the Court conclude based on the evidence before it, that the Compact is the product of fraud, overreaching, or collusion. Therefore, the Water Court will focus the remainder of this Memorandum on whether the Compact, taken as a whole, is fair, adequate and reasonable to all concerned, including whether it conforms to existing federal law and policy, and whether summary judgment should be granted against Objectors.

### C. Indian Reserved Water Rights in the Montana General Stream Adjudication

Indian reserved water rights were first recognized by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908), a case arising in the Milk River in northern Montana.

The Winters Court held:

The power of the Government to reserve the waters [of the Milk River] and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888 [treaty date], and it would be extreme to believe that within a year Congress destroyed the reservation and . . . took from [the Indians] the means of continuing their old habits, yet did not leave them the power to change to new ones.

207 U.S. 564, 577 (1908). In Cappaert v. United States, a more contemporary United States Supreme Court decision, Chief Justice Burger, writing the unanimous opinion, summarized the Reserved Water Rights Doctrine as follows:

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

\* \* \*

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

426 U.S. 128, 138-139 (1976). Although Cappaert involved federal reserved water rights for a national monument, Chief Justice Burger noted that the doctrine applies to Indian reservations and other federal enclaves and encompasses water rights in navigable and nonnavigable streams. Ibid.

Montana law has long acknowledged the existence of Indian reserved water rights and distinguished those rights from state appropriated water rights. In Greely II, the Montana Supreme Court recognized the distinctions and held that “[s]tate-created water rights are defined and governed by state law” and “Indian reserved water rights are created or recognized by federal treaty, federal statutes or executive order, and are governed by federal law.” 219 Mont. at 89-90, 95.<sup>5</sup> In the absence of controlling federal authority, the Water Court is required to follow the directives of the Montana Supreme Court. Greely II, 219 Mont. at 99-100.

Whether by adjudication or by negotiation, determining the scope and extent of Indian reserved water rights has proved difficult at best. *See e.g.*, Greely II, 219 Mont. at 92; Ciotti, 278 Mont. at 60. As articulated by the United States Supreme Court, the Reserved Water Rights Doctrine is vague and open-ended and has been construed both broadly and narrowly by subsequent federal and state courts.<sup>6</sup> After nearly one hundred years of legislation, litigation, and policy-

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<sup>5</sup> *See also*, Confederated Salish & Kootenai Tribes v. Clinch (“Clinch”), 297 Mont. 448, 451-453, 992 P.2d 244 (1999); In re Application for Beneficial Water Use Permit (“Ciotti”), 278 Mont. 50, 56, 923 P.2d 973 (1985); and State ex rel. Greely v. Water Court (“Greely I”), 214 Mont. 143, 691 P.2d 833 (1985).

<sup>6</sup> For cases applying the doctrine broadly, *see e.g.* Colorado River Water Conservation District v. United States, 424 U.S. 808, 818 (1976); United States v. Ahtunum Irrigation Dist., 236 F.2d 321, 326 (9<sup>th</sup> Cir. 1956); Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908). For cases applying the doctrine narrowly, *see e.g.* Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979); United States v. New Mexico, 438 U.S. 696, 715 (1978); Cappaert v. United States, 426 U.S. 128 (1976); In re the General Adjudication of all rights to Use Water in the Big Horn River System (“Big Horn”), 753 P.2d 76 (Wyo 1988);

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

Senate Bill 76 was passed in 1979 to expressly recognize Indian reserved water rights and incorporate them into the state-wide general adjudication. Greely I, 214 Mont. at 146.<sup>7</sup> To expedite and facilitate the difficult process of comprehensively and finally determining Indian reserved water rights in Montana, the legislature created a nine-member Montana Reserved Water Rights Compact Commission. The Commission has the authority to “negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts,”<sup>8</sup> the terms of which will ultimately be included in the preliminary and final State decrees pursuant to Montana law. This Compact is a product of that negotiation process.

#### D. The Authority of the Montana Legislature to Enter Reserved Water Rights Compacts

The Montana Legislature possesses all the powers of lawmaking inherent in any independent sovereignty and is limited only by the United States and Montana Constitutions. *See e.g.*, Hilger v. Moore, 56 Mont. 146, 163, 182 P. 477, 479 (1919), and State ex rel. Evans v. Stewart, 53 Mont. 18, 161 P. 309 (1916).

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and In re the General Adjudication of All Rights to Use Water in the Gila River System and Source (“Gila River III”), 989 P.2d 739 (1999). For cases distinguishing between Indian reserved water rights and other federal reserved water rights, *see e.g.*, Clinch, 297 Mont. 448, 992 P.2d 244 (1999); Greely II, 219 Mont. 76, 89-90, 712 P.2d 754 (1985). For cases that do not distinguish between Indian reserved water rights and other federal reserved water rights, *see e.g.*, Colorado River, at 811; United States v. District Court for Eagle County, 401 U.S. 520, 524 (1971); Cappaert v. United States, 426 U.S. at 138; and Arizona v. California, 373 U.S. 546, 601 (1963).

<sup>7</sup> Section 85-2-701, MCA (1979) sets forth the legislative intent as follows:

**Legislative Intent.** Because the water and water rights within each water division are interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. Therefore, it is the intent of the legislature that the attorney general’s petition required in 85-2-211 include *all claimants of reserved Indian water rights* as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666. . .

<sup>8</sup> Section 23-15-212, MCA

Our government has long been known to be one of delegated, limited and enumerated powers. Kansas v. Colorado, 206 U.S. 46, 81-82 (1907), *citing* Martin v. Hunter's Lessee, 1 Wheat 304, 324 (1816).<sup>9</sup> Those powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Art. X, U.S. Constitution.<sup>10</sup> Although the history of the relationship between the Federal Government and the States in the reclamation of arid lands of the Western States is both long and involved, through it runs the consistent thread of purposeful and continued deference to state water law by Congress and, more recently, a blossoming sensitivity to the impact of the implied-reservation doctrine upon those who have obtained water rights under state law. California v. United States, 438 U.S. 645, 653 (1978) and United States v. New Mexico, 438 U.S. 696, 699, 701, 702-705, 718 (1978).

In 1972 the people of Montana ratified a new constitution. The Montana Constitution provides in Article IX(3) as follows:

**Water rights.** (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

.....

(3) 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.

(4) The legislature shall provided for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

Pursuant to Art. IX, Section 3(4), Mont. Const. 1972, the legislature enacted the Montana Water Use Act of 1973. Title 85, Chapter 2 of the Montana Code Annotated. The Water Use Act governs the administration, control and regulation of water rights within the state of Montana.

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<sup>9</sup> It can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. Ibid.

<sup>10</sup> See also Kansas v. Colorado, 206 U.S. 46, 79 (1907), and United States v. Rio Grande Irrigation Company, 174 U.S. 690, 703 (1899).

Greely II, 219 Mont. 76, 712 P.2d 754 (1985) and § 85-2-101, MCA.

As long as the State acts within the parameters of the State and federal constitutions, Montana has broad authority over the administration, control and regulation of the water within the State boundaries. Accordingly, if the State negotiates, approves, and ratifies a compact that grants more water to a reserved water right entity than that entity might have obtained under a strict adherence to the “limits” of the Reserved Water Right Doctrine through litigation and does so without injuring other existing water users, the State is effectively allocating and distributing surplus state waters to that entity to resolve a dispute. In the absence of material injury to existing water users, the merits of such public policy decisions is for the legislature to decide, not the Water Court.

Therefore, in the absence of clear federal authority prohibiting the various Compact provisions and in the absence of demonstrated injury to Objectors by these provisions, the Compacting Parties are within their authority to craft creative solutions to resolve difficult problems caused by ambiguous standards. In reviewing creative solutions found in a compact, the Court has used the balancing test described earlier to determine whether the resulting compact is fundamentally fair, adequate and reasonable, and conforms to applicable law.

#### E. The Fort Peck-Montana Compact

##### 1: Quantification

The scope and extent of the Tribal Water Right is set forth in Article III of the Compact.

Article III(A) sets forth a general statement of the right:

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation have the right to divert annually from the Missouri River, certain of its tributaries, and ground water beneath the Reservation the lesser of (i) 1,050,472 acre-feet of water, or (ii) the quantity of water necessary to supply a consumptive use of 525,236 acre-feet per year for the uses and purposes set forth in this Compact with a priority date of May 1, 1888, provided that no more than 950,000 acre-feet of water, or the quantity of water necessary to supply a consumptive use of 475,000 acre-feet may be diverted annually from surface water sources. This right is held in trust by the United States for the benefit of the Tribes and is further defined and limited as set forth in this Compact.” Section 85-20-201, MCA

The Objectors contend that use of the practicably irrigable acreage standard (PIA) to quantify the Tribal Water Right is inappropriate, and that even under that standard, the Tribal Water Right was incorrectly quantified.

There is no more contentious issue in Indian water law than the quantification of Indian reserved water rights. It is clear from the parties' briefs and the record before the Court that quantification of federal reserved water rights is a task of enormous complexity, to be determined without the benefit of clear or conclusive federal law, and with the potential for impacting or displacing some existing state-based water rights.

Quantification of an Indian reserved water right is governed by the amount necessary to fulfill the purposes of the reservation. See United States v. New Mexico, 438 U.S. 696 (1978), Cappaert v. United States, 426 U.S. 128 (1976), Arizona v. California, 373 U.S. 546 (1963), and Winters v. United States, 207 U.S. 564 (1908). However, there is no clear consensus among the federal courts as to how the “purpose” of the reservation is to be determined, the proper quantification standard to apply, or the method for quantifying the rights based on that standard.

In Winters, the Supreme Court held that when the primary purposes of an Indian reservation are not clearly articulated, the purposes must be liberally, not strictly, construed from the perspective of the Indians. 207 U.S. 564, 576-577 (1908).<sup>11</sup> In Arizona v. California, the United States Supreme Court held that Indian reserved water rights must be quantified to “satisfy the future as well as the

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<sup>11</sup> In Winters, the United States Supreme Court concluded that: “By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.” 207 U.S. at 577. In United States v. Adair, the Ninth Circuit Court of Appeals quoted with favor the principle that: “While the purpose for which the federal government reserves other types of lands may be strictly construed . . . the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained. . . . Additionally, where interpretation of an Indian treaty is involved, not only the intent of the Government, but also the intent of the tribe must be discerned.” 723 F.2d 1394, 1409 (9th Cir. 1983), quoting W. Canby, *American Indian Law* 245-246 (1981), and citing Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 675-676 (1979). See also United States v. Winans, 198 U.S. 371, 381 (1905); Colville Confederated Tribes v. Walton, 647 F.2d 42, 47-48 (9th Cir. 1981), reversed on other grounds in 752 F.2d 397 (1981); and Greely II, 219 Mont. at 90, 91.

present needs of the Indian[s]” and that given the uncertainty of a tribe's future needs, “the only feasible and fair way by which reserved water for the reservations [at least for agricultural purposes] can be measured is irrigable acreage.” 373 U.S. at 601.<sup>12</sup>

In United States v. New Mexico, however, the same Court held that application of the doctrine is limited to only that amount of water *strictly necessary* to fulfill the *original, primary* purposes of the reservation, no more. 438 U.S. 696, 700 (1978). Also, the New Mexico Court apparently introduced a “sensitivity” concept into the required analysis so that “the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and the Congress’ general policy of deference to state water law.” *See* dissent of Justice Powell at 718 citing the majority opinion at 699, 701-702, and 705.

Neither the United States Supreme Court, nor any other federal court, however, has held that PIA is the *only* standard that may be applied. In recent years, the PIA standard has been criticized as being too complex, overgenerous at the expense of state water users, and anachronistically assimilistic for modern times.<sup>13</sup> The Objectors embrace some of these criticisms. Such criticism of

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<sup>12</sup> In Arizona both the Master and the Supreme Court rejected the State’s argument that “the quantity of water reserved should be measured by the Indians’ ‘reasonably foreseeable needs.’” Adoption of the PIA standard was essentially a compromise between a standard that would be fair to the Indians and one that would provide certainty and finality for competing water users. In exchange for a generous standard and application (essentially the *maximum* amount the tribes could claim under the State’s “reasonable needs” test, whether the tribes would ever actually need or use the water or not), the reserved water rights of the tribes were finally quantified and forever fixed in an amount that could not be enlarged, even for changed circumstances in the future. 373 U.S. 546, 600-601 (1963).

The fact that most of the agricultural land on the Fort Peck Indian Reservation has never been irrigated, therefore, does not necessarily argue against application of the PIA standard. In Greely II, the Montana Supreme Court observed that most Indian reservations use only a fraction of their reserved water rights and that: “The Water Use Act, as amended, recognizes that a reserved right may exist without a present use. Section 85-2-224(3), MCA, permits a ‘statement of claim for rights reserved under the laws of the United States which have not yet been put to use.’ The Act permits Indian reserved rights to be decreed without a current use.” 219 Mont. at 93-94. *See also* Section 85-2-234(6), MCA, and Clinch, 297 Mont. at 452.

<sup>13</sup> *See e.g.* Peter W. Sly, Reserved Water Rights Settlement Manual 194 app. A (1988), at 104; Alvin H. Shrago, *Emerging Indian Water Rights: An analysis of Recent Judicial and Legislative Developments*, 26 Rocky Mt. Min. L. Inst. 1105, 1116 (1980); *Indian Reserved Water Rights: Hearings before Senate Comm. On Energy and Natural Resources*, 98<sup>th</sup> Cong., 2d Sess. 27-28 (1984)(Western States Water Council, Report to Western Governors); and Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 Ariz. L. Rev. 195 (1994). *See also* Wyoming v. United States, 492 U.S. 406 (1989); and Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 Land & Water Rev. 1, 6 (1992) (in which he asserts that Chief Justice Rehnquist and Justices White, Scalia, and Kennedy would have reversed use of the PIA standard in the Big Horn River adjudication).

the PIA standard was reflected in a more stringent application of the standard in the Big Horn adjudication in Wyoming,<sup>14</sup> and in the United States Supreme Court's *per curiam* decision affirming the application, albeit by an evenly divided Court.<sup>15</sup> Despite its recent criticism, no court has yet rejected the PIA standard and the Montana Supreme Court has expressly approved it. Greely II, 219 Mont. at 93-94. The PIA standard remains the principle method of quantifying Indian reserved water rights for agricultural purposes. Therefore, the Compacting Parties' determination of the scope and extent of the Tribal Water Right by using the practicably irrigable acreage standard was appropriate and is not contrary to federal law or policy.

To quantify the Tribal Water Right, the parties agreed to use the Ten Year Plan formulated by the President's Water Policy Committee as an analytical guide and retained competent and experienced water resource specialists to assist them.<sup>16</sup> After several months of study, Stetson Engineers concluded that 501,755 acres (approximately one-quarter of the Reservation) could be irrigated out of the Missouri River.<sup>17</sup> The State's water resource specialists conducted their own investigation of Reservation lands, and, using the "prime and important" land classification of the

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<sup>14</sup> In Big Horn, 753 P.2d 76 (Wyo 1988), the Wyoming Supreme Court was more sensitive to state-held rights by requiring that factors such as land arability, engineering and economic feasibility must be considered in determining whether reservation land was practicably irrigable for purposes of the PIA standard.

<sup>15</sup> Wyoming v. United States, 492 U.S. 406 (1989).

<sup>16</sup> Final Report of Tribal Negotiating Team to Fort Peck Tribal Executive Board on Fort Peck-Montana Water Compact ("Tribal Report"), p. 12., which is attached as Exhibit 1 to the Affidavit of Tribal Chairman Caleb Shields, filed March 21, 1997. *See also* Affidavit of D. Scott Brown, program manager of the Compact Commission, filed March 10, 1997; Affidavit of Thomas Stetson, Stetson Engineers, water resource specialist for the Tribes, filed as Exhibit 2 to the Affidavit of Caleb Shields, filed March 21, 1997. D. Scott Brown is the program manager overseeing the State's participation in the settlement negotiations and the data and analysis produced by the State's soil scientist, hydrologist, attorney and the DNRC. Stetson, who was the Tribes' water resource and civil engineer specialist, has served as an expert witness in Arizona v. California, Big Horn, Gila River III, and most other significant Indian reserved water right cases in the last twenty years.

<sup>17</sup> Tribal Report, p. 13. In making that determination, Stetson Engineers reviewed extensive data from the Soil Conservation Service, the Bureau of Indian Affairs, historical hydrological stream flow data, and data on the quantity and quality of groundwater. They interpreted numerous aerial photographs, analyzed the climate and available surface water measurements, determined the available water supply and existing uses in each watershed, developed 27 maps showing land classifications, and ultimately determined the extent of the practicably irrigable acreage on the Reservation and the amount of water required per acre.

Soil Conservation Service, concluded that 487,763 acres on the Reservation were irrigable from the Missouri River (less than a 3% difference). The State then, apparently, discovered an oversight in its calculations and accepted the Stetson acreage determination.<sup>18</sup>

The Bureau of Indian Affairs did a title study and concluded that 291,798 of the 501,755 potentially irrigable acres are owned by the Tribes or Tribal Members or are within the Fort Peck Irrigation Project.<sup>19</sup> After negotiation, the Compacting Parties agreed to calculate a fixed Tribal Water Right based only on those acres presently in Indian ownership, rather than a fluctuating right based on future increases and decreases in Indian ownership.<sup>20</sup> The parties agreed to an average water duty of 3.6 acre-feet per acre, and this resulted in the annual diversion figure of 1,050,472 acre-feet.<sup>21</sup> Consumptive use was calculated by the parties to be 1.8 acre-feet per acre for full service irrigation at 50 percent average efficiency. Therefore, “the Tribal Water Right is stated alternatively in terms of the lesser of diversions and consumptive uses, whichever is less.”<sup>22</sup>

In negotiating Article III of the Compact, the Tribes recognized that the Compact must provide some protection for existing non-Tribal uses to be politically acceptable, even if litigation would not have protected those uses.<sup>23</sup> The protection for existing state uses is set forth in Art. IV(A) of the Compact. The Tribes agreed not to divert surface water from the mainstem of the Milk River and, with some exceptions, to subordinate the Tribal Water Right to four categories of existing uses on the remaining Missouri River “north-south” tributaries within the Reservation (but not on the Missouri River mainstem):

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<sup>18</sup> Tribal Report, pp. 2-4,13-14.

<sup>19</sup> Tribal Report, p. 14.

<sup>20</sup> Tribal Report, pp. 14-15.

<sup>21</sup> Tribal Report, p. 15.

<sup>22</sup> Tribal Report, p. 15, n. 23.

<sup>23</sup> Tribal Report, p. 32.

- (a) the beneficial uses of water with a priority date of December 31, 1984, or earlier established under the laws of the State and identified in Appendix A to this Compact;
- (b) such rights of the United States Fish and Wildlife Service to the waters of Big Muddy Creek for the Medicine Lake National Wildlife Refuge as may be finally determined by the state water court;
- (c) beneficial uses of water for domestic purposes;
- (d) beneficial uses of water for stock watering purposes in existence prior to December 31, 1984, and beneficial uses of water for stock watering subsequent to that date not in excess of 20 acre-feet per year for each impoundment.<sup>24</sup>

The protected existing state uses identified in Appendix A of the Compact are almost all for irrigation.<sup>25</sup> The Tribes have estimated that “about 19,500 acres in all are irrigated on a regular basis (full-service irrigation) in these watersheds. About 13,000 additional acres are served by “water spreading” during periods of high stream flow, usually during the early spring. The . . . full-service irrigation diverts about 70,000 acre-feet and consumes about 35,000 acre-feet a year. The water spreading . . . consumes about 6,000 acre-feet annually. Most of the full-service irrigation is done from groundwater, not surface flow. Of the 19,500 acres served by full-service irrigation, almost 12,000 acres are irrigated by groundwater pumping. Use of groundwater is especially prevalent in the Porcupine Creek and Big Muddy Creek watersheds, where a total of almost 10,000 acres (mostly outside the reservation) are irrigated by groundwater.”<sup>26</sup>

The Tribes also determined that most of the acres irrigated under existing state-based water rights (approximately 25,000 of 32,000 acres) are outside the Reservation boundaries.<sup>27</sup> Under the Compact, these existing irrigation uses would be protected from the Tribes’ prior senior right.<sup>28</sup>

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<sup>24</sup> Section 85-20-201, MCA, Fort Peck-Montana Compact, Article IV(A)(3)(a)-(d).  
*See also* Tribal Report, p. 15, and D. Scott Brown Affidavit, p. 4.

<sup>25</sup> Tribal Report, p. 32.

<sup>26</sup> Ibid.

<sup>27</sup> Tribal Report, p. 33

<sup>28</sup> Ibid.

In addition, approximately 1,500 acre-feet of existing municipal uses (mostly on the Poplar and Big Muddy River), 2,100 acre-feet per year of existing industrial and commercial uses (mostly on the Big Muddy River), and any existing federal reserved water rights in Big Muddy Creek and its tributaries for maintaining the Medicine Lake Wildlife Refuge are also protected.<sup>29</sup>

With the exception of the wildlife refuge, the Compact protects nearly 44,600 acre-feet per year of consumptive uses, which is split nearly equally between surface flows and groundwater.<sup>30</sup> The Tribes point out that “most surface water available in these streams during the irrigation season in normal years will be used by non-Indians exercising their state law based water rights.”<sup>31</sup> Therefore, they conclude that by ratifying the Compact, the Tribes are foreclosed from developing substantial new appropriations from these tributary streams.<sup>32</sup>

Objector Weimer argues that factual disputes exist concerning the factors used to determine the quantity of the Tribal Water Right and that summary judgment is not appropriate on the quantification issue. Although Weimer identified several factors, he primarily addresses the number of irrigable acres on the reservation. He argues that a February 20, 1985 Memorandum from the Supervisor of the Hydrosciences Section of the DNRC to the Water Management Bureau Chief creates a material issue of fact.

The DNRC Memorandum concludes that approximately 167,000 acres of irrigable land could be supplied from the Milk and Missouri Rivers by the diversion of approximately 603,000 acre feet of water, that available tributary flow was limited to approximately 122,000 acre feet, and that about 133,000 acre feet was available from groundwater.<sup>33</sup> The Memorandum further predicts that if tribal

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Tribal Report, pp. 33-34.

<sup>32</sup> Ibid.

<sup>33</sup> Memorandum, page 18.

use of tributary water under a reserved rights settlement was not subordinated to existing non-tribal use, tribal users would likely displace some or all of an estimated 10,000 acres of non-tribal irrigation.<sup>34</sup>

Because of the short time available for DNRC to conduct its analyses, several simplifying assumptions were made in the Memorandum and no attempt was made to distinguish between tribal and non-tribal ownership of irrigable lands along the Milk and Missouri Rivers.<sup>35</sup> The Memorandum received “little critical technical review” and DNRC expressed hope in its transmittal document that “the Commission can take the time to have these results reviewed carefully by individuals outside the Department.” See February 25, 1985 transmittal document from Larry Fasbender, Director of the Department of Natural Resources and Conservation, to Gordon McOmber, Chairman of the Reserved Water Rights Compact Commission.

There is nothing in the record indicating the February 20, 1985 Memorandum was ever critically and technically reviewed or that the simplifying assumptions were tested. As a result, the Memorandum has a hypothetical or speculative quality to it and the Court cannot conclude it introduces factual uncertainty. Simmons v. Jenkins, 230 Mont. 429, 432, 750 P.2d 1067 (1988) and Officers for Justice, 688 F.2d 615 at 624-625.

At most, the Memorandum represents one hasty determination of one hypothetical PIA scenario that might result if the reserved water right were litigated to a conclusion. One important concern from the State’s perspective is definitely highlighted by the DNRC Memorandum. Irrigation on as many as 10,000 acres of non-tribal lands irrigated from the “north-south” tributaries within the reservation would have to be curtailed if the parties pursued litigation to its ultimate conclusion. See Memorandum at page 14. Under the Compact, irrigation on over 9,000 acres of

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<sup>34</sup> Memorandum, page 14.

<sup>35</sup> Memorandum, pages 1 and 18.

these non-Tribal lands will never be curtailed by the exercise of the Tribal Water Right because the Tribal Water Right is subordinated to most of the water usage on these non-Tribal lands.

Given the detailed and comprehensive research and analysis involved in determining the Tribal Water Right by the Compacting Parties and the protections provided the most threatened existing state uses of water, the Court concludes that Article III of the Compact is within the authority of the legislature, and is fundamentally fair, adequate and reasonable to all concerned.

## 2. Groundwater

Article III(A) and (I) of the Compact expressly extends the Tribal Water Right to groundwater. The Objectors contend that extension of the Tribal Water Right to groundwater is either not supported by, or is contrary to, federal law.

Whether Indian reserved water rights include groundwater is another unsettled question of federal law. In Cappaert v. United States, the United States Supreme Court noted that none of its cases have applied the doctrine of implied reservation of water rights to groundwater. The Court avoided directly confronting the issue by finding that the water in Devil's Hole was in fact surface water, albeit underground. 426 U.S. 128, 142 (1976).

The paucity and ambiguity of federal law and policy with respect to reserved water rights in groundwater has led to inconsistent rulings on the subject. For example, in 1968 the Federal District Court of Montana observed that “whether the [necessary] waters were found on the surface of the land or under it should make no difference.” Tweedy v. Texas Company, 286 F.Supp. 383, 385 (D. Mont. 1968). According to Judge Rodeghiero, the Montana Supreme Court appears to tacitly agree. *See* dissenting opinion of Judge Rodeghiero in Clinch, 297 Mont. 448 at 458, ¶ 32 (“the majority apparently assumes that groundwater is included within the Tribes’ reserved water right.”)

In Big Horn, the Wyoming Supreme Court acknowledged:

The logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater. *See Tweedy v.*

*Texas Company*, 286 F.Supp. 383, 385 (D.Mont. 1968) (“Whether the [necessary] waters were found on the surface of the land or under it should make no difference”). Certainly the two sources are often interconnected. See § 41-3-916, W.S. 1977 (where underground and surface waters are “so interconnected as to constitute in fact one source of supply,” a single schedule of priorities shall be made); Final Report to the President and to the congress by the National Water Commission, Water Policies for the Future 233 (1973) (groundwater and surface water ‘often naturally related’); *Cappaert v. United States*, *supra* 426 at 142-143, 96 S.Ct. at 2071 (citing additional authority for this effect).”

753 P.2d 76, 99-100 (Wyo. 1988). Despite the Wyoming Supreme Court’s recognition of the logic of including groundwater in Indian reserved water rights; it nevertheless declined to do so, because it could find no controlling federal law on the issue. *Ibid.* at 100.

In Gila River III, the Arizona Supreme Court found the Big Horn decision declining Indian reserved water rights in groundwater, unpersuasive. Instead, it found support for recognizing such rights in Winters, Arizona, and Cappaert:

If the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

989 P.2d 739 at 747. Accordingly, the Gila III Court held that “the federal reserved water rights doctrine applies not only to surface water but to groundwater,” but only “where other waters are inadequate to accomplish the purpose of the reservation.” *Ibid.*

Given the unsettled state of federal and state law with respect to the issues, the Water Court finds that extension of the doctrine to groundwater in Article III of the Compact is neither supported by, nor prohibited by, controlling federal law. Recognizing this fact, the parties reasonably chose to avoid the risk of litigation by negotiating this issue through the Compact process.

The parties recognized the potential adverse impact reserved groundwater rights could have on existing junior state water rights. Thus, Article V(D)(1)(a) and (b), provides that, with the

exception of those tribal uses protected in Article IV, neither the State nor the Tribes shall authorize or continue the use of groundwater without the consent of the other if the use will either:

- (a) result in degradation of the instream flows established pursuant to section L of Article III; or
- (b) contribute to permanent depletion or the significant degradation of the quality of a ground water source which in whole or in part underlies the Reservation.<sup>36</sup>

In Paragraph 2 of Article V(D), the Tribes agree not to authorize a new use of groundwater which interferes with the state authorized groundwater rights protected by Article IV of the Compact, unless the State consents.<sup>37</sup> Article III(I)(1)-(3) provides implicitly that the Tribes cannot divert groundwater outside the Reservation for use within the Reservation, or market groundwater off the Reservation.<sup>38</sup> The State was not seriously concerned with tribal uses of groundwater because the Tribes are relatively downstream users and their uses are unlikely to impact surface flows, particularly on the Missouri River.<sup>39</sup> Therefore, in order to protect existing water rights, the State apparently was willing to authorize the Tribes to access a resource that might contain otherwise unappropriated or untapped surplus state waters.

### 3. Changes in Use and Instream Use

Article III(D) of the Compact provides that Tribes can put water to use for any purpose on

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<sup>36</sup> Section 85-20-201, MCA and Final Report, pp. 44-45.

<sup>37</sup> Section 85-20-201, MCA and Tribal Report, p. 45

<sup>38</sup> The question of groundwater could have been litigated, of course, but if a court held groundwater was a component of the reserved water rights doctrine then the Compacting Parties might have had to address the implications arising from Sporhase v. Nebraska, 458 U.S. 941 (1982), and City of Altus v. Carr, 225 F.Supp. 828 (W.D. Tex. 1966), *summarily aff'd*, Carr v. City of Altus, 385 U.S. 35 (1966). By negotiating the groundwater issue, the Compacting Parties could add another dimension of contractual protection to the State's groundwater resources.

<sup>39</sup> Tribal Report, pp. 45-46. The Tribes acknowledge that "very little is known concerning groundwater sources on the Reservation. Without years of study, it simply cannot be determined whether groundwater can be safely pumped from aquifers below the Reservation without depleting those aquifers. The quality of groundwater is questionable as well. Less is known about groundwater in this area than any other technical matter relating to the Tribes' water rights. We thus will be uncertain for many years as to whether and to what extent groundwater resources will be available in practice to the Tribes." Tribal Report, p. 48.

the Reservation, “without regard to whether such use is beneficial as defined by valid state law,” but “[n]o use of the Tribal Water Right may be wasteful or inconsistent with the terms of this Compact.”<sup>40</sup>

One of the specific changes in use authorized by the Compact is the right to change diverted uses into instream flow uses. Article III(L) provides that “[a]t any time within five years after the effective date of this Compact, the Tribes may establish a schedule of instream flows to maintain any fish or wildlife resource in those portions of streams, excluding the mainstem of the Milk River, which are tributaries of the Missouri River that flow through or adjacent to the Reservation.”<sup>41</sup> These instream flow uses will have all the characteristics of the Tribal Water Right, including a priority date of 1888 and the subordination provisions in Article IV of the Compact.<sup>42</sup>

Flygt (whose claims are not on any of these tributaries) contends that the Tribes’ right under the Compact to use the reserved water “for any purposes,” including instream flow, is contrary to the prevailing principles by which Indian reserved water rights are established. This objection necessarily raises the issue of whether the purposes for which an Indian reservation was established limit the uses to which reserved water may be put.

Federal courts have not yet conclusively decided this issue. No standards have been developed concerning permissible changes in the nature of use or place of use of Indian reserved water rights.<sup>43</sup> The clearest Supreme Court pronouncement on the issue appears with no explanation in a supplemental decree entered in Arizona v. California, in which the United States Supreme Court approved the parties’ stipulation that the Tribe’s reserved water right for irrigation could be used for

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<sup>40</sup> 85-20-201(III)(D), MCA; Tribal Report, pp. 8-9.

<sup>41</sup> 85-20-201(III)(L); Tribal Report, p. 47.

<sup>42</sup> Tribal Report, p. 47.

<sup>43</sup> See Ranquist, The Effect of Changes in Nature and Place of Use of Indian Rights to Water Under the ‘Winters Doctrine,’ 5 Nat. Res. L 34, 35-36 (1972).

non-agricultural purposes.<sup>44</sup> The Court decreed:

The foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation [of the practicably irrigable acres within the reservations] . . . shall not constitute a restriction of the usage of them to irrigation or other agricultural application. If all or part of the adjudicated water rights of any of the . . . Reservations is used other than for irrigation or other agricultural applications, the total consumptive use . . . shall not exceed the consumptive use that would have resulted if the diversions . . . had been used for irrigation of the number of acres specified for that Reservation. . . .

439 U.S. 419, 422 (1979). This decree confirmed the conclusions of the Special Master in the 1963

Arizona v. California case:

This [method of quantifying water rights] does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses . . . . The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.

Report of Simon H. Rifkind, Special Master to the Supreme Court 265-166 (December 5, 1960), in the case of Arizona v. California, 373 U.S. 546 (1963).

In Colville Confederated Tribes v. Walton, the Ninth Circuit Court of Appeals recognized the right of the Tribes to change the use of part of their reserved water right from irrigation and fishery maintenance to an instream flow sufficient to permit natural spawning. The Court observed that:

When the Tribe has a vested property right in reserved water, it may use it in any lawful manner. As a result, subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water. . . . We recognize that open-ended water rights are a growing source of conflict and uncertainty in the West. . . . Resolution of the problem is found in quantifying reserved water rights, not in limiting their use.

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Specifically, for recreation and housing developments.

647 F.2d 42, 48, *cert. denied* 454 US 1092 (9<sup>th</sup> Cir. Wash. 1981).

The Montana Supreme Court has recognized that Indian reserved water rights include water “for future needs and changes of use.” Greely II, 219 Mont. 76, 97 (1985). In contrast, in Big Horn III, the Wyoming Supreme Court rejected the argument that the Tribes could change the use of their reserved right from agricultural uses to any other purpose, including instream flows. 835 P.2d 273 at 278.

Recognizing a potential adverse impact on state water users, the Compact provides that the diversion of the Tribal Water Right, including water allocated to instream flow purposes, in the watersheds of seven “north-south” Reservation tributaries of the Missouri River and all groundwater shall be subordinated to certain referenced uses. In addition, any use of the Tribal Water Right outside the Reservation must be “beneficial” as that term is defined by valid state law. To protect state water users from increased depletion of water sources resulting from changes in use not anticipated in the original quantification process, Article III(A) and (F) provide a cap on the amount of water that may be diverted and the amount that may be consumed. As instream flows could deprive an upstream state water user of that quantity of water, the Tribes agreed in Article III(L) to count the instream flows as a consumptive use and to require the State's consent before any change from that consumptive use to instream use.<sup>45</sup>

Given the lack of conclusive federal law with respect to the issues, the provisions negotiated by the parties to protect existing state water uses, and the current federal policy of encouraging tribal self-sufficiency on the reservations,<sup>46</sup> the Water Court concludes that Articles III(A), (D) and (L) authorizing the Tribal Water Right to be used “for any purpose,” including the establishment of

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<sup>45</sup> 85-20-201(III)(A) and (F), Tribal Report, p. 47.

<sup>46</sup> *See e.g.*, 55 FR 9223, “Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims,” Department of the Interior, March 12, 1990.

instream flows, is within the authority of the legislature, and is fundamentally fair, adequate and reasonable to the parties and all those concerned.

#### 4. Off Reservation Diversion, and Off Reservation Use and Marketing

Article III(A) and (I) authorize the Tribes to divert the Tribal Water Right from certain off-reservation surface water locations, including the mainstem of the Missouri River above Fort Peck Dam. Article III (D), (E), (F), (G), (I), (J), and (K) of the Compact authorize the Tribes to transfer their reserved water right use “within or outside the Reservation” to the extent authorized by federal law.<sup>47</sup> The Objectors contend that use of the Tribal Water Right by the Tribes or other persons off the reservation violates the purpose of an Indian reserved water right and violates federal law. Objectors specifically contend that the United States Supreme Court has limited Indian reserved water rights to on-reservation diversions through its statements that such water rights reserve “appurtenant” water. The Objectors similarly contend that authorization to transfer part or all of the Tribal Water Right for off-reservation use is contrary to federal law and policy, specifically, United States Supreme Court case law and the Indian Non-Intercourse Act of 1901, 25 U.S.C. § 77.

The United States Supreme Court has described the Reserved Water Rights Doctrine in terms of reserving “appurtenant” water:

"This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves *appurtenant* water then unappropriated to the extent needed to accomplish the purpose of the reservation."

Cappaert, 426 U.S. 128 (1976). In Winters v. United States, the Court recognized that the governmental policy of creating reservations was to change the habits of nomadic Indians to an agricultural way of life. 207 U.S. 576 (1908). The Court stated that without water, the lands ceded

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<sup>47</sup> 85-20-201, MCA. Article III (K) provides:“As an incident to and in exercise of the Tribal Water Right, the Tribes may transfer within or outside the Reservation, as authorized by federal law and this Compact, the right to use water but may not permanently alienate such right or any part thereof.” Article III (K) authorizes the Tribal Water Right to be exported outside the State. Article II (24) defines a “transfer” to mean “any authorization for the delivery or use of water by a joint venture, service contract, lease, sale, exchange or other similar agreement.”

to the Tribes were worthless, and concluded that the government thus reserved waters for use by the Tribes. Id.

a. Off-Reservation Diversions

Objectors contend that no authority exists allowing the Tribal Water Right to be diverted from off-reservation sources, and are particularly concerned about the Tribal Water Right being possibly diverted from the mainstem of the Missouri above Fort Peck Dam. Objector Weimer cites to the above cases, as well as the Conference of Western Attorneys General American Indian Law Deskbook, 184 (1993) as authority that “[i]n general discussions of reserved water rights, the U.S. Supreme Court limits the doctrine to waters appurtenant to a reservation.” Id. at 11. Essentially, Objectors contend that off-reservation sources are not appurtenant to a reservation, and because the U.S. Supreme Court cases only discuss reserved water rights as reserving “appurtenant” waters, reserved water rights cannot be diverted from off-reservation sources.

In considering the authorities presented by Objectors and the Court’s own review, the Objectors are correct that no federal authority exists that explicitly discusses the off-reservation diversion of Indian reserved water rights. However, the Objectors present no direct, binding authority prohibiting off-reservation diversion of these rights as provided in the Compact, and the Court has found none. These cases allow for the reservation of appurtenant water rights. None of the United States Supreme Court cases cited by the Objectors include a ruling on whether a reserved water right may be diverted off the reservation.

At least one commentator has stated that the United States Supreme Court has extended Indian reserved water rights to an off-reservation source, although the Court did so without comment as to the basis for the decision in either the decree or the opinion.<sup>48</sup>

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<sup>48</sup> Indian Reserved Water Rights: The *Winters* of Our Discontent, 88 Yale L. Journal 1689, 1697, 1699 (1979), footnotes 54 and 60.

The Water Court finds that extension of the Reserved Water Rights Doctrine to off-reservation diversions in Article III of the Compact is neither directly supported by, nor prohibited by, controlling federal authority. Recognizing this fact, the parties chose to avoid the risk of litigation by negotiating the issues through the Compact process. As stated above in Section IV(D) of this Memorandum, in the absence of clear federal authority prohibiting the Compact provisions, the Compacting Parties are within their authority to create such provisions.

The Compact places some basic limitations on the Tribes' ability to divert water from off the Reservation. These are summarized on pp. 18-23 of the Tribal Report, to include:

First. [P]aragraph 2 of Article III(K) requires the Tribes to give the State at least 180 days advance written notice of any proposed transfers of water from the Missouri River outside the Reservation, including Fort Peck Reservoir, and the opportunity to participate in the water marketing venture as a substantially equal partner with the Tribes.

Second. [P]aragraphs 5 and 6 of Article III(K) limit the total consumptive use of water that may be marketed outside the Reservation by the Tribes in any year to (1) 50,000 acre-feet (2) plus 35 percent of any amount over 200,000 but less than 300,000 acre-feet authorized to be transferred by the State under state law, (3) plus 50 percent of any amount over 300,000 acre-feet authorized to be transferred by the State under state law. Paragraph 6 provides that if the State is not itself authorized to transfer at least 50,000 acre-feet of water annually, the Tribes may market water subject to any volume limitations provided by federal law, or if there are no federal limitations, subject to any volume limitations imposed by state law on holders of state water rights. In no event shall the quantity limitation on the Tribes be less than 50,000 acre-feet per year.

Third. [S]ection D of Article III provides that [“outside the Reservation, any use of water in the exercise of the Tribal Water Right shall be beneficial as defined by valid state law on the date the Tribes give notice to the State of a proposed use outside the Reservation.”] Although the State cannot generally regulate tribal water marketing, it could under this provision ban a particular use of water proposed to be marketed by the Tribes outside the Reservation if the use proposed was non-beneficial under state law.

Fourth. [S]ection E of Article III provides that the Tribes or any diverter or user of water marketed by the Tribes shall comply with valid state laws regulating the siting, construction, operation or uses of any industrial facility, pipeline or the like which transports or uses the water outside the Reservation. This Section is intended to apply statutes such as the State's Major Facilities Siting

Act to industries using or transporting water marketed by the Tribes outside the Reservation.

Fifth. [T]he limitations on monthly diversions that Tribes may take from the Missouri River in Section F of Article III impose a constraint on diversion of water for marketing outside the Reservation, as well as on-reservation uses such as irrigation. . . .

Sixth. [U]nder Section G of Article III the Tribes must comply with any valid state law prohibiting or regulating export of water outside the State at the time of a proposed transfer. . . .

Seventh. [S]ection I of Article III sets the sources from which diversions may be made for uses outside the Reservation. Paragraph 3 of Section I provides that the Tribes can divert water for marketing outside the Reservation from the mainstem of the Missouri River from Fort Peck Reservoir or downstream. This paragraph and III(J)(3) provide that diversions from the mainstem of the Missouri River can also be made *upstream* from Fort Peck Reservoir, but these must comply with all state laws and secure the consent of the State legislature. . . .

Eighth. [W]hile diversions from Fort Peck Reservoir or downstream from Fort Peck Dam do not have to comply with state regulatory and administrative requirements, the Tribes are required by III(J)(1) to give advance notice to the State showing that:

(1) the off-reservation use of water will be beneficial as defined by valid state law;

(2) the means of diversion and construction and the operation of any diversion works outside the Reservation are adequate;

(3) the diversion will not adversely affect any federal or state water right actually in use at the time notice is given without the owner's consent;

(4) that the proposed use does not cause any unreasonable significant environmental impact;

(5) that the larger diversions in excess of 4,000 acre-feet per year and 5.5 cubic feet per second of water will not:

(i) substantially impair the quality of water for existing uses in the source of supply;

(ii) be made where low quality water can economically be used and is legally and physically available to the Tribes for the proposed use;

(iii) create or substantially contribute to saline seep; or

(iv) substantially injure fish or wildlife populations in the source of supply.

Paragraph 2 of Article III, Section J authorizes legal challenges to proposed off-reservation diversions within 30 days after expiration of the notice given the State by the Tribes, in a court of competent jurisdiction, by the State or a person whose rights are adversely affected by the diversion or proposed use. If a court case is brought, the Tribes have the initial burden of proving by a preponderance of the evidence that the notice was sufficient to show the above five items. Pursuant to Article II(23), the notice given to the State by the Tribes will be provided to the Director of the State Department of Natural Resources and Conservation. The Court has no reason to conclude that the Director would not promptly provide personal notice to potentially affected state-based water users.

Although the Compacting Parties were free to negotiate the provisions regarding off-reservation diversions due to the absence of federal law to the contrary, these notice provisions and limitations confer additional protection for any state-based water users that could potentially be affected by such off-reservation diversions. The Water Court concludes that the provisions in Article III(A) and (I) authorizing off-reservation diversion of the Tribal Water Right are fundamentally fair, adequate and reasonable.

b. Marketing, Off-Reservation Use, and the Indian Non-Intercourse Act

The Objectors have stated that based upon cases such as New Mexico, 438 U.S. 696, 699 (1978), Walton, 647 F.2d 42, 48 (1981), Cappaert, 426 U.S. 128 (1976), and Winters, 207 U.S. 564 (1908) “[t]here is no legal authority for removing the reserved right from the reservation.” Objector

Weimer's Brief in Support of Motion for Summary Judgment, p. 10. Objector Flygt states that she is "unaware of any standard which attaches marketability and off-reservation use to a reserved water right established by Congress." Objector Flygt's Motion for Partial Summary Judgment and Brief in Support, p. 12. Objector Flygt also contends that such off-reservation use conflicts with the "primary purpose doctrine" as set forth in Winters and subsequent cases, in that the primary purpose of the Fort Peck Reservation should be interpreted as providing a means for the Tribes to become "a pastoral and agricultural people." Id. at 7.

The federal courts have not yet conclusively decided whether Indian reserved water rights may be severed and transferred apart from the land. Some cases suggest that reserved water rights are inseparably appurtenant to the reservation and may not be used elsewhere. *See e.g.* Cappaert, 426 U.S. 128 (1976) and New Mexico, 438 U.S. 696, 699 (1978). Other cases, however, suggest that once quantified, Indian reserved water rights are vested property rights which the Indians may use and transfer in any lawful manner. *See e.g.*, Walton, 647 F.2d 42 (1981) and Arizona, 373 U.S. 546 (1963).

The Objectors also contend that the Indian Non-Intercourse Act of April 12, 1901, 25 U.S.C. 177, prevents the off-reservation use, and specifically marketing, of reserved water rights. The Act provides that:

No purchase, grant, lease, or other conveyance of *lands*, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. (Emphasis added)

25 U.S.C.S. § 177 (2001). The consent of the United States is required for such transactions to be effective. *See e.g.* County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985), *reh den.* 471 U.S. 1062 (1985).

Article III(J) of the Compact expressly prohibits the *permanent* alienation of any part of the Tribal Water Right, either on or off the Reservation, and Article III(K) authorizes the Tribes to

transfer a portion of the Tribal Water Right only “as authorized by federal law and this Compact.” Accordingly, an off-reservation transfer will happen only if Congress authorizes it to happen.<sup>49</sup> If a future off reservation transfer is prosecuted without the authorization of federal law and the Compact, then any aggrieved person has recourse to the appropriate judicial system.

Objectors are correct that no federal authority exists that explicitly discusses the off-reservation use and marketing of Indian reserved water rights. However, the Objectors present no direct, binding authority prohibiting off-reservation use and marketing of these rights as provided in the Compact, and the Court has found none. These cases allow for the reservation of appurtenant water rights. None of the United States Supreme Court cases cited by the Objectors include a ruling on whether a reserved water right may be used or marketed off the reservation.

The Water Court finds that extension of the Reserved Water Rights Doctrine to off-reservation uses and marketing in Article III of the Compact is neither supported by, nor prohibited by, controlling federal law. Recognizing this fact, the parties chose to avoid the risk of litigation by negotiating the issues through the Compact process. As stated above in Section IV(D) of this Memorandum, in the absence of clear federal authority prohibiting the Compact provisions, the Compacting Parties are within their authority to create such provisions.

The State and the Tribes recognized the potential impact the right to transfer part or all of an Indian reserved water right for off-reservation use could have on those holding state water rights.<sup>50</sup> To protect those state water rights, the Compacting Parties included certain restrictions in the Compact. The Tribal Report, pages 18-23, summarizes these restrictions as set forth above in

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<sup>49</sup> According to one commentator, the Compact was specifically structured to avoid the necessity for immediate congressional approval for fear that downstream Missouri River states would withhold their consent due to the potential implications of the Compact's water awards on their future water supply. *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 Ariz. L. Rev. 195, n. 215.

<sup>50</sup> The Water Court notes that the junior water rights owned by the Objectors are diverted from unnamed tributaries to tributaries of the Missouri River many miles upstream from the Fort Peck Indian Reservation.

Section IV(D)(4)(a) of this Memorandum.

Paragraph 2 of Article III, Section J authorizes legal challenges to proposed off-reservation uses within 30 days after expiration of the notice given the State by the Tribes, in a court of competent jurisdiction, by the State or a person whose rights are adversely affected by the diversion or proposed use. If a court case is brought, the Tribes have the initial burden of proving by a preponderance of the evidence that the notice was sufficient to show the above five items. Pursuant to Article II(23), the notice given to the State by the Tribes will be provided to the Director of the State Department of Natural Resources and Conservation. Again, the Court has no reason to conclude that the Director would not promptly provide personal notice to potentially affected state-based water users.

Although the Compacting Parties were free to negotiate the provisions regarding off-reservation use and marketing of the Tribal Water Right due to the absence of federal or state law to the contrary, these notice provisions and limitations in the Compact confer additional protection for any state-based water users that could potentially be affected by such off-reservation diversions. The Court recognizes the extensive restrictions placed on off-reservation transfers. In light of the absence of federal law to the contrary, and considering the notice provisions in the Compact and additional restrictions on off-reservation marketing, the Water Court concludes that the provisions set forth in Article III (D), (E), (F), (G), (I), (J), and (K) authorizing transfers of the Tribal Water Right for off-reservation use are not in violation of federal law or policy, are within the authority of the legislature, and are fundamentally fair, adequate and reasonable.

##### 5. Equal Protection

Finally, the Objectors contend that Article IV(A) violates the Equal Protection Clause of the Montana Constitution, because if applied as agreed, it would subordinate the Tribal Water Right to *some* junior state water rights on *some* watersheds, but not all junior state-based water rights on all

watersheds.

Equal Protection of the law requires that all persons be treated alike under like circumstances. Classification of persons is allowed as long as it has a permissible purpose. Billings Assoc. Plumbing, Heating, & Cooling Contractors v. Bd. Of Plumbers, 184 Mont. 249, 602 P.2d 597 (1979), *citing* Montana Land Title Ass'n v. First Am. Title, 167 Mont. 471, 539 P.2d 711 (1975) and United States v. Reiser, 394 F. Supp. 1060 (D.C. Mont. 1975), reversed on other grounds by United States v. Reiser, 532 F.2d 673 1976. The applicable test is whether the classification is rationally related to a legitimate governmental interest. Montana Const. D & F Sanitation Serv. v. Billings, 219 Mont. 437, 713 P.2d 977 (1986).

The Objectors admit that any injury they may suffer as a result of not being included among the protected junior state water uses is merely potential and not actual. They have not yet received a “call” for their water and, given the facts, they probably never will. As the State points out, “[g]iven the extremely small size of Mr. Weimer's and Mrs. Flygt's claims, the odds that the Tribes would bother to exercise a call against them are extremely small. The fears of Mr. Weimer and Mrs. Flygt that the Tribes would seek to secure water from [an unnamed tributary] to Dry Armelles Creek, and an unnamed tributary of Seven Blackfoot Creek, both ephemeral streams, rather than from the adjacent Fort Peck Reservoir, are simply illogical.”<sup>51</sup>

The Tribes emphasize this remoteness and further argue that under the Compact they could only make an upstream call in a year when they are actually using the water, when storage in the Fort Peck Reservoir is unavailable, and the flows of the Missouri River are less than one million acre-feet i.e. less than one-quarter of the lowest flows for any year on record (in the drought of the 1930s).<sup>52</sup>

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<sup>51</sup> State of Montana's Memorandum in Support of Motion to Dismiss Objections and to Approve Fort Peck-Montana Compact, filed March 10, 1997, p. 4, n. 1.

<sup>52</sup> Assiniboine and Sioux Tribes of the Fort Peck Reservation Responsive Memorandum of the Fort Peck Tribes to Objectors, filed April 15, 1997, p. 5.

Although the Objector's standing to raise the constitutionality of the subordination provisions of the Compact is questionable, Olson v. Dept. of Revenue, 223 Mont. 464, 469-470, 726 P2d 1162 (1986), *citing* Chovának v. Mathews, 120 Mont. 520, 188 P.2d. 582 (1948), the Court will discuss this matter further.

More of the reasoning behind the subordination provisions is described by D. Scott Brown in his Affidavit, filed with the Water Court on March 10, 1997:

The Compact Commission's studies indicated that on the Milk River and the "north-south tributaries" (i.e. Porcupine Creek, Poplar River, Big Muddy Creek, Little Porcupine Creek, Wolf Creek, Tule Creek and Chelsea Creek), it would be difficult to protect existing users -- most of whom had priority dates junior to the Tribe -- and recognize the Tribal Water Right. In fact, most existing users on those streams already experienced shortages even without the addition of potential new uses. Devising a method to allow for the protection of those junior users thus became one of the main priorities of the Compact Commission in further negotiations.

In an effort to secure such protections, the Compact Commission and Tribes agreed to shift any new tribal uses away from the Milk River and the "north-south tributaries" toward the Missouri River, where there was available unappropriated water. The general approach that was settled on was to secure protections for water users on the Milk River and "north-south tributaries" by providing the tribes with greater flexibility to market and use its Missouri River water.

The Tribes agreed to negotiate the issue because of the importance they attach to off-reservation marketing of their water, and because they recognized that a Compact must provide some protection for existing uses to be politically acceptable, even if successful litigation would not have protected those uses.<sup>53</sup> While it was apparently worth subordinating part of their Tribal Water Right to a *limited* number of existing uses on a *limited* number of sources, it would be unreasonable to expect the Tribes to do the same for *all* existing junior uses on *every* water source that "might" be influenced by the exercise of the Tribal Water Right. Requiring all concessions to be applied equally across-the-board would unduly restrict and likely defeat the negotiation and settlement process.

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<sup>53</sup> Tribal Report, p. 32

Forced to choose, it was rational and reasonable for the State to protect junior water users on the north-south tributaries with perennially low flows that surely would be displaced by the exercise of the Tribal Water Right, over the junior water users on the abundant mainstem of the Missouri River or its intermittent tributaries that are many miles away and whose potential for injury is very remote.

The subordination provisions of Article IV are the result of a negotiation process intended to serve the legitimate governmental purpose of completing the state-wide adjudication process as quickly and efficiently as possible, thereby providing certainty and finality for all water users and developers. Accordingly, the Water Court concludes that the subordination provisions of Article IV do not violate the Equal Protection clause of the Montana Constitution.

## **VI. FUNDAMENTAL FAIRNESS OF COMPACT AS A WHOLE**

After more than four years of intense, adversarial negotiations, the Fort Peck-Montana Compact was concluded “finally and forever” determining the Tribal Water Right of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. The Compact was authorized by federal and state law, negotiated by competent professionals experienced in the field of water resource law and knowledgeable about the water needs of the State and the Reservation. They in turn were advised by competent specialists in the field of water resource analysis and water law. The investigation conducted by the parties and their specialists was comprehensive, involving extensive research and surveys, data interpretation, soil and water analysis, financial analysis and numerous calculations and projections.

It is clear that the Compact is not the product of fraud or overreaching by or collusion between the Compacting Parties. The factual and legal positions of the parties were vigorously debated and often seemed irreconcilable. In 1983, the first proposed Compact was rejected by the Governor’s office, and negotiations broke off altogether. Negotiations commenced one year later, and additional concessions to resolve disputed issues were made on both sides of the negotiating

table.

A careful balancing of various facts went into settling the final Compact. Potential adverse effects on the State, the Tribes and the junior state water uses were fairly considered, and a number of reasonable provisions were ultimately included to protect against such effects. Out of over 6,200 potentially effected water users who received notice of the Compact, only three objections were filed, and one of those objections was subsequently dismissed for the objector's lack of standing.

None of the provisions of the Compact are prohibited by federal law or policy. The goals of finally and conclusively quantifying the Tribal Water Right and completing the Montana comprehensive water right adjudication substantially outweigh the minimal potential for injury to the Objectors' remote, junior water rights. The Compact has been ratified by the Montana Legislature, approved by the Governor, ratified by the Fort Peck Tribal Executive Board, and approved by the United States Departments of Justice and Interior. The Compact as a whole carries a strong presumption of fairness, adequacy, and reasonableness.

Just as this Court concluded in its "Order to Confirm and Approve the Northern Cheyenne Tribal Water Right contained in the Northern Cheyenne Compact," filed August 3, 1995, this Compact resolves legal issues and rights that began over one hundred years ago and achieves an end result that could never be reached were the Tribal Water Right litigated before this Court. Like the Northern Cheyenne Compact, the Fort Peck-Montana Compact is a remarkable achievement for a settlement process created in 1979 as an untried, first of its kind concept, and it validates the confidence reposed by the 1979 Legislature in the Reserved Water Rights Compact Commission, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, and the United States that good faith negotiations can achieve solutions to difficult problems.

## VII. SUMMARY JUDGMENT

### A. Standard of Review for Summary Judgment

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), M.R.Civ.P. In applying the standard, all reasonable inferences are viewed in the light most favorable to the party opposing summary judgment. Erker v. Kester, 296 Mont. 123, 988 P.2d 1221, 1224 (1999). However, the facts presented in opposition must be of a substantial and material nature. Brothers v. General Motors, 202 Mont. 477, 658 P.2d 1108 (1983). Speculation is not sufficient to raise a genuine issue of material fact. Cheyenne Western Bank v. Young, 179 Mont. 492, 587 P.2d 401 (1978); State v. DeMers, 192 Mont. 367, 628 P.2d 676 (1981). Absent affirmative evidence to defeat the motion, the motion is properly granted. In re Estate of Lien, 270 Mont. 295, 892 P.2d 530 (1995), *overruled* on other grounds in Estate of Daniel G. Bradshaw, 305 Mont. 178, 24 P.3d 211 (2001).

### B. Discussion

The issues set forth in the cross motions for summary judgment have been addressed in the above discussion concerning the objections to the Compact, and such discussion is incorporated herein. The Objectors in this case have failed to prove by more than mere speculation that any genuine issues of material fact remain for the Montana Water Court to decide. The Objectors have failed to provide the affirmative evidence necessary to defeat the motion and overcome the strong presumption of reasonableness, fairness, and legal sufficiency this Compact carries with it.

All negotiations and adjudications quantifying Indian reserved water rights involve extensive and complex disputed issues of facts and law. They inherently involve competing interests in a scarce resource, the allocation of which must be determined by ambiguous, perhaps anachronistic

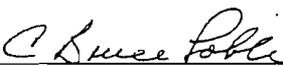
law, evolving governmental policies, and increasingly sophisticated science – all amidst rapidly changing circumstances, within the confines of a complex adjudication process. That is precisely the incentive for the negotiation and settlement of complex water right adjudications.

In the negotiation process, the uncertainties inherent in the determination of the Assiniboine and Sioux Tribal Water Right were employed by the parties as tools to gain leverage and bargaining power. Compromise moved the process forward.<sup>54</sup> In exchange for saving the cost and inevitable risk of litigation, the parties each gave up something they might have won in trial at the Montana Water Court.<sup>55</sup> In the settlement process, the parties resolved to their own satisfaction all of the remaining issues of fact and law. It is not for the Montana Water Court to re-negotiate those disputes or rule on their merits.

### CONCLUSION

For the reasons set forth above and further detailed in the submissions of the parties, the Court has entered its Order Approving and Confirming the Fort Peck-Montana Compact and dismissing the objections thereto.

DATED this 10 day of August, 2001.



\_\_\_\_\_  
C. Bruce Loble  
Chief Water Judge

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<sup>54</sup> See e.g. SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984), citing United States v. Armour & Co., 402 U.S. 673, 681 (1971).

<sup>55</sup> Armour, *supra*, at 681

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D N R C

IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE RIVER DIVISION  
SPECIAL NORTHERN CHEYENNE COMPACT SUBBASIN

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION )  
OF EXISTING AND RESERVED RIGHTS TO )  
THE USE OF WATER, BOTH SURFACE AND )  
UNDERGROUND, OF THE NORTHERN )  
CHEYENNE TRIBE OF THE NORTHERN )  
CHEYENNE INDIAN RESERVATION WITHIN )  
THE STATE OF MONTANA IN BASINS )  
42A, 42B, 42C, 42KJ, & 43P )  
\_\_\_\_\_ )

CAUSE NO. WC-93-1

FILED

JUL 24 1995

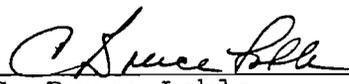
Montana Water Court

ORDER

This Matter is before the Court on the joint motions of the State of Montana, the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation and the United States of America for the entry of a decree confirming the Northern Cheyenne Tribal Water Right in accordance with the Northern Cheyenne - Montana Compact.

For reasons that will be set forth in a memorandum to be filed later, the Northern Cheyenne Tribal Water Right contained in the Northern Cheyenne - Montana Compact is hereby CONFIRMED and APPROVED.

DATED this 24<sup>th</sup> day of July, 1995.

  
\_\_\_\_\_  
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Chief Water Judge

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IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE RIVER DIVISION  
SPECIAL NORTHERN CHEYENNE COMPACT SUBBASIN

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION )  
OF EXISTING AND RESERVED RIGHTS TO )  
THE USE OF WATER, BOTH SURFACE AND )  
UNDERGROUND, OF THE NORTHERN )  
CHEYENNE TRIBE OF THE NORTHERN )  
CHEYENNE INDIAN RESERVATION WITHIN )  
THE STATE OF MONTANA IN BASINS )  
42A, 42B, 42C, 42KJ, & 43P )

CAUSE NO. WC-93-1

**FILED**

AUG 3 1995

**Montana Water Court**

MEMORANDUM OPINION

THIS MATTER came before the Court upon the motions of the State of Montana [State], the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation [Tribe] and the United States of America [United States] to commence proceedings to review and approve the Northern Cheyenne-Montana Compact. The Court, based upon the submissions and stipulations of the parties, and being otherwise fully advised in the premises, hereby FINDS, CONCLUDES, and ORDERS as follows:

PROCEDURAL HISTORY

The State of Montana and the Northern Cheyenne Tribe of the Northern Cheyenne Reservation have reached a water rights compact in accordance with Mont. Code Ann. § 85-2-702. The Northern Cheyenne-Montana Compact was ratified by the Montana Legislature, see 1991 Mont. Laws, ch. 812, § 1, (codified at Mont. Code Ann. § 85-20-301) and with some modifications was "approved, ratified, and confirmed" by the Congress of the United States as a part of the "Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992," Pub. L. 102-374, 106 Stat. 1186, § 4(a)

[the Federal Act]. By a resolution of the Northern Cheyenne Tribal Council and a referendum held in accordance with § 13 of the Federal Act, the Northern Cheyenne Tribe provided its consent to the Compact as modified by the Federal Act. In accordance with Article V, section A.1. of the Northern Cheyenne-Montana Compact the Montana Legislature consented to the modifications contained in the Federal Act, see 1993 Mont. Laws (Nov. 1993 Sp. Sess.) ch. 7, § 1, [HB 74]. Hereinafter, the Northern Cheyenne-Montana Compact, as modified, will be referred to as "the Compact."

On January 19, 1994 the Court entered its Findings of Fact, Conclusions of Law, Order for Commencement of Special Proceedings for Consideration of the Northern Cheyenne-Montana Compact.

On January 19, 1994 the Court entered its Order directing the Department of Natural Resources and Conservation to serve the Notice of Entry of Northern Cheyenne Compact Preliminary Decree and Notice of Availability [Notice of Availability], together with a basin specific general description of the Tribal Water Right, on approximately 3500 entities. On February 24, 1994 the DNRC filed its Certificate of Mailing indicating compliance with that Order.

The Notice of Availability was published in accordance with Mont. Code Ann. § 85-2-232 at least once each week for three consecutive weeks in at least three newspapers of general circulation covering the water division in which the Tribal Water Right is located. In fact, the Notice of Availability was properly published in the following newspapers: the *Billings Gazette*, the *Big Horn County News*, the *Hysham Echo*, the *Miles City Star*, The *Terry Tribune* and the *Sidney Herald-Leader*.

Ten objections to the Compact were filed with the Court. All ten objections were eventually withdrawn by the objectors and no objection to the Compact remains outstanding. No objection to the Compact filed in the Water Court has been sustained.

Following the withdrawals of objections, the parties filed submissions including the following affidavits: (1) Robert Delk, Chief of Water Resources Branch, Billings Area Office, Bureau of Indian Affairs, United States Department of Interior; (2) Chris D. Tweeten, Chairman of the Montana Reserved Water Rights Compact Commission; and (3) Susan Cottingham, currently the Program Manager for the Montana Reserved Water Rights Compact Commission and formerly the Northern Cheyenne Technical Team leader during the negotiations between the Compact Commission and the Northern Cheyenne Tribe.

On July 24, 1995 this Court issued its Order confirming and approving the Tribal Water Right contained in the Compact. The Order indicated that the Court would set out its reasons in a later filed memorandum. This is that memorandum.

#### DISCUSSION

After years of negotiation, the State of Montana, the Northern Cheyenne Tribe and the United States of America concluded a water right compact defining the Tribal Water Right of the Northern Cheyenne Tribe. This compact was approved and ratified by the Montana Legislature, the Northern Cheyenne Tribal Council, the Northern Cheyenne tribal members through referendum, the United States Congress and the President of the United States of America. It is now before the Montana Water Court by virtue of state law and the Federal Act.

All objections to the Compact have been withdrawn and no objection has been sustained. The Court has carefully read the Compact, the Federal Act and all submissions of the parties. The Court has two options here. It may approve the Compact or declare it void. Mont. Code Ann. § 85-2-233. Nothing has been presented in this proceeding to convince the Court that the Compact should be declared void. The Court is satisfied that the Compact is fundamentally fair, adequate, reasonable and conforms to applicable law.

The State raised three issues in its March 13, 1995 Memorandum in Support of Motion for Approval of Northern Cheyenne/Montana Compact. The issues raised by the State, each of first impression, are as follows: (1) what is the scope of the Court's power to review the Compact, particularly given that there are no remaining objections; (2) what is the standard that the Court should employ in such a review; and (3) does the Northern Cheyenne - Montana Compact meet that standard and thus warrant approval.

Without opposition and arguments to the contrary being presented on these issues, the Court's first thought was that such an exercise might be of doubtful assistance.<sup>1</sup> However, under the rationale of *Scribimus Indocti Doctique*, the Court will briefly address these issues.

The State suggests that the Court's authority to review the Compact is limited to those provisions which determine or interpret the Tribal Water Right -- as opposed to those

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<sup>1</sup> See the language of the Honorable Simeon E. Baldwin cited in Mettler v. Ames Realty Co., 61 Mont. 152, 166, 201 Pac. 702 (1921).

provisions which, for example, delineate the powers of the Tribe or the State with respect to the administration or management of the Tribal Water Right. The State supports its position with reference to Mont. Code Ann. §§ 3-7-224 and 85-2-216 that the Court's jurisdiction is limited to " . . . all matters relating to the determination of existing water rights within the boundaries of the State of Montana."

Although the Court appreciates and understands the theory of this argument, the Court is not willing to embrace this concept in a proceeding in which no objections remain outstanding.<sup>2</sup> The problem of limiting the Court's review of a compact to the water right component is that it ignores the fact that a compact is a negotiated settlement in which some or all components are contingent upon each other. A contingent non water component could relate to the determination of the existing rights. Conceivably, one non water right component could be so grievous in application that the water right component could be rendered meaningless.

The terms of the statute cited by the State, "all matters relating to the determination of existing rights," arguably are quite broad. Judicial analysis on a case by case may be necessary in the future to define the Court's limitations. It is not necessary to do so in this proceeding.

The State next contends that absent objections, the Court is still obligated to review the Compact and not just automatically approve it. The Court agrees with the State on this issue. State law contemplates a Court review of compacts and it is quite clear

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<sup>2</sup> The Court recognizes limitations do exist on its permitted review of a Compact. See, for example, the Court's Memorandum and Order in this case filed December 10, 1993 at page 2.

that Congress intended the Montana Water Court to review the Compact. Indeed, section 4(c) and 4(d) of the Federal Act refers specifically to the Montana Water Court and withholds Congressional authorization to expend several million dollars until this Court enters and approves an appropriate decree.

What then is the scope of the Court's review in the absence of an objection to the Compact? Citing language found in Mont. Code Ann. § 85-2-701, the State recommends that the Court's standard of review should be to determine whether the Compact provides for an "equitable division and apportionment of waters" between the state and its people and the Northern Cheyenne Tribe. The State further suggests that the Compact is closely analogous to a consent decree and that the principles articulated in several decisions of the 9th Circuit Court of Appeals should apply.

In United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990) Cert. denied *sub nom.* Makah Indian Tribe v. United States, \_\_\_ U.S. \_\_\_, 111 S.Ct. 2889, 115 L.Ed. 2d 1054 (1991), the Court noted that before approving a consent decree, ". . . the court must be satisfied that it is at least fundamentally fair, adequate and reasonable [and] . . . because it is a form of judgment, a consent decree [must] conform to applicable laws." In Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 625 (9th Cir. 1982), the Court held that "[t]he relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case."

This Court will utilize the foregoing principles as its

standard of review for this Compact. In reviewing the Compact, however, it is obvious that it is not a typical settlement agreement between competing water right litigants. In addition to the parties, this Compact has been reviewed and ratified by the Montana Legislature, the United States Congress and the President of the United States. Without any objections remaining, it carries a strong presumption of reasonableness, fairness, and legal sufficiency.

It's possible that different people might have differing opinions on the individual components of the Compact. Some might say "It's too much" and others might say "It's too little." But taken as a whole, the Compact represents a fair settlement of a difficult problem. The affidavits of Chris D. Tweeten and Susan Cottingham outline the "give and take" nature of this negotiated settlement. The affidavit of Robert Delk represents that the Tribal Water Right is founded on reliable data. The Court has relied heavily on those affidavits in reaching its conclusion.

Prior to the Compact, the factual and legal basis for the elements of the Tribe's reserved water right were in dispute. It is clear that a careful balancing of various factors went into the formulation of the Compact. For example, the State agreed to the Tribe's priority date of 1881 rather than asserting an 1884 or 1900 priority date in large part because the actual use of the Tribal Water Right was to be subordinated to most non-Indian water uses in the affected basins. [Tweeten Aff., para. 4(a)].<sup>3</sup> The State

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<sup>3</sup> Continuation of this subordination depends upon the reconstruction of the Tongue River Dam and its continuance as a viable reservoir. To accomplish the reconstruction goal more than half of the estimated \$52 million Tongue River Dam Project cost is to be provided from a Federal contribution. See § 7 of the Federal

asserts that it agreed to the 1881 priority date only after being satisfied that the subordination provisions provided non-Indian water users with an equivalent, if not better, level of protection than if the Tribal priority date were set at 1900. [Tweeten Aff., supra].

In summary, this Compact resolves issues that began over one hundred years ago and appears to resolve a dam problem that has hindered Tongue River water users for several years. It is a remarkable achievement for a settlement process created in 1979 as an untried, first of its kind concept. This Compact, coupled with the passage of the Federal Act, achieves an end result that could never be reached were the Reserved Tribal water right litigated before this Court. This Compact validates the confidence reposed by the 1979 Legislature in the Reserved Water Rights Compact Commission and the Northern Cheyenne Tribe that good faith negotiations can achieve solutions to difficult problems.

This Court finds no reason that overcomes the strong presumption of reasonableness, fairness, and legal sufficiency that this Compact carries with it. It provides for an "equitable division and apportionment of waters" between the parties and does so in conformity with applicable laws.

#### ORDER

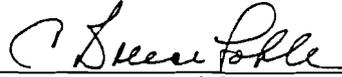
It is for the reasons set forth above and further detailed in the submissions of the parties that the Court entered its July 24, 1995 Order to CONFIRM and APPROVE the Northern

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Act. The long term viability of the project will be enhanced by a continuing Federal proportionate share of the annual operation, maintenance and replacement costs for the dam allocated on the basis of the Tribe's stored water in the reservoir. See § 10 of the Federal Act.

Cheyenne Tribal Water Right contained in the Northern Cheyenne -  
Montana Compact.

DATED this 3<sup>RD</sup> day of August, 1995.



---

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Chief Water Judge

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IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER AND LOWER MISSOURI RIVER DIVISIONS  
ROCKY BOY'S COMPACT SUBBASIN

\*\*\*\*\*

IN THE MATTER OF THE ADJUDICATION )  
OF EXISTING AND RESERVED RIGHTS TO )  
THE USE OF WATER, BOTH SURFACE AND )  
UNDERGROUND, OF THE CHIPPEWA CREE )  
TRIBE OF THE ROCKY BOY'S RESERVATION )  
WITHIN THE STATE OF MONTANA )  
\_\_\_\_\_ )

CASE NO. WC-2000-01

**FILED**

JUN 12 2002

**Montana Water Court**

MEMORANDUM OPINION  
CHIPPEWA CREE TRIBE-MONTANA COMPACT

PROCEDURAL HISTORY

In January 1997, the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation reached an agreement in accordance with § 85-2-702, MCA. After five years of research, analysis, revisions, meetings and negotiations, the Chippewa Cree Tribe-Montana Compact ("the Compact") was ratified by the Tribe on February 21, 1997; approved by the Montana State Legislature on April 10, 1997; signed by the Governor of Montana and the Chippewa Cree Tribal Chairman on April 14, 1997, making it the third such "government-to-government" compact to be completed between an Indian Tribe and the State of Montana. The Compact is codified at Mont. Code Ann. § 85-20-601.

The federal Act ratifying the Compact, "the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999,"

("Federal Settlement Act") was passed by both houses of Congress and signed by the President on December 9, 1999. P.L. 106-163, 113 Stat. 1778 (1999).

On February 15, 2000, pursuant to Section 101(b)(1) of the Federal Settlement Act, the State of Montana, the Chippewa Cree Tribe, and the United States of America ("Settling Parties") jointly filed in this Court a Motion for Incorporation of Rocky Boy's Compact into Preliminary and Final Decrees and for a consolidated Hearing on Any Objections to Such Compact.<sup>1</sup> On April 27, 2000, the Court entered its Findings of Fact, Conclusions of Law, Order for Commencement of Special Proceedings for Consideration of the Rocky Boy's Compact and thereby granted the motion. On April 27, 2000, the Montana Department of Natural Resources and Conservation ("DNRC") mailed a Notice of Availability and the Summary Description of Water Right to approximately 3,750 water users in all of the basins comprising the Rocky Boy's Compact Subbasin in accordance with § 85-2-233, MCA, which included Big Sandy Creek (Basin 40H), Milk River (Basin 40J), Marias River (Basin 41P), and Willow Creek (Basin 41N), collectively referred to as the Special Rocky Boy's Compact Subbasin.<sup>2</sup> Objections were required to be filed by October 24, 2000.

Seventeen objections to the Rocky Boy Compact were filed.<sup>3</sup> Eight Objections were subsequently withdrawn.<sup>4</sup> On December 4, 2001, the Court granted the Settling Parties' motion to

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<sup>1</sup> Section 101(b)(3) of the Federal Settlement Act states that if "the approval by the appropriate court, including any direct appeal, does not become final within 3 years after the filing of the decree," the "approval, ratification, and confirmation of the compact by the United States shall be null and void," and with certain exceptions, the "Act shall be of no further force and effect." Since the Settling Parties filed the Compact and proposed decree with this Court on February 15, 2000, the applicable deadline is February 14, 2003.

<sup>2</sup> See Order Designating the DNRC to Mail Notice of Entry of Rocky Boy's Compact Preliminary Decree and Notice of Availability (April 18, 2000). In addition, On June 2, 2000, the Court directed the DNRC to mail postcards to these same persons identifying two corrections to the Summary Description.

<sup>3</sup> See Notice that Objections have been Filed and Hearings Requested (November 9, 2000).

<sup>4</sup> See Orders Dismissing Objection of: Aaron Pursley and Roger L. & Gaye L. Genereux (Jan. 30, 2001); Haney L. Keller (Mar. 23, 2001); Richard N. Looby, Wesley Berlinger, and Wilfred A. Berlinger (Jun. 8, 2001); Brian G. Berlinger (Jun. 13, 2001); and Ronald W. Butler (Sept. 21, 2001).

dismiss Eric Fjelde on the grounds that Mr. Fjelde did not file an objection in this case.<sup>5</sup> On January 25, 2002, the Court ordered the dismissal of the objection of Hjortur Hjartarson, *dba* H & J Quarter, Inc.<sup>6</sup>

On February 1, 2002, the Settling Parties moved the Court for summary judgment (1) to approve the Chippewa Cree Tribe-Montana Compact pursuant to §§ 85-2-234 and 85-2-702(3), MCA and 43 U.S.C. §666, and Art. VII(B) of the Compact; and (2) to grant summary judgment in favor of the Settling Parties dismissing the remaining seven objections. On the same date, the Settling Parties also filed a Motion in Limine . . . Concerning Evidence to be Brought Before the Court. Answer and reply briefs were filed.

On April 18, 2002, the Montana Water Court held a pre-hearing conference and a hearing on the motions at the Chouteau County Courthouse, in Fort Benton, Montana. Present were Lyle K. Ophus; Sam J. Bitz, *dba* Rocky Crossing Ranch Co.; Lisa Swan Semansky, representing Bitz, *dba* Rocky Crossing Ranch Co., and for purposes of the hearing, Keith H. Rhodes; Candace West, Ass't Attorney General for the State of Montana; Susan Schneider, Attorney for the United States Department of Justice, and Richard Aldrich, Field Solicitor, representing the United States; Yvonne T. Knight, attorney for the Native American Rights Fund, and Daniel D. Belcourt, attorney for the Chippewa Cree Tribe, both representing the Tribe; and Faye Bergan, attorney for the Montana Reserved Water Rights Compact Commission. Affidavits were filed, testimony and evidence was taken, and oral arguments on the pre-hearing motions were heard. The Court dismissed the request of Mr. Bitz, *dba* Rocky Crossing Ranch Co., to withdraw or amend admissions deemed pursuant to

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<sup>5</sup> See Order Granting Motion For Dismissal of Eric Fjelde (Dec. 4, 2001).

<sup>6</sup> Order Granting Motion for Partial Summary Judgment and Dismissing Objection of Hjortur Hjartarson, *dba* H & J Quarter, Inc. (Jan. 25, 2002).

Rule 36, M.R.Civ.P., for his failure to respond to discovery requests. The matter was fully submitted.

On May 22, 2002, the Court entered its Order Approving Compact for reasons that would be set forth in a future memorandum. This is that future memorandum.

### JURISDICTION

The Montana Water Court has jurisdiction to review the Chippewa Cree Tribe-Montana Compact under the authority granted by the McCarran Amendment of 1952 (43 U.S.C. § 666); authority granted in §§ 85-2-231, 85-2-233 and 234, 85-2-701 and 702, MCA; and Section B of Article VII of the Chippewa Cree Tribe-Montana Compact. *See also* Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 564 (1983), and State ex rel. Greely v. Confederated Salish & Kootenai Tribes (“Greely II”), 219 Mont. 76, 89, 712 P.2d 754 (1985). In adjudicating federal or Indian reserved water rights, this Court must apply federal law. San Carlos Apache, 463 U.S. at 867; Colorado River Water Conservation District v. United States, 424 U.S. 800, 812-813 (1976); Greely II, 219 Mont. at 89, 95.

### STANDARD OF REVIEW

This Court previously concluded in its August 10, 2001 Memorandum and Order Approving Fort Peck-Montana Compact (Fort Peck Memorandum) that a compact negotiated, ratified, and approved pursuant to the authority and procedures set forth in § 85-2-702, MCA, is closely analogous to a consent decree, in that it represents a voluntary, negotiated settlement between parties that is subject to continued judicial policing. *See e.g.*, United States v. Oregon, 913 F.2d 576, 580 (9<sup>th</sup> Cir. Ore.1990), *cert. denied sub nom.* Makah Indian Tribe v. United States, 501 U.S. 1250 (1991). The following description of consent decrees by the United States Supreme Court illustrates the similarities:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation. . . . [T]he parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

United States v. Armour & Co., 402 U.S. at 681-82.

Essentially, in reviewing a consent decree, "a . . . court must be satisfied that [the settlement] is at least fundamentally fair, adequate and reasonable, [and] because it is a form of judgment, a consent decree must conform to applicable laws." State of Oregon, 913 F.2d at 580.<sup>7</sup> The review and resulting decree is not a "decision on the merits or the achievement of the optimal outcome for all parties," nor must it "impose all the obligations authorized by law." Id. at 580, 581. Rather, it is a *limited* review, the extent and limitations of which have been described by the Ninth Circuit Court as follows:

[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be *limited* to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators. (Citations omitted) Ultimately, the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.'

Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 625 (9th Cir. Cal. 1982), *cert denied*,

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<sup>7</sup> See also Davis v. City and County of San Francisco, 890 F.2d 1438, 1445 (9th Cir. Cal. 1989); SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. Cal. 1984).

Byrd v. Civil Service Commission, 459 U.S. 1217 (1983).

While the review is intended to be limited, it requires more than automatic incorporation of the proposed compact into a decree.<sup>8</sup> As the Ninth Circuit Court further explained in Officers for Justice:

The . . . court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. (Citations omitted) This is by no means an exhaustive list of relevant considerations, nor have we attempted to identify the most significant factors. The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claims advanced, the types of relief sought, and the unique facts and circumstances presented by each individual case.

688 F.2d at 625.

The purpose of this kind of judicial review is not to ensure that the settlement is fair or reasonable between the negotiating parties, but that it is fair and reasonable to those parties and the public interest who were not represented in the negotiation, but have interests that could be materially injured by operation of the compact. State of Oregon, 913 F.2d at 581. Where an objector can establish standing, i.e. "good cause," to object to the compact, the responsibility of the Court to protect those interests is heightened, and the Court's level of inquiry should be commensurate with the potential degree of injury. Id., and Fort Peck Memorandum pp. 7-8.

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<sup>8</sup> This Court is not bound by stipulations filed by the parties in the statewide adjudication. See analysis in Memorandum on Anderson and Harms Amended Stipulation, Water Court Case WC-90-1, September 7, 2000, incorporated herein by reference.

## ISSUES PRESENTED

- I. The Compact: Whether the Compact is in conformance with applicable law, and whether the settlement, taken as a whole, is fair, reasonable and adequate to all concerned?
- II. The Objections: Whether the Objectors have established “good cause” to object, and whether any of the objections invalidate the Compact?
- III. Summary Judgment: Whether there are any genuine issues of material fact, and whether the Settling Parties are entitled to summary judgment as a matter of law?

## DISCUSSION

### I.

#### Winters Doctrine of Indian Reserved Water Rights

Indian reserved water rights were first recognized by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908), where it held that the 1888 Treaty creating the Fort Belknap Indian Reservation in Montana reserved not only land, but impliedly reserved sufficient water to accomplish the purposes of the treaty agreement. 207 U.S. at 577. Recognizing that the “lands were arid, and, without irrigation, were practically valueless,” the Court concluded that Congress, by creating the Indian reservation, impliedly reserved all of the waters of the river necessary for the purposes for which the reservation was created. Id. The Court held:

The power of the Government to reserve the waters [of the Milk River] and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888 [treaty date], and it would be extreme to believe that within a year Congress destroyed the reservation and . . . took from [the Indians] the means of continuing their old habits, yet did not leave them the power to change to new ones.

Id.

Despite the Fjelde family's objections and argument to the contrary, the United States

Supreme Court has repeatedly found that Indian reserved water rights prevail over junior state-based rights in the same water source even when the settlers have made substantial investments in the land and water, developed entire communities, and generated substantial employment in reliance upon federal homestead and state water laws. *See e.g.*, Winters, 207 U.S. at 569-570; Cappaert v. United States, 426 U.S. 128, 138-139 (1976); United States v. Walker River Irrigation Dist., 104 F.2d 334, 339 (9th Cir. Nev. 1939).

In Cappaert, a more contemporary United States Supreme Court decision, the Court summarized the federal reserved water rights doctrine as follows:

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

\* \* \*

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

426 U.S. at 138-139.

#### **Indian Reserved Water Rights in the Montana General Stream Adjudication**

In 1979, the Montana Legislature passed Senate Bill 76 to expressly recognize Indian reserved water rights and incorporate them into the state-wide general adjudication. State ex rel. Greely v. Water Court (“Greely I”), 214 Mont. 143, 146, 691 P.2d 833 (1985). In Greely II, the Montana Supreme Court distinguished between state-based water rights and Indian reserved water

rights and held that “[s]tate-created water rights are defined and governed by state law” and “Indian reserved water rights are created or recognized by federal treaty, federal statutes or executive order, and are governed by federal law.” 219 Mont. at 89.<sup>9</sup> In the absence of controlling federal authority, the Water Court has been instructed to follow the directives of the Montana Supreme Court. Greely II, 219 Mont. at 99-100.

To expedite and facilitate the difficult process of comprehensively and finally determining Indian reserved water rights in Montana, the legislature created a nine-member Montana Reserved Water Rights Compact Commission. Section 2-15-212, MCA. The Commission is charged by the Montana legislature to negotiate “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,” the terms of which are ultimately included in the preliminary and final basin decrees pursuant to Montana law. §§ 85-2-701(1) and 85-2-702, MCA. In this process, the Commission negotiates with the Tribes on a “government-to-government” basis, without representing the interests of any single water user.<sup>10</sup>

The Montana Legislature possesses all the powers of lawmaking inherent in any independent sovereign and is limited only by the United States and Montana Constitutions. *See e.g., Hilger v. Moore*, 56 Mont. 146, 163, 182 P. 477, 479 (1919), and State ex rel. Evans v. Stewart, 53 Mont. 18, 20, 161 P. 309 (1916). As long as the State acts within the parameters of the United States and

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<sup>9</sup> *See also, Confederated Salish & Kootenai Tribes v. Clinch* (“Clinch”), 297 Mont. 448, 451-453, 992 P.2d 244 (1999); In re Application for Beneficial Water Use Permit (“Ciotti”), 278 Mont. 50, 56, 923 P.2d 1073 (1996); and State ex rel. Greely v. Water Court (“Greely I”), 214 Mont. 143, 157-160, 691 P.2d 833 (1985).

<sup>10</sup> *See e.g.,* Governor Marc Racicot's State of Montana Proclamation, March 10, 1993, and Governor Judy Martz' State of Montana Proclamation, June 27, 2001. Barbara A. Cosens, “The 1997 Water Rights Settlement Agreement Between the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Reservation: The Role of the Community and the Trustee,” 16 UCLA J. Env't'l L. & Policy 255, 266 (1997/1998). (“Cosens, 16 UCLA J. Env'tl. L. & Pol'y”)

Montana Constitutions, Montana has broad authority over the administration, control and regulation of the water within its boundaries. Accordingly, if Montana negotiates, approves, and ratifies a compact that grants more water to a reserved water right entity than that entity might have obtained under strict adherence to the “limits” of the Reserved Water Right Doctrine through litigation and does so without injuring other existing water users, the State is effectively allocating and distributing surplus state waters to resolve a dispute. See analysis in Fort Peck Memorandum at 13-15, incorporated herein by reference. In the absence of material injury to existing water users, the merits of such public policy decisions is for the legislature to decide, not the Montana Water Court.

Therefore, in the absence of clear federal authority prohibiting the various Compact provisions and in the absence of demonstrated injury to Objectors by these provisions, compacting parties are within their authority to craft creative solutions to resolve difficult problems caused by ambiguous standards. This Compact is a product of that creative negotiation process.

### Preliminary Review of the Chippewa Cree Tribe-Montana Compact

#### **Introduction**

The Rocky's Boy Reservation is located in north central Montana, with portions of the Reservation extending onto the plains between the Bearpaw Mountains and the Milk River to the north. The Reservation serves as the permanent homeland for over 3,000 Tribal members, with an annual population growth rate in excess of three percent.<sup>11</sup> Unemployment on the Reservation is traditionally high, and many live below the poverty line.<sup>12</sup>

Although historically the Tribe has been economically dependent on agriculture and

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<sup>11</sup> MSE-HKM Engineering, Municipal, Rural and Industrial Water Supply System Needs Assessment, Rocky Boy's Indian Reservation, prepared for the Bureau of Reclamation in 1996, pp. 21-26, as cited in Technical Report Compiled by the Montana Reserved Water Rights Compact Commission (“Commission Technical Report”), p. 11.

<sup>12</sup> Id.

ranching, the potential arable land base is small, its historically irrigated land even smaller, and its water supply scarce.<sup>13</sup> Big Sandy Creek and Beaver Creek, the two major tributary drainages on the Reservation, both flow through a checkerboard of private and Reservation land before leaving the Reservation, making the administration of private and Tribal water rights difficult. Water storage and developed wells are minimal, and the Reservation's existing domestic water supply and distribution system seriously inadequate.<sup>14</sup> Providing water sufficient to make the Reservation a self-sustaining permanent homeland for the Chippewa Cree Tribe, both now and in the future, while protecting the environment and existing water users, was clearly a challenge of monumental proportions.

### Summary of the Compact

In 1979, the Reserved Water Rights Compact Commission commenced negotiations for this Compact by serving a written request to negotiate on the governing body of the Tribe. Affidavit of Chris D. Tweeten ("Tweeten Aff."); *See* § 85-2-702(1), MCA. Active negotiations began in 1992 and involved the Compact Commission (representing the State of Montana), the Chippewa Cree Tribe, and the United States as trustee for the Tribe. The parties formed three teams of official, legal, and technical advisors to conduct the negotiations: the Commission's Rocky Boy's negotiating

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<sup>13</sup> *See e.g.*, Commission Technical Report at 11-12, 20; Affidavit of Ronald E. Billstein ("Billstein Aff."), pp. 2-4; *See generally*, Cosens, 16 UCLA J. Envtl. L. & Pol'y at 268-273; and "Average Annual Precipitation, Montana," USDA, SCS, 1977.

<sup>14</sup> Billstein Aff. at 3-4; and Commission Technical Report at 23-25, 29-30, 38, and Appendices referenced therein.

team,<sup>15</sup> the Tribal Negotiating Committee,<sup>16</sup> and the Federal Negotiation Team.<sup>17</sup> The Chippewa Cree Tribe and the United States agreed to open all negotiations to the public, and the Commission published and mailed notice to interested individuals one to two weeks prior to each negotiating session. Over the course of the negotiations, public meetings in the area were held on October 29, 1992, June 23, 1993, July 19, 1993, November 4, 1993, April 18, 1994, February 27, 1995, March 21, 1995, June 21, 1995, and January 30, 1997. Cosens, 16 *UCLA J. Env't'l L. & Pol'y* at 274-275; Commission Technical Report at 18.

In January of 1997, the State and the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation reached an agreement in accordance with § 85-2-702, MCA. Commission Technical Report at 15. Chris Tweeten, Chairman of the Compact Commission and member of the Commission's negotiating team, described the process as follows:

The Compact negotiations were based on 10-15 years of work by legal and technical professionals with expertise in water resources and related fields. The Compact is a result of 5 years of intensive good-faith negotiations between well-represented parties with dissimilar interests on some important issues. There was extensive public involvement, including numerous public meetings, information sessions and individual meetings with water users. Many ideas that were eventually incorporated

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<sup>15</sup> Initially composed of Chris Tweeten, Chairman of the Compact Commission; Gene Etchart, Senator Mike Halligan (succeeded by Representative Antoinette R. Hagener), Jack Salmond, and Commission staff Barbara Cosens, Legal Counsel; Bill Greiman, Agricultural Engineer; Ariel Anderson, Soil Scientist; Bob Levitan, Hydrologist; and Joan Specking, Historical Researcher. See Affidavit of Susan Cottingham ("Cottingham Aff."), p. 2; and Commission Technical Report at 4.

<sup>16</sup> Initially composed of Rocky Stump, Sr., Chairman, Ray Parker, Jr., Duncan Standing Rock, Jim Morsette (Chairman, 1992), and Joe Big Knife. Affidavit of Jim Morsette ("Morsette Aff."), Exhibit 1.

<sup>17</sup> In the late 1980s, the Department of the Interior established the Department of the Interior Working Group in Indian Water Settlements, composed of five Assistant Secretaries of the Interior (Indian Affairs, Water and Science, Land and Minerals, Parks and Wildlife; and Policy, Management, and Budget) and the Solicitor. On May 7, 1990, the Working Group appointed a federal negotiation team comprised of representatives of the Bureau of Indian Affairs, Bureau of Reclamation, Fish and Wildlife Service, Department of Justice, and Solicitor for the Department of the Interior. The Team was chaired by David Pennington of the BIA. In addition, the Team was supported by consultants and agency technical staff as needed. Memorandum in Support of Settling Parties' Motion for Compact Approval and Summary Judgment, at p. 14, n. 8. While the federal government participates in negotiations through the federal negotiation team, all decisions are made by the Working Group. *Criteria and Procedures*, 55 Fed. Reg. 9, 223 (1990).

into the terms of the Compact were originally proposed by water users. The Compact has been ratified by the State, the Tribe, and Congress. State monies promised under the Compact to fund mitigation measures and provide contract water, have been paid out. Construction of mitigation measures paid for by the State are complete and contract water purchase options are paid for and in place.

Tweeten Aff. at 5.

Article III of the Chippewa Cree Tribe-Montana Compact, codified at § 85-20-601, MCA, quantifies the Tribal Water Right as 20,000 AFY, allocated in amounts by basin and drainage. To facilitate implementation of the Tribal Water Right, and to minimize or mitigate the adverse affect of increased Tribal water use on the environment and on downstream off-reservation water users, the Tribe agreed to limitations on new total depletions in water-short drainages.

In accord with the requirements of § 85-2-702, MCA, the Compact was ratified by the Tribe, approved by the Montana State Legislature, and signed by the Governor of Montana and the Chippewa Cree Tribal Chairman on April 14, 1997. *Id.* After jointly drafting the Federal Settlement Act with the State and the Tribe, the United States Department of the Interior joined the State and the Tribe in supporting the Federal legislation in Congressional hearings. Memorandum in Support of Settling Parties' Motion for Compact Approval and Summary Judgment, p. 15, n. 2. The Compact was eventually "approved, ratified, and confirmed" by Congress on December 9, 1999. Federal Settlement Act, Section 101, Pub. L. 106-163, 113 Stat. 1782.

In confirming the Compact, Congress specifically found that:

- (1) in fulfillment of its trust responsibility to Indian tribes and to promote tribal sovereignty and economic self-sufficiency, it is the policy of the United States to settle the water rights claims of the tribes without lengthy and costly litigation;
- (2) the Rocky Boy's Reservation was established as a homeland for the Chippewa Cree Tribe;
- (3) adequate water for the Chippewa Cree Tribe of the Rocky Boy's Reservation is

important to a permanent, sustainable, and sovereign homeland for the Tribe and its members;

(4) the sovereignty of the Chippewa Cree Tribe and the economy of the Reservation depend on the development of the water resources of the Reservation;

(5) the planning, design, and construction of the facilities needed to utilize water supplies effectively are necessary to the development of a viable Reservation economy and to implementation of the Chippewa Cree-Montana Water Rights Compact;

(6) the Rocky Boy's Reservation is located in a water-short area of Montana and it is appropriate that the Act provide funding for the development of additional water supplies, including domestic water, to meet the needs of the Chippewa Cree Tribe;

(7) proceedings to determine the full extent of the water rights of the Chippewa Cree Tribe are currently pending before the Montana Water Court as a part of In the Matter of the Adjudication of All Rights to the Use of Water, Both Surface and Underground, within the State of Montana;

(8) recognizing that final resolution of the general stream adjudication will take many years and entail great expense to all parties, prolong uncertainty as to the availability of water supplies, and seriously impair the long-term economic planning and development of all parties, the Chippewa Cree Tribe and the State of Montana entered into the Compact on April 14, 1997; and

(9) the allocation of water resources from the Tiber Reservoir to the Chippewa Cree Tribe under this Act is uniquely suited to the geographic, social, and economic characteristics of the area and situation involved.

113 Stat. 1779, December 9, 1999.

#### Preliminary Conclusion

There is no evidence in the record that the Chippewa Cree Tribe-Montana Compact is the product of fraud or overreaching by, or collusion between, the negotiating parties. The Court finds that each party to the negotiation organized its own "negotiation team" bristling with private and government legal and technical advisors experienced in the fields of soils, hydrology, agricultural engineering, fish and wildlife, statistics, computer modeling, economics, and law. The information

and technical data necessary to conduct the negotiation was collected by all three teams and exchanged openly between the parties and the public. Commission meetings and negotiation sessions were publicized and open to the public, with opportunities for public questions and comment. In addition, the Compact Commission conducted meetings with individual off-Reservation water users, who participated in crafting mitigation measures to protect their interests.

The possibility of collusion or over-reaching by or between the parties was also foreclosed by the competing interests and goals involved. The inherently adversarial nature of the negotiations became apparent when the State of Montana rejected the Tribe's first settlement proposal, because it required the transfer of all State lands within the 1939 "greater purchase area" to the Tribes, and called for large and expensive dams on most drainages arising on the Reservation -- both of which could have had serious impact on downstream off-Reservation water users. The final Tribal proposal approved by the State addressed not only the present and future needs of the Tribe, but more effectively reduced the adverse impact of increased Tribal water use and storage on the environment and the downstream off-Reservation interests.

This Court has adopted the rule employed by the Ninth Circuit Court in reviewing consent decrees, which is that "once the court is satisfied that the [settlement] was the product of good faith, arms-length negotiations, a negotiated [settlement], is presumptively valid, and the objecting party has a 'heavy burden' of demonstrating that the [settlement] is unreasonable." *See e.g., State of Oregon*, 913 F.2d at 581. The Court finds this presumption particularly appropriate where, as here government actors committed to the protection of the public interest have "pulled the laboring oar in constructing the proposed settlement." *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 84 (1st Cir. Mass. 1990). *See also, Davis*, 890 F.2d at 1445; *Randolph*, 736 F.2d at 529; and

Officers for Justice, 688 F.2d. at 625.

For these reasons, the Court finds there is no genuine issue of material fact with respect to the legality of the manner in which this Compact was negotiated, approved and ratified by the Settling Parties, and that the Settling Parties are entitled to summary judgment that the Compact was the product of good faith and arms length negotiation and in compliance with applicable law. The Compact, taken as a whole, is therefore presumptively fair, reasonable and adequate to all concerned.

## II.

### The Objections & Heightened Review

#### A. Standing of the Objectors

1. Objectors Lyle and Barbara Ophus - Keith Rhodes - Calvin and Arlene Frelk, the Verna F. Waddell Trust, Karl Fjelde, and Martha Fjelde Ondrejko.

On April 27, 2000, the Montana Water Court ordered the Commencement of Special Proceedings for Consideration of the Rocky Boy's Compact and issued a Notice of Entry of Rocky Boy's Compact Preliminary Decree and Notice of Availability notifying the public that:

. . . all affected parties are required to state any objections that they may have to the [Rocky Boy's] Compact. Your water usage may be affected by the [Rocky Boy's] Compact. If you do not agree with the Tribal Water Right recognized in the Compact, you may file an objection and request a hearing and the Water Court will hear your objection. \* \* \* All objections must be received by the Montana Water Court . . . on or before October 24, 2000.

Sam J. and Rose M. Bitz, *dba* Rocky Crossing Ranch Co., Lyle and Barbara Ophus, Keith Rhodes, Calvin and Arlene Frelk, the Verna F. Waddell Trust, Karl Fjelde, and Martha Fjelde Ondrejko filed objections and requested the Court to invalidate the Compact and dismiss the Tribal Water Right claim.

The standing to object to a claim in the state-wide adjudication process in Montana is

established by Montana statute and Supreme Court rule. Section 85-2-233, MCA, provides that:

(1) For good cause shown a hearing shall be held before the water judge on any objection to a temporary preliminary decree or preliminary decree by . . . (iii) any person within the basin entitled to receive notice under 85-2-232(1). . .”<sup>18</sup>

Rule 1.II(7) of the Montana Supreme Court Water Right Claim Examination Rules defines

“good cause shown” as:

. . . a written statement showing that one has a substantial reason for objecting, which means that the party has a property interest in land or water, or its use, that has been affected by the decree and that the objection is made in good faith, is not arbitrary, irrational, unreasonable or irrelevant in respect to the party objecting. (Emphasis added)

The Montana Water Court has traditionally practiced a “broad tent” policy with respect to objections to compacts. That is to say that while objections must not be “arbitrary, irrational, unreasonable, or irrelevant,” only a minimal claim or interest in land or water that could feasibly be adversely affected by a compact is sufficient to bring an objector within the “good cause” standard to object to the compact. This policy is appropriate with compacts because the Court is ultimately required to review and approve or disapprove them, even without the filing of a single objection.

The Settling Parties do not dispute that the remaining Objectors all own an interest in land or water within the Big Sandy, Beaver Creek or Milk River drainages. They do, however, challenge the remoteness and degree of any potential harm to those interests and the reasonableness of the objections. There is no question that the potential harm to some of the Objectors is so remote that, in retrospect, it may be stretching the “broad tent” policy too far. But, in the interest of resolving all potential disputes that could arise, this Court finds that the land and water interests owned or

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<sup>18</sup> Section 85-2-232(1) (1993) provides in relevant part that “the water judge shall serve by mail a notice of availability of the temporary preliminary decree or preliminary decree to *each person who has filed a claim of existing right within the decreed basin . . .*” (Emphasis added.)

claimed by the Objectors (with the exception of Sam J. Bitz) could feasibly be adversely impacted by exercise of the Tribal Water Right, and, therefore, the Objectors meet the “good cause” standard as applied by this Court. The Objectors have standing to file their objections.

## 2. Sam J. Bitz

On June 1, 2001, the Settling Parties served joint discovery requests, including interrogatories, requests for production of documents and requests for admissions on Sam J. Bitz and Rose M. Bitz, *dba* Rock Crossing Ranch. The Settling Parties later granted Mr. Bitz and other Objectors additional time, eventually until September 1, 2001, to respond.<sup>19</sup>

On August 13, 2001, the Court conducted a telephonic status conference with representatives of the Settling Parties and some of the Objectors, including Mr. Bitz, wherein the Court reviewed with the parties the Water Court Rules and Procedures, discovery procedures and applicable discovery deadlines, and how to establish and use the primary contact attorney for the Settling Parties.<sup>20</sup> The Court also granted Mr. Bitz and other Objectors an additional extension of 13 days (until September 14, 2001) to respond to the discovery requests. *Id.* The Court’s August 14, 2001 Scheduling Order expressly informed the parties that:

Failure to comply with the terms of this Order may result in sanctions, up to and including entry of default and . . . the dismissal of objections thereto. Any request for a continuance must be made before the scheduled deadlines, in accordance with Uniform District Court rules 2 and 3, and must include a showing a good cause.

*Id.*<sup>21</sup> (Emphasis in original). Mr. Bitz failed to meet the September 14, 2001 deadline and thereby

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<sup>19</sup> Notice of Stipulated Extension of Time Within Which to Respond to Discovery, Motion to Stay Proceedings on the Settling Parties’ Motion for Partial Summary Judgment and Dismissal of Objectors Butler, H&J Quarters, and Ophus, and Request for Telephonic Status Conference, filed August 6, 2001.

<sup>20</sup> Court Minutes and Scheduling Order, filed August 14, 2001.

<sup>21</sup> “Rule 16(f), M.R.Civ.P., provides that if a party fails to comply with a Rule 16(b) scheduling order, the court may impose such sanctions as are just on its own initiative. It contains no requirement that a party move for imposition of such sanctions.” Rule 37(b)(2), M.R.Civ.P. provides that “[i]f a party . . . fails to obey an order to provide or

did not comply with the Court's Order.

On September 28, 2001, the Settling Parties filed a Motion for Partial Summary Judgment in which they requested the Court to enter partial summary judgment dismissing the objections of the following Objectors: Hjortur Hjartarson, *dba* H & J Quarters, Inc., and Sam J. and Rose M. Bitz, as individuals and *dba* Rocky Crossing Ranch. The Motion was based on the failure of these Objectors to respond to the discovery requests propounded by the Settling Parties. On November 20, 2001, this Court served notice that it anticipated entering its order granting or denying the Settling Parties' motion on December 3, 2001.

On December 3, 2001, Sam J. Bitz, *dba* Rocky Crossing Ranch Co., by fax, filed an Objection of Motion for Entry of Order on Motion for Partial Summary Judgment and Dismissal of Objections; and Request for Continuance, together with a supporting brief. Mr. Bitz argued that the extenuating circumstances in his personal life and the "interrelated complexity" of the discovery requests with other title issues involving mineral interests related to the Bitz property required a six month continuance.<sup>22</sup>

On December 4, 2001, the Court issued its Scheduling Order on Request for Continuance, which set a briefing schedule and required oral argument on the Bitz request. In its Order, the Court noted that the time involved in resolving the Request for Continuance would operate as a *de facto* continuance for Mr. Bitz and further noted that the Court had a limited time frame under the federal

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permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just. . . ." It contains no requirement that an opposing party move for sanctions." McKenzie v. Scheeler, 285 Mont. 500, 512, 949 P.2d 1168 (1997). (Emphasis added.)

<sup>22</sup> Mr. Bitz stated that his wife, Rose M. Bitz, died on March 26, 2001, and the discovery requests were received "at the height of my farming and ranching season." In addition, Mr. Bitz stated that he, the Montana Department of Highways, and the Bureau of Indian Affairs were involved in a dispute involving ownership of mineral interests related to the Bitz land. Objection of Motion for Entry of Order on Motion for Partial Summary Judgment and Dismissal of Objections; and Request for Continuance, and Brief in Support, filed December 3, 2001.

Act ratifying the Compact to approve the Compact.

On January 14, 2002, the Court heard oral argument on the Request for Continuance. The Court concluded that Mr. Bitz' request for the six month continuance of all further proceedings was too long given the time constraints imposed by the Federal Settlement Act. As Mr. Bitz had obtained the services of an attorney, the Court elected to proceed without any further continuances.

On January 22, 2002, the Settling Parties, with respect to Sam Bitz, withdrew their Motion for Partial Summary Judgment, and proposed a stipulated briefing and hearing schedule. On January 25, 2002, the Court issued its Unified Briefing Schedule and scheduled a hearing on all pre-hearing motions for April 18, 2002 in Fort Benton, Montana.

On February 1, 2002, the Settling Parties moved the Court for summary judgment to approve the Compact and dismiss the objections. With respect to Mr. Bitz, they contended that by repeatedly refusing to respond to the discovery requests, including Requests for Admission Nos. 3, 10, 11, 12, 15 and 16, Mr. Bitz was deemed by law to have admitted that his land and water interests "have not and will not be affected by the . . . Tribal Water Right recognized in the Compact," that there are no genuine issues of material fact with respect to his objections, and that -- vis-a-vis the Bitz objections -- the Settling Parties were entitled to a judgment approving the Compact as a matter of law.

Rule 36(a), M.R.Civ.P., provides in part that:

The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow. . . ., the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

See also Exhibit 13, General Instructions B-D, Discovery served June 1, 2001 on Mr. Bitz. Rule 36(b), M.R.Civ.P. states that "any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Admissions obtained

pursuant to Rule 36 may be used to establish that there are no genuine issues of material fact in a motion for summary judgment. Garrett v. PACCAR Financial Corp., 245 Mont. 379, 381, 801 P.2d 605 (1990); Holmes & Turner v. Steer-In, 222 Mont. 285, 721 P.2d 1276 (1986); Morast v. Auble, 164 Mont. 100, 105, 519 P.2d 157 (1974).

Rule 36(b), M.R.Civ.P., also authorizes a court to:

. . . permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

However, this Court notes that since 1981, the Montana Supreme Court has endorsed a strict policy that dilatory discovery actions should not be dealt with leniently. Morris v. Big Sky Thoroughbred Farms, Inc., 291 Mont. 32, 36, 965 P.2d 890 (1998); McKenzie v. Scheeler, 285 Mont. at 506. In First Bank (N.A.), Billings v. Heidema, the Court emphasized that:

When litigants use willful delay, evasive responses, and disregard of court direction as part and parcel of their trial strategy, they must suffer the consequences. . . . Where it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with rules of discovery or with court orders enforcing the rules or in flagrant disregard of those rules or order, it is within the discretion of the trial court to dismiss the action or to render judgment by default against the party responsible for the default. . . . Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. . . .

219 Mont. 373, 376, 711 P.2d 1384 (1986). This policy has been applied to *pro se* litigants, as well as those represented by counsel:

While we are predisposed to give *pro se* litigants considerable latitude in proceedings, that latitude cannot be so wide as to prejudice the other party. . . . To do so makes a mockery of the judicial system and denies other litigants access to the judicial process. It is reasonable to expect all litigants, including those acting *pro se*, to adhere to the procedural rules. But flexibility cannot give way to abuse. We stand firm in our expectation that the lower courts hold all parties litigant to procedural standards which do not result in prejudice to either party.

Id. See also Federal Land Bank v. Heidema, 224 Mont. 64, 67-68, 727 P.2d 1336 (1986).

The Federal Settlement Act ratifying and approving the Chippewa Cree Tribe-Montana Compact expressly provided that:

In the event the approval by the appropriate court, including any direct appeal, does not become final within 3 years after the filing of the decree . . . the approval, ratification, and confirmation of the Compact by the United States shall be null and void . . . .

Federal Settlement Act, Section 101(b)(3). (Emphasis added) The Settling Parties and the Court, therefore, have been working within a strict time frame, a fact that was made clear to Mr. Bitz.

While the Court sympathizes with Mr. Bitz on the loss of his wife and does not wish to trivialize his bereavement, Mr. Bitz failed to respond to discovery requests after several extensions of time. Mr. Bitz was extended considerable latitude. To grant further latitude would have prejudiced the Settling Parties' effort to have the Compact judicially reviewed within the Congressionally mandated three year deadline. In accordance with the Rule 36(a), M.R.Civ.P. admissions, the objections of Sam Bitz, *dba* Rocky Crossing Ranch Co. are denied and dismissed.

#### **B. Standing of the Chippewa Cree Tribe to Compact**

The Objectors contend that the Chippewa Cree Tribe lacks legal standing to claim the Tribal Water Right set forth in the Compact, because the Tribe has not been federally recognized by treaty as an autonomous, self-governing body, and because the Reservation is neither the ancestral nor permanent home of the Tribe, or even owned by the Tribe. As Mr. Ophus asserted, "It is a fact you need land to have a water right."

In 1908, the Sixtieth Congress authorized the Secretary of the Interior to:

. . . expend not to exceed thirty thousand dollars *for the purpose of settling Chief Rocky Boy's band of Chippewa Indians*, now residing in Montana, upon public lands, if available, in the judgment of the Secretary of the Interior, or upon some suitable existing Indian reservation in said State, and to this end he is authorized to negotiate and conclude an agreement with any Indian tribe in said State, or, in his discretion, to purchase suitable tracts of lands, water and water rights, in said State of Montana  
.....

Chapter 153, Session 1, Sixtieth Congress, Session 1 (1908). (Emphasis added) On February 11, 1915, Congress authorized the Secretary of the Interior to survey Fort Assiniboine for disposal and to identify the coal, timber and agricultural lands suitable for disposal and settlement or reservation. Act of February 11, 1915, 38 Stat. 807.

In 1916, upon petition of the leaders of the Chippewa and Cree Tribes, Congress amended the Act of 1915 to “set apart [56,035 acres of land] as a reservation for Rocky Boy's Band of Chippewa and such other homeless Indians in the State of Montana as the Secretary of the Interior may see fit to locate thereon. . . .” Act of September 7, 1916, 39 Stat. 739. Senate records confirm that the amendatory Act was “approved by the President” in Document No. 14135, Pub. L. No. 261.<sup>23</sup>

The Objectors argue that modification of the phrase “permanent reservation” to “reservation” during the 1916 Congressional amendment process is significant in determining the validity of the Rocky Boy's Reservation. However the subsequent actions of Congress and the Department of the Interior over the next eighty years clearly evidence the federal government's intention to create a reservation and homeland for the Chippewa Cree Tribe. *See Commission Technical Report* at 13-14 and Cosens, 16 UCLA J. Env't'l L. & Pol'y at 267-271 for a more in-depth review of those subsequent actions.

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<sup>23</sup> Article I, Section 7 of the United States Constitution also provides that a bill automatically becomes law even without a presidential signature ten days after being submitted, if Congress has not adjourned during that time.

Section 2(2) of the Federal Settlement Act expressly finds that “the Rocky Boy’s Reservation was established as a homeland for the Chippewa Cree Tribe,” and Section 2(3) of the Act finds that “adequate water for the Chippewa Cree Tribe of the Rocky Boy’s Reservation is important to a *permanent, sustainable, and sovereign homeland for the Tribe and its members.*” (Emphasis added)

The fact that the federal government owns legal title to the Reservation in trust for the Tribe does not diminish the Tribe's standing to claim the Tribal Water Right. The Montana Supreme Court has directed this Court that:

The United States is not the owner of Indian reserved rights. It is a trustee for the benefit of the Indians. Its powers regarding Indian water rights are constrained by its fiduciary duty to the tribes and allottees, who are the beneficiaries of the land that the United States holds in trust. Indian reserved water rights are “owned” by the Indians.

Greely II, 219 Mont. at 97.

Objector Ophus also appears to argue that Winters’ reserved water rights apply only to Indian reservations created by treaty before March 3, 1871. The Act of November 10, 1888, Revised Statutes at 2079, as amended by 25 U.S.C. 71, reversed the policy of making treaties with the Indians. Thereafter, Congress subjected Indian tribes to the direct legislation of Congress. Thus, the Rocky Boy’s Reservation was created by legislation, not by treaty. This fact does not diminish the Tribe’s claim to reserved water rights. The Montana Supreme Court has acknowledged that Indian reserved water rights may be created or recognized by federal treaty, federal statute or executive order. Greely II, 219 Mont. at 89. In Arizona v. United States, the United States Supreme Court rejected the State of Arizona’s argument that the water rights in that case were not reserved merely because the Reservation was created (or expanded) by Executive Order, rather than treaty. 373 U.S. 546, 598 (1963). Similarly, in Walker River Irr. Dist., the Ninth Circuit Court of Appeals

concluded that:

We see no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent. While in the Winters case the court emphasized the treaty, there was in fact no express reservation of water to be found in that document. The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved.

104 F.2d at 336.

The fact that the Chippewa Cree Tribe is not indigenous to the Reservation is also immaterial to its standing in this case. The removal of Indian tribes from their ancestral homes for relocation on “reservations” is well documented in the annals of history and the courts. *See e.g.*, Act of June 5, 1850, 9 Stat. 437; Appropriation Act of March 3, 1853, 10 Stat. 226; Quinault Allottee Ass'n v. United States, 485 F.2d 1391, 1392-1393 (USCC, 1973), *cert denied*, 416 U.S. 961 (1974); Morton v. Mancari, 417 U.S. 535, 552 (1974); Getches, Rosenfelt, & Wilkinson, *Federal Indian Law* 52-61 (1979 ed.); and Felix S. Cohen's *Handbook of Federal Indian Law* 770 (1982 ed.). Federal courts have recognized Indian reserved water rights for Indian reservations even when the Indians “had no rights which they might reserve, and none to surrender in exchange for those now claimed for them.” *See e.g.*, Walker River Irrigation District, 104 F.2d at 337. Aboriginal title is material only when an Indian tribe is claiming Indian reserved water rights, “from time immemorial,” which the Chippewa Cree Tribe have not claimed in this Compact. *See e.g.*, United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. Ore. 1984); United States v. Klamath Indians, 304 U.S. 119, 122-123 (1938).

Any difficulty courts may have encountered in determining whether a tribe was federally recognized was substantially reduced in 1978 when Congress authorized the Executive Branch to prescribe regulations for making that determination and ordered a list of “federally recognized”

tribes to be published in the Federal Register no less than every three years. See 25 C.F.R. Part 83; 25 U.S.C. 1a, 2; Cherokee Nation of Oklahoma v. Babbitt, 117 F.3d 1489, 1498 (D.D.C. 1997); Western Shoshone Business Council v. Babbitt, 1 F.3d 1052, 1056-1057 (10th Cir. Utah 1993). Recognition by the Department of the Interior has traditionally been "a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. 25 C.F.R. 83.2. Acknowledgment of tribal existence has meant "that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes *by virtue of their government-to-government relationship with the United States* as well as the responsibilities, powers, limitations, and obligations of such tribes." 25 C.F.R. 83.2; and Cherokee Nation, 117 F.3d at 1498; Western Shoshone, 1 F.3d at 1057. (Emphasis added)

On November 2, 1994, Congress passed the Federally Recognized Indian Tribe List Act of 1994, which expressly stated that:

- (2) . . . the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;
- (3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;
- (4) *a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;*
- (5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated. . . .

P.L. 103-454, Title I, § 103, 25 USCS 479(a). (Emphasis added.)

The Court takes judicial notice that the Chippewa Cree Tribe of the Rocky Boy's Reservation

has been included on the lists published pursuant to Part 83 of the Code of Federal Regulations and Public Law 103-45 at least since July 8, 1981 (46 FR 35360), including the list published on March 10, 2000 (65 FR 13298). That period included the years during which this Compact was negotiated and ratified by the Tribe, the State of Montana, and the Congress of the United States. Consequently, publication (i.e. formal federal recognition) was not “ex post facto to the compact,” as asserted by Mr. Ophus.

Historically, the federal judiciary has deferred to such executive and legislative determinations of tribal recognition. Cherokee Nation, 117 F.3d at 1496; Western Shoshone, 1 F.3d at 1058; United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 549-550 (10th Cir. Colo. 2001); and United States v. Holliday, 70 U.S. 407, 419 (1866) (“In reference to all [federal recognition] matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government . . . . If by them those Indians are recognized as a tribe, this court must do the same.”). Although this deference was originally grounded in the executive's exclusive power to govern relations with foreign governments, federal courts have found that broad congressional power over Indian affairs justifies its continuation. Western Shoshone, 1 F.3d at 1057. States are traditionally bound by a similar doctrine of deference to federal agency recognition of Indian tribes. In re Kansas Indians, 72 U.S. 737 (1866).

Accordingly, this Court finds that for purposes of reviewing this Compact and adjudicating the Tribal Water Right, inclusion of the Chippewa Cree Tribe of the Rocky Boy's Reservation on the Department of the Interior's List of Federally Recognized Tribes is dispositive on the issue of federal recognition. If the Objectors wish to challenge such federal recognition, they must take their case to the United States Congress. Without substantive evidence to the contrary, the Court finds

that there is no genuine issue of material fact with respect to this issue, and that the Settling Parties are entitled to judgment as a matter of law that the Chippewa Cree Tribe has sufficient standing to claim the Tribal Water Right set forth in the Compact.

### C. The Rocky Boy's Reservation Boundaries

The Objectors have also challenged the size and boundaries of the Reservation as described in public meetings during the negotiation process and in the Compact. The Compact defines the "Reservation" as "the Rocky Boy's reservation and includes all lands and interests in lands which are held in trust by the United States for the Chippewa Cree Tribe, including future additions to the Reservation." Compact, Article III(42). The Reservation boundaries, however, like its population and needs, have changed over time and will continue to change in ways not entirely predictable or within the control of the State or the Tribe.

The pre-1934 Congressional actions involving the Rocky Boy's Reservation are set forth in the Commission Technical Report at pages 11 through 13 and in Cosens, 16 UCLA J. Envtl. L. & Pol'y at 268-271. Those actions need not be detailed here.

In 1938, pursuant to the Indian Reorganization Act of 1934, the Bureau of Indian Affairs purchased approximately 35,500 acres of land from private landholders to add to the Rocky Boy's Reservation. Senate Report 105, 76th Cong., 1st Sess., February 24, 1939. The land was not added to the Reservation, however, until November 26, 1947, when the Assistant Secretary of the Interior signed a proclamation transferring the land to the Reservation after the Tribe agreed to enroll more landless Indians. *See* Addition of Certain Lands to Rocky Boy's Indian Reservation, Montana, Fed. Reg. Doc. 43-2629, Proclamation of the Assistant Secretary of the Interior, November 26, 1947. *See also* Cosens, 16 UCLA J. Envtl. L. & Pol'y at 270, n. 92.

In 1939, Congress withdrew all public domain land (approximately 2000 acres in scattered tracts) within a 156,000 acre area, described as a “greater purchase area,” and added it to the Reservation. An Act to Add Certain Public Domain Land in Montana to the Rocky Boy Indian Reservation, Pub. L. No. 13, 53 Stat. 552 (1939). Senate Report 105 which accompanied the bill stated that purchase of additional acreage within the greater purchase area would depend upon future appropriations and purchases. United States Senate, Committee on Indian Affairs, 76<sup>th</sup> Cong., 1<sup>st</sup> Sess., February 24, 1939.

On May 21, 1974, Congress declared that:

... all right, title, and interest of the United States in minerals, including coal, oil and gas, underlying lands held in trust by the United States for the Chippewa and Cree Indians of the Rocky Boy's Reservation and lands located within the legal subdivision described in the Act of March 24, 1939 (53 Stat. 552), are hereby . . . to be held by the United States in trust for the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana. . . .

“An Act to Declare Certain Mineral Interests are Held by the United States in Trust for the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana,” Public Law 93-285, 88 Stat. 142 (1974).

This transfer to the Tribe included only the mineral estate and not the surface estate in the land.

Although the 1939 Act merely withdrew *public domain* land and added it to the Reservation, the boundaries of the greater purchase area were described in the Tribal Constitution as the Reservation Boundary, which was approved by the Secretary of the Interior. The apparent conflict between the Tribal Constitution Reservation Boundary description, which was depicted on some of the maps used during the negotiation process, and the boundaries of the actual properties owned by the United States in trust for the Tribe, caused significant concern for some of the Objectors who own land within the greater purchase area.

For purposes of this Compact review, however, the Court finds there is no dispute with

respect to the fact that the greater purchase area described in the 1939 Act, includes a significant amount of private land that has never been purchased or added to the Reservation. The Chippewa Cree Tribe-Montana Compact is clear in describing the Reservation as only those “lands and interests in lands which are held in trust by the United States for the Chippewa Cree Tribe, including future additions to the Reservation.” Article II(42). Those lands not yet transferred to the United States in trust for the Tribe are considered and referred to as “off-Reservation” lands. Id.

#### **D. Priority Date and Block Allocations during Water Shortages**

Article III of the Compact establishes the priority date for the Tribal Water Right in most cases to be September 7, 1916, the date the Rocky Boy's Reservation was created by Act of Congress. The only exceptions to this priority date are the private water rights acquired by the Tribe in Box Elder Creek and those contributed by the United States in Lake Elwell. Under the Compact, both the Box Elder Creek and Lake Elwell water rights become part of the Tribal Water Right, but the Box Elder water rights retain their original state-based priority date of September 10, 1888, and the Lake Elwell water rights retain the priority date “established for the source of supply.” The Objectors argue that lands purchased within the 1939 “greater purchase area” should also have a priority date no later than 1939, and that during times of shortage, “all should suffer in proportion.”

Generally, the priority date of Indian reserved water rights is the date the Indian reservation was created by treaty, act of Congress, or executive order. Arizona v. United States, 373 U.S. at 600; Winters, 207 U.S. at 577. Various tracts and interests in land were added to the Rocky Boy's Reservation after the Act of September 7, 1916 and some of the acquired land had senior state-based water rights that passed to the Tribe as appurtenant to the land. The Settling Parties assert that the State's agreement to the 1916 priority date for lands acquired after 1934 was a *quid pro quo* for the

Tribe's agreement not to assert any of the senior state-based water rights appurtenant to the acquired lands.

During the course of negotiation, the Tribe asserted earlier priority dates of "time immemorial," 1874 (original Blackfeet ("and such other Indians as the President may, from time to time, see fit to locate thereon") Treaty date), and 1880 (Fort Assiniboine Military Reservation). The State and the Tribe were able to agree on the 1916 priority date primarily because of their related agreement to subordinate priorities during periods of water shortage.

During times of shortage, water rights in Montana are normally enforced by priority date, with first in time being first in right. 85-2-401, MCA. The Compact provides that during times of shortage both Tribal and State-based water rights will be allocated in blocks of fixed amounts. In exchange for the mitigation provisions set forth in the Compact, or separately agreed to in drainage stipulations, those claiming (and decreed) senior state-based water rights downstream from the Reservation may not assert priority over the Tribal Water Right, so long as the Tribe is using water within its quantified right. In return, the Tribe may not assert priority over those claiming (and decreed) state-based water rights upstream from the Reservation with priority dates before ratification of the Compact. Compact, Article IV(A)(8). This block allocation provision was negotiated to reduce the risk of priority enforcement for both parties during times of water shortage<sup>24</sup> and to minimize the daily monitoring and enforcement of stream flows and allocations that would

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<sup>24</sup> See e.g., Dan Tarlock, "Prior Appropriation: Rule, Principle, or Rhetoric," 76 N.Dak. L. Rev. 881, 883 (2000): "Priority's modern significance lies in the threat of enforcement rather than the actual enforcement because it encourages water users to cooperate either to reduce the risk of enforcement to as close to zero as possible or to share more equitably the burdens of shortages. This said, cooperation and ad hoc sharing do not come easily to water users. Alternative allocation systems usually emerge only when a significant group of water users thinks that cooperation will produce a superior result to the likely legal resolution allocation of the resources. If there is a credible threat of actual priority enforcement, users may cooperate to avoid the short and long term costs of the result."

have been required in the checkerboard jurisdiction of the Reservation and surrounding area.<sup>25</sup>

None of the Objectors have water right claims, certificates or permits in drainages that could be adversely affected by the subordination and block allocations set forth in the Compact. Keith Rhodes, Calvin and Arlene Frelk, Verna F. Waddell Trust, Martha Fjelde Ondrejko, and Karl Fjelde have claims, permits, or certificates that are on tributaries to the Milk River miles downstream from the drainages on the Reservation. Lyle Ophus has six water right claims in the Big Sandy drainage both up and downstream from points on the Reservation: three stockwater claims that are junior to the Tribal Water Right, and three irrigation claims that are senior. Greiman Aff., Exhibit 2, and Exhibits attached to Affidavit of Rita Nason ("Nason Aff."). According to the mutual subordination clause in the Compact and Appendix 3 to the Compact, the Tribal Water Right is subordinate to all of the six Ophus claims. Compact, Article IV(A)(8) and Appendix 3.

For the reasons set forth above, the Court finds that there is no genuine issue of disputed fact with respect to the priority dates, and that the Settling Parties are entitled to judgment as a matter of law that the priority dates established by the Compact, and the agreement to subordinate priorities during periods of water shortage as set forth in the Compact, are not necessarily contrary to applicable law, and are fair, reasonable and adequate to all concerned.

#### **E. Quantification of Tribal Water Right**

The Tribal Water Right is set forth in Article III of the Compact. The Compact recognizes the right of the Tribe to 20,000 acre-feet of water per year (AFY) for irrigation, stockwatering, domestic, commercial, industrial, and environmental purposes. The water is allocated from surface

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<sup>25</sup> As some Objectors acknowledged: "Measuring exactly these reserved water quantifies is not as simple as words imply. Precision of the measured amounts of water used, in the particular setting is asking more than can be achieved. Keeping records of each deduction is nearly impossible." Exhibit 10, Objection to the Proceedings, Answers to Interrogatory Questions. . . By Objectors Calvin and Arlene Frelk, Verna P. Waddell Trust, Martin Fjelde Ondrejko, Eric Fjelde and Karl Fjelde, at unnumbered page 9.

and groundwater sources in the Big Sandy Creek drainage (9,260 AFY), the Beaver Creek drainage (740 AFY), and from Lake Elwell (10,000 AFY), an off-Reservation reservoir in the Marias River basin. Though not clearly articulated, the Objectors appear to question the “university text-book theories” used by the State and Tribe's technical advisors to quantify the Tribal Water Right, and the feasibility and impact of a proposed ten-acre irrigation project on Upper Big Sandy Creek.

Generally, the measure of an Indian reserved water right is governed by the amount of water necessary to fulfill the purposes of the reservation. United States v. New Mexico, 438 U.S. 696, 700 (1978); Cappaert, 426 U.S. at 138; Arizona v. California, 373 U.S. at 600; Winters, 207 U.S. at 577; Adair, 723 F.2d at 1419; Greely II, 219 Mont. at 92; and Greely I, 214 Mont. at 159.

Quantifying this open-ended standard as been difficult at best, and after nearly one hundred years of legislation, litigation and policy-making, there are still no clear or consistent bright lines. Greely II, 219 Mont. at 92.<sup>26</sup> Because the purposes of each reservation differ, federal courts have devised several general quantification standards. Id. While there is no exclusive or universal standard, federal courts have been clear that Indian reserved water rights must include sufficient water for the future as well as present needs of the reservation. Arizona v. California, 373 U.S. at 599-600; Winters, 207 U.S. at 577; and Greely II, 219 Mont. at 93, 97.

Because the future population and needs of an Indian tribe can only be guessed, the Court

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<sup>26</sup> For cases applying the doctrine broadly, See Colorado River Water Conservation District v. United States, 424 U.S. 808 (1976); United States v. Ahtunum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956); Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908); In re the General Adjudication of All Rights to Use Water in the Gila River System and Source (Gila River), 989 P.2d 739 (1999) and 35 P.3d 68 (2001). For cases applying the doctrine narrowly, See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); United States v. New Mexico, 438 U.S. 696 (1978); Cappaert, 426 U.S. at 141; In re the General Adjudication of All Rights to Use Water in the Big Horn River System (“Big Horn I”), 753 P.2d 76 (Wyo. 1988), *aff'd* in Wyoming v. United States, 492 U.S. 406 by an equally divided court. For cases distinguishing between Indian reserved water rights and other federal reserved water rights, See Clinch, 297 Mont. 448, 992 P.2d 244 (1999); Greely II, 219 Mont. 76, 712 P.2d 754 (1985). For cases that do not distinguish between Indian reserved water rights and other federal reserved water rights, See Colorado River, 424 U.S. at 811; United States v. District Court for Eagle County, 401 U.S. 520 (1971); Cappaert, 426 U.S. at 138; and Arizona v. California, 373 U.S. at 601.

in Arizona v. California concluded that the only feasible and fair way by which reserved water for agricultural reservations can be measured is by “practicably irrigable acreage” (“PIA”), which the Court defined as “enough water . . . to irrigate all the practicably irrigable acreage on the reservations,” not merely that amount which is sufficient to satisfy the Indians’ “reasonably foreseeable needs.” Id. at 600-601.<sup>27</sup> This method involves a complex, cost-benefit analysis which weighs the arability and engineering practicability of growing crops on particular land with the economics of such irrigation. See Commission Technical Report at 20 and Appendices E and F; Greiman Aff. at 3; and Billstein Aff. at 4-6.

In recent years, the PIA standard has been criticized as being overly complex, overgenerous at the expense of state water users, and anachronistically assimilistic for modern times.<sup>28</sup> This criticism resulted in a more stringent application of the standard in Wyoming’s Big Horn River System adjudication,<sup>29</sup> and in the United States Supreme Court’s *per curiam* decision affirming the application, albeit by an evenly divided Court. In Gila River, the Arizona Supreme Court observed

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<sup>27</sup> In Arizona v. California, both the Master and the Supreme Court rejected the State’s argument that “the quantity of water reserved should be measured by the Indians’ ‘reasonably foreseeable needs.’” Adoption of the PIA standard was essentially a compromise between a standard that would be fair to the Indians and one that would provide certainty and finality for competing water users. In exchange for a generous standard and application (essentially the *maximum* amount the tribes could claim under the State’s “reasonable needs” test, whether the tribes would ever actually need or use the water or not), the reserved water rights of the tribes were finally quantified and forever fixed in an amount that could not be enlarged, even for changed circumstances in the future. 373 U.S. at 600-601.

<sup>28</sup> As early as 1939, the Ninth Circuit Court observed that “questions as to the quantity of water reserved is one of great practical importance, and *a priori* theories ought not to stand in the way of a practical solution of it. The area of irrigated land included in the reservation is not necessarily the criterion for measuring the amount of water reserved whether the standard be applied as of the date of creation or as of the present.” Walker River Irrigation District, 104 F.2d at 340. See also Peter W. Sly, Reserved Water Rights Settlement Manual 194 app. A (1988), at 104; Alvin H. Shrago, *Emerging Indian Water Rights: An analysis of Recent Judicial and Legislative Developments*, 26 Rocky Mt. Min. L. Inst. 1105, 1116 (1980); *Indian Reserved Water Rights: Hearings before Senate Comm. On Energy and Natural Resources*, 98<sup>th</sup> Cong., 2d Sess. 27-28 (1984)(Western States Water Council, Report to Western Governors); and Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 Ariz. L. Rev. 195 (1994); and Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 Land & Water Rev. 1, 6 (1992) (in which he asserts that Chief Justice Rehnquist and Justices White, Scalia, and Kennedy would have reversed use of the PIA standard in the Big Horn River adjudication).

<sup>29</sup> In Big Horn I, 753 P.2d at 111-112, the Wyoming Supreme Court was more sensitive to state-held rights by requiring that factors such as land arability, engineering and economic feasibility must be considered in determining whether reservation land was practicably irrigable for purposes of the PIA standard.

that while the PIA standard appears on its face to be an objective method of determining water rights, "its flaws become apparent on closer examination." 35 P.3d at 78.

Despite its recent criticism, the PIA standard remains the principal method of quantifying Indian reserved water rights for agricultural reservations and was used by the Settling Parties as a guideline in negotiating the Tribal Water Right. Initially, the State and the Tribe differed substantially on the amount of the Tribal Water Right for the Rocky Boy's Reservation. The Tribe quantified its present and long-term water needs to be in excess of 35,000 AFY, based on a PIA of 20,000 AFY for irrigation, and 15,000 AFY for non-irrigation purposes, such as stockwatering, domestic, municipal, commercial and industrial purposes. *Billstein Aff.* at 5-7. The State quantified the Tribe's reserved rights to be approximately 3,900 AFY, based on a "feasibly irrigable lands" method of quantifying reserved water rights. *See Commission Technical Report* at 19-20; Appendix F; and *Tweeten Aff.* at 3-4.

An important objective of the Commission in negotiating the Compact was to minimize, to the extent possible, the impact that exercise of the reserved water right could have on off-Reservation water users. "From this perspective, the negotiation of this Compact presented several difficult legal and factual problems." *Tweeten Aff.* at 2. Both the State and the Tribe recognized that the Rocky Boy's Reservation is land and water poor -- a fact not disputed by the Objectors and a fact supported by the technical data gathered by the parties, the legislative history of the Reservation, and the Federal Settlement Act ratifying the Compact.

Ultimately, the parties agreed to the Tribal Water Right of 20,000 AFY, an amount equal to the Tribe's high-end PIA calculation, and one which both parties agreed to be within the range of possible litigation outcomes if the Tribal Water Right were adjudicated in a court of law. *Morsette Aff.* at 5; *Tweeten Aff.* at 4. The State agreed to the Tribe's numbers because fully one-half of the

Tribal Water Right is water imported from the Marias River drainage, and because the parties successfully negotiated mitigation measures to reduce the adverse impact on off-Reservation water users from increased Tribal water use. Id.

Mr. Ophus challenges the Compact provisions allowing for the future development of ten acres in the Upper Big Sandy Creek drainage. The fact that the proposed ten-acre development has never been irrigated does not necessarily argue against application of the PIA standard. In Greely II, the Montana Supreme Court observed that:

The Water Use Act, as amended, recognizes that a reserved right may exist without a present use. Section 85-2-224(3), MCA, permits a 'statement of claim for rights reserved under the laws of the United States which have not yet been put to use.' The Act permits Indian reserved rights to be decreed without a current use.

219 Mont. at 94. Moreover, the development is expected to have no measurable affect on the Ophus water rights. Bill Greiman, agricultural engineer on the staff of the Reserved Water Rights Compact Commission, explained:

The 10 acres of new irrigation is limited to a maximum diversion of 100 gpm (0.2 cfs) and 45 acre-feet annually. Estimated irrigation requirements (SCS TR-21) for the Tribe's high elevation (+4,000 ft) project is 16" for an annual water depletion of 13 acre-feet. The remaining water diverted returns to the stream in the late summer season and could be a minor (although not measurable) benefit to stock water needs near the Reservation boundary. The average flow for the irrigation season at the reservation boundary upstream of Mr. Ophus' place of use (USGS gage 06137400) is greater than 3,800 acre-feet. Thus, the Tribe's maximum use would be 0.3 percent of the available flow and that impact is not measurable. The Tribe's maximum diversion rate of 0.2 cfs would equal a depletion rate of less than 0.1 cfs. The Tribe's use is 22 stream miles up stream, 1000 feet higher, and impacts only 25% of the drainage basin above Mr. Ophus' diversion. The usable flow rate for Mr. Ophus' system is approximately 4 cfs. There is no measuring device available that can measure the Tribe's 0.1 cfs (50 gpm) impact on Mr. Ophus' minimum diversion needs of 4 cfs. . . . The Tribes' 50 gpm depletion 22 miles away will have no measurable affect on any water right claimed by Mr. Ophus.

Greiman Aff. at 4-5.

Although Mr. Ophus disagrees with the Greiman analysis, he provided no probative evidence

to support his disagreement. Significantly, during his testimony at the April 18, 2002 Fort Benton hearing, Mr. Ophus acknowledged that his water spreading irrigation system was downstream from the IX Ranch and that this upstream neighbor often diverts the entire flow of the water source and leaves Mr. Ophus with no return flow. Mr. Ophus testified that the IX Ranch “has sucked up more water than they have a right to.” This testimony supports Bill Greiman’s findings that the IX Ranch has a more substantial impact on Mr. Ophus’s use of water than the Tribe’s use could ever have. At page 5 of his Affidavit, Mr. Greiman stated:

The IX Ranch has [a] decreed right for 3,000 acres of irrigation with a diversion right to 32 cfs above Mr. Ophus’ diversion. The irrigation systems for Mr. Ophus and the IX Ranch are similar and so have similar water timing needs. The only water available to Mr. Ophus is spring flows in excess of the IX Ranch needs and IX Ranch return flows. The IX Ranch net irrigation requirement exceeds the average annual flow of the system, so it is even more improbable that the Tribe’s minimal water use could be deliverable to Mr. Ophus below the IX Ranch diversion.

Id. at 5. Since the Ophus water use is so heavily influenced by his close neighbor, the IX Ranch, Mr. Ophus’s disagreement with the Greiman analysis over the Tribe’s prospective 50 gpm depletion use of water over 22 miles away is too speculative and conclusionary to be accepted.

For these reasons, the Court finds there are no genuine issues of material fact with respect to this issue, and that the Settling Parties are entitled to judgment as a matter of law that the scope and extent of the Tribal Water Right is fair, reasonable and adequate to all concerned.

#### **F. Off-Reservation Importation of Water**

During the course of the negotiations, it became clear to all the participants that the water supply on the reservation, including the existing domestic water supply, was seriously inadequate for the present and future needs of the Reservation. It also became clear, however, that exercise of the Tribal Water Right through increased development, storage and use of on-Reservation water supplies could materially damage the rights of existing water users within and downstream of the

Big Sandy and Beaver Creek drainages. A number of solutions were proposed, which included:

1. The Tribe's and Department of Interior's initial proposals to increase the available water supply by significantly enlarging existing on-Reservation storage facilities and constructing new ones for storage from on-Reservation water sources;
2. The Department of Interior's proposal to retire irrigation lands on the Reservation and provide the Reservation with subsidized hay on an on-going basis;
3. The Department of Interior's proposal to purchase off-Reservation hay land and water rights to replace retired Reservation irrigation land; and
4. The Commission's proposal that the Tribe and members from off-Reservation communities in the area facing similar domestic water supply problems form an Ad Hoc Committee to coordinate a feasibility study for a regional water system, whereby various off-reservation rural water and municipal systems could be combined with the Tribe's system to achieve safe drinking water; and
5. The combined team of technical advisors' (Tribal, United States, and State) proposal to transport 10,000 acre feet of excess water from Lake Elwell in the Marias River Basin to the Reservation to meet Tribal long-term water needs and augment the Big Sandy water supply.<sup>30</sup>

To resolve the stalemate, the United States agreed to contribute 10,000 AFY to the Tribe from the unallocated portion of Lake Elwell, a Bureau of Reclamation reservoir constructed on the Marias River to provide irrigation water to a Lower Marias River irrigation project that was never completed. The water is unallocated or excess water in that rights to the water have not yet been sold or allocated for other use by the federal government.

The Federal Settlement Act ratifying the Compact found importation of the Tiber Reservoir (Lake Elwell) water to be legal and "uniquely suited to the situation." Federal Settlement Act, Section 2. Accordingly, Congress enacted Title II of the Act (Tiber Reservoir Allocation and Feasibility Studies Authorization), which expressly provided that:

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<sup>30</sup> See summary of proposals in Commission Technical Report at 30-31; Morsette Aff. at 4-7; Tweeten Aff. at 3-4; and Billstein Aff. at 8-13.

The Secretary shall permanently allocate to the Tribe, without cost to the Tribe, 10,000 acre-feet per year of stored water from the water right of the Bureau of Reclamation in Lake Elwell, Lower Marias Unit, Upper Missouri Division, Pick-Sloan Missouri Basin Program, Montana. . . . The allocation shall be part of the Tribal Water Right and subject to the terms of this Act.

113 Stat. 1789, Section 201. The importation of unallocated water from Lake Elwell will provide the Tribe with a safe and dependable drinking water supply and substantially reduce the adverse affects that increased Tribal use and storage of water from on-Reservation sources could have had on existing water users like the Objectors. *See Commission Technical Report* at 39; *Tweeten Aff.* at 4; and *Morsette Aff.* at 5.

Congress certainly has the authority to allocate unallocated water from a Bureau of Reclamation reservoir. The fact that the Rocky Boy's Indian Reservation is involved doesn't change that authority.

For these reasons, the Court finds there is no genuine issue of material fact with respect to the importation of water from Lake Elwell, and that the Settling Parties are entitled to judgment as a matter of law that importation of 10,000 acre-feet of water from Lake Elwell (Tiber Reservoir) for inclusion as part of the Tribal Water Right is not contrary to applicable law, and is fair, reasonable, and adequate to all concerned.

## CONCLUSION

The compacting process established by the Montana legislature and confirmed by the Montana Supreme Court has allowed the State and the Chippewa Cree Tribe to define and enforce its Indian reserved water right outside the strict confines of federal and state law by negotiating and concluding a compact "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." Section 85-2-701, MCA *Greely I*, 214 Mont. at 147. (Emphasis added) The provisions of this Compact, and

the process by which they were negotiated, received the confirmation of Congress in the Federal Settlement Act, where Congress explicitly found that “it is the policy of the United States to settle the water rights claims of the tribes without lengthy and costly litigation,” and that its stated purpose in approving the Compact was “to achieve a fair, equitable, and final settlement of all claims to water rights in the State of Montana for . . . the Chippewa Cree Tribe; and (B) the United States for the benefit of the Chippewa Cree Tribe.” Federal Settlement Act, §§ 2(1), and 3(1). (Emphasis added)

The compacting alternative provided the Settling Parties with the flexibility they needed to craft a settlement that reflected the unique conditions on the Reservation and the changing needs of the Chippewa Cree Tribe. By involving both Reservation and off-Reservation water users in the negotiation process, and by recognizing and respecting the interests and concerns of both, together with significant contributions by the United States and the State of Montana, the Settling Parties were able to negotiate a Tribal Water Right that fairly and reasonably reflects the essential purpose of the Reservation as a continuing homeland for the Chippewa Cree Tribe, and, at the same time, minimizes, to a fair and reasonable degree, the potential adverse effects that exercise of the reserved water rights could have had on off-Reservation water users.

Jim Morsette, Chairman of the Tribal Negotiating Team, described the process in his Affidavit to the Court:

After five years of intensive negotiations; numerous public meetings to explain the settlement plan, receive input from tribal members, non-Indian water users, and other interested parties; numerous revisions of the proposed settlement agreement to meet concerns expressed by non-Indian water users and other persons and by the Commission; and extensive on-going legal and technical analysis, agreement was reached between the Tribe and the State of Montana as to quantification of the Tribe’s water rights and as to administration of those rights. . . . The Compact embodies a compromise unique to the circumstances of the Rocky Boy’s Reservation that meets the long-term needs of the Tribe while, at the same time, protecting investment in state-based water needs.

Morsette Aff. at 7-8.

In reviewing this settlement, the Court is not required "to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." Officers for Justice, 688 F.2d at 625. "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators. (Citations omitted)" Id.

The Compact Commission and several Indian tribes have had remarkable success in negotiating unique agreements to define the reserved water rights associated with the Fort Peck Reservation, the Northern Cheyenne Reservation, and now the Rocky Boy's Indian Reservation. Every compact approved by this Court has been unique and specific to the history of the reserved right and the resources available to the water users in the area. The parties to these compacts achieved results that were more tailored to their interests than they ever could have achieved through litigation. The equitable division and apportionment of waters reflected in these compacts bring obvious benefits to Indian and non-Indian water users, alike.

The Court reiterates that in the absence of clear federal authority prohibiting the various compact provisions and in the absence of demonstrated injury to objectors by these provisions, compacting parties are within their authority to craft creative solutions to resolve difficult problems caused by ambiguous standards. As noted by this Court in its Fort Peck Memorandum, if other parties claiming and negotiating reserved water rights proceed to litigation before the Montana Water Court on the merits of those rights and thus forsake the compacting alternative, this Court will draw hard lines and resolve ambiguous legal precedent on many of the issues which are given a broad brush in its Compact review. Fort Peck Memorandum, p. 9.

### III.

#### Summary Judgment

The Montana Rules of Civil Procedure provide that “Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), M.R.Civ. P. In applying the standard, all reasonable inferences are viewed in the light most favorable to the party opposing summary judgment. Erker v. Kester, 296 Mont. 123, 128, 988 P.2d 1221 (1999). However, the opposing facts must be of a substantial and material nature. Brothers v. General Motors, 202 Mont. 477, 481, 658 P.2d 1108 (1983). Speculation and conclusory statements are not sufficient to raise a genuine issue of material fact. DeMers, 192 Mont. at 373; Young, 179 Mont. at 497. Absent affirmative evidence to defeat the motion, the motion is properly granted. Estate of Lien, 270 Mont. 295, 306 (1995).

The Montana Water Court has previously found that:

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

In the negotiation process, the uncertainties inherent in the determination of the . . . Tribal Water Right were employed by the parties as tools to gain leverage and bargaining power. Compromise moved the process forward. In exchange for saving the cost and inevitable risk of litigation, the parties each gave up something they might have won in a court of law. In the settlement process, the parties resolved to their own satisfaction all of the remaining issues of fact and law. It is not for the Montana Water Court to re-negotiate those disputes or rule on their merits.

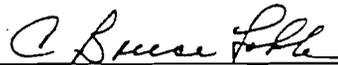
Fort Peck Memorandum, pp 41-42.

The Objectors in this case have failed to prove that any additional genuine issues of material

fact remain for the Montana Water Court to decide. They have failed to provide the affirmative evidence and law necessary to defeat the motion and to overcome the strong presumption attached to this Compact that it is fair, reasonable, and adequate to all concerned.

For the reasons set forth above and further detailed in the submissions of the Settling Parties, the Court has entered its Order Approving Compact.

DATED this 12 day of June, 2002.



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C. Bruce Loble  
Chief Water Judge

