



# Staff Report on the Confederated Salish and Kootenai – Montana Compact



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## I. INTRODUCTION

This Staff Report for the Confederated Salish and Kootenai Tribes-Montana Water Rights Compact<sup>1</sup> describes (from the State of Montana's perspective) the history of how the agreement was reached and the legal and technical basis for Montana's Reserved Water Rights Compact Commission decisions in negotiating the Compact.

### 1. Background on the Montana Reserved Water Rights Compact Commission and the Flathead Indian Reservation

The Montana Reserved Water Rights Compact Commission ("Compact Commission" or "Commission") was established by the Montana Legislature in 1979 to help integrate federal reserved water rights into the state adjudication process.<sup>2</sup> The Compact Commission was authorized to negotiate settlements with Indian tribes and federal agencies claiming federal reserved water rights within Montana.<sup>3</sup> A federal reserved water right is a right to use water that is expressly or implicitly recognized by an act of Congress, a treaty, or an executive order establishing a tribal or federal reservation. It is a right that is recognized by federal law and is quantified based on standards different than the beneficial use standard that governs state law rights for the appropriation of water. For federal reserved water rights, the amount of water to which a reservation is entitled depends on the purpose(s) for which the land was reserved. The water right does not require beneficial use to be perfected and may not be lost through non-use.

In Montana, reserved water rights have been claimed for seven Indian reservations: Blackfeet, Crow, Flathead, Fort Belknap, Fort Peck, Northern Cheyenne, Rocky Boy's, and for trust allotments of the Turtle Mountain Band of Chippewa Tribal members. Federal agencies claiming reserved water rights include the Bureau of Land Management, the National Park Service, the U.S. Fish and Wildlife Service, the Agricultural Research Service, and the U.S. Forest Service.

The Compact Commission was composed of nine members. Four members were appointed by the Governor, two by the President of the Montana Senate, two by the Speaker of the Montana House of Representatives, and one by the Montana Attorney General. Members served four-year terms.

Legal and historical research and technical analysis were prepared for the Compact Commission by a staff that included a program manager, two attorneys, an agricultural engineer, a historical researcher, two hydrologists, a soils scientist, and a geographical information specialist.

Since its inception in 1979, the Compact Commission has negotiated compacts with the:

- Assiniboine and Sioux Tribes of the Fort Peck Reservation;
- Northern Cheyenne Tribe;
- National Park Service, the Bureau of Land Management;

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<sup>1</sup> Section 85-2-1901, MCA (2021).

<sup>2</sup> Section 2-15-212(1), MCA.

<sup>3</sup> Section 85-2-702, MCA.

- Chippewa-Cree Tribe of the Rocky Boy's Reservation;
- U.S. Fish and Wildlife Service;
- Crow Tribe;
- the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation;
- U.S. Department of Agriculture;
- Blackfeet Tribe; and
- Confederated Salish and Kootenai Tribes ("Tribes" or "CSKT") of the Flathead Reservation.

As required by Montana law, these compacts have all been approved by the Montana Legislature.<sup>4</sup>

The Northern Cheyenne,<sup>5</sup> Fort Peck,<sup>6</sup> Chippewa-Cree Tribe of the Rocky Boy's Reservation,<sup>7</sup> Crow,<sup>8</sup> Blackfeet,<sup>9</sup> National Park Service,<sup>10</sup> U.S. Fish and Wildlife Service Red Rock Lakes National Wildlife Refuge,<sup>11</sup> U.S. Fish and Wildlife Service Black Coulee and Benton Lake National Wildlife Refuge,<sup>12</sup> U.S. Department of Agriculture Forest Service,<sup>13</sup> U.S. Bureau of Land Management,<sup>14</sup> U.S. Department of Agriculture Fort Keogh Research Station,<sup>15</sup> U.S. Department of Agriculture Sheep Experiment Station,<sup>16</sup> U.S. Fish and Wildlife Service Bowdoin National Wildlife Refuge,<sup>17</sup> U.S. Fish and Wildlife Service, National Bison Range,<sup>18</sup> Bureau of Land Management Upper Missouri River Breaks National Monument,<sup>19</sup> and the U.S. Fish and Wildlife Service Charles M. Russell National Wildlife Refuge<sup>20</sup> compacts have been approved in final decrees by the Water Court. The Fort Belknap Compact is still in the Congressional approval process.

For all negotiations where a compact had not been approved by the Legislature and the respective Indian tribe by July 1, 2015, state law required that all claims for reserved water rights be filed with the DNRC in preparation for adjudication in the absence of a compact.<sup>21</sup> Therefore, even though the CSKT-Montana Compact had been approved by the Montana Legislature, claims were filed by the United States on behalf of the Tribes. The Tribes also filed their own claims. The two sets of filed claims are largely duplicative of each other.

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<sup>4</sup> Title 85, Ch. 20, MCA.

<sup>5</sup> Northern Cheyenne-Montana Compact, WC-1993-1 (Mont. Water Ct. 1995).

<sup>6</sup> Fort Peck-Montana Compact, WC-1992-1 (Mont. Water Ct. 2001).

<sup>7</sup> Chippewa-Cree Tribe-Montana Compact, WC-2000-01 (Mont. Water Ct. 2002).

<sup>8</sup> Crow Tribe-Montana Compact, WC-2012-06 (Mont. Water Ct. 2015).

<sup>9</sup> Blackfeet Tribe-Montana Compact, WC-2018-06.

<sup>10</sup> U.S. National Park Service-Montana Compact, WC-1994-1 (Mont. Water Ct. 2005).

<sup>11</sup> USFWS, Red Rock Lakes-Montana Compact, WC-2000-02. (Mont. Water Ct. 2005).

<sup>12</sup> USFWS, Black Coulee and Benton Lake-Montana Compact, WC-2000-03 and WC-2002-04 (Mont. Water Ct. 2005).

<sup>13</sup> USDA Forest Service-Montana Compact, WC-2007-03 (Mont. Water Ct. 2012).

<sup>14</sup> U.S. BLM-Montana Compact, WC-2008-10 (Mont. Water Ct. 2011).

<sup>15</sup> USDA ARS Fort Keogh Research Station-Montana Compact, WC-2014-07 (Mont. Water Ct. 2015).

<sup>16</sup> USDA ARS Sheep Experiment Station-Montana Compact, WC-2014-06 (Mont. Water Ct. 2015).

<sup>17</sup> USFWS, Bowdoin National Wildlife Refuge-Montana Compact, WC-2013-04 (Mont. Water Ct. 2016).

<sup>18</sup> USFWS, National Bison Range-Montana Compact, WC-2011-01 (Mont. Water Ct. 2014).

<sup>19</sup> U.S. BLM, Upper Missouri Breaks National Monument-Montana Compact, WC-2015-06.

<sup>20</sup> USFWS, Charles M. Russell National Wildlife Refuge-Montana Compact, WC-2015-05.

<sup>21</sup> Section 85-2-702(3), MCA.

## **2. Brief Description of the Flathead Indian Reservation and the Hellgate Treaty of 1855**

The 1.24 million-acre Flathead Reservation of northwestern Montana lies primarily within the Flathead River basin. Two DNRC adjudication basins, 76L (Flathead River, Below Flathead Lake) and 76LJ (Flathead River, To and Including Flathead Lake) divide the Reservation into northern and southern parts. The Reservation includes the southern half of Flathead Lake in its northeastern corner; is bounded on the east by the dramatic Mission Mountains; on the south, by the divide between the Flathead and Clark Fork basins; and, on the west, by the western divide of the Little Bitterroot River basin. Below Flathead Lake, the Reservation encompasses approximately sixty-eight miles of the lower Flathead River and tributary streams. The Reservation includes parts of four Montana counties—Flathead, Lake, Sanders, and Missoula. Of approximately 7,753 enrolled tribal members, around 5,000 live on or near the Reservation.

The Flathead Indian Reservation was created by the Hellgate Treaty on July 16, 1855 (12 Stat. 975), which provided for the conveyance of 12 million acres of land to the United States by the Flathead, Kootenai, and Upper Pend d'Oreilles Indians, now known as the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, with the Tribes reserving for themselves the approximately 1.2 million acre Flathead Indian Reservation. The Hellgate Treaty is one of several Indian treaties entered into between the United States, represented by Governor of the Territory of Washington, Isaac Stevens, and other tribes in the Columbia River basin. The Hellgate Treaty is the only “Stevens” Treaty in Montana, which is notable because Stevens Treaties include specific language regarding the signatory tribes’ (including CSKT) broad retention of certain off-reservation rights. This distinguishes the CSKT’s treaty from the treaties entered into by other Montana tribes.

During negotiations, approximately half the land was owned by the Tribes or was fee or trust status owned by individual Tribal members. The remaining lands were owned in fee by individual non-Tribal members, the State, or the United States.<sup>22</sup> There were approximately 2,600 irrigators on the Reservation, the majority of whom were non-Indian.<sup>23</sup> Water was used for domestic, municipal, and other non-agricultural uses on the Reservation.

## **3. Fundamental Issues Resolved in the CSKT-Montana Compact**

### **A. Quantification of CSKT Water Rights**

The Compact quantifies the Tribes’ aboriginal and reserved water rights.<sup>24</sup> These include water rights for the Flathead Indian Irrigation Project (“Project” or “FIIP”), Instream Flow and Existing Uses by the Tribes, tribal members, and Allottees, including religious and cultural uses. The

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<sup>22</sup> Memorandum, from Scott Brown to Henry Loble, Chairman, Reserved Water Rights Compact Commission, Background information; Flathead and Northern Cheyenne Reservations, June 5, 1980. [<https://lmi.mt.gov/Portals/135/Publications/LMI-Pubs/LocalAreaProfiles/Reservation%20Profiles/RF13-Flathead.pdf>]

<sup>23</sup> Joint Bd. of Control of the Flathead, Mission, and Jocko Irr. Dist. v. United States, 646 F. Supp. 410, 426 (Mont. Dist. Ct. 1998), *rev'd*, 832 F.2d 1127 (9th Cir. 1987).

<sup>24</sup> See the “Summary of Water Rights Quantified by CSKT-Montana Compact” in DNRC digital records for a summary of all Compact rights in table form.

Compact also quantifies water rights for wetlands, high mountain lakes, Flathead Lake, the Boulder and Hellroaring hydroelectric projects, and minimum pool elevations for FIIP reservoirs.

A critical aspect of the Compact negotiations was the State's need to reach an agreement on the nature and extent of these off-Reservation rights that protected existing, state law-based water right users on and off the Reservation. To settle these claims, the Compact includes Instream Flow water rights for the maintenance and enhancement of fish habitat in the Kootenai River (consistent with the fishery operations at Libby Dam under the Federal Columbia River Power System Biological Opinions, and the Northwest Power and Conservation Council's Columbia River Basin Fish and Wildlife Program), the Swan River, and the Lower Clark Fork River. The Tribes will also have four additional off-Reservation Instream Flow rights in small Kootenai River tributaries, located within the Kootenai National Forest and upstream of private lands.

The Compact defines the relationship between the exercise of the Tribes' Instream Flow water rights and the River Diversion Allowances for the FIIP. The Compact and Ordinance also address the Tribes' Instream Flow water rights for on-Reservation streams outside the FIIP. The Tribes will defer the enforcement of these Instream Flow rights until enforceable flow schedules have been established that are protective of existing users on those streams through a process set forth in the Ordinance.

The Compact quantifies a water right to "Flathead System Compact Water." This term describes water from the Flathead River and water stored in Hungry Horse Reservoir that the Tribes may use to meet Instream Flow and consumptive use needs on the Reservation. The Tribes may also lease this water for use on or off the Reservation. The Compact provides access to 11,000 acre-feet per year of this water from Hungry Horse Reservoir that may be leased at a fixed rate to mitigate for domestic, commercial, municipal, and industrial water development off the Reservation.

The Compact provides the Tribes co-ownership with Montana Fish, Wildlife, and Parks ("MFWP") of existing water rights for instream flow and recreation purposes in the Clark Fork, Bitterroot, Kootenai, and upper Flathead basins (see Section IV Appendix 28). The Compact also provides the Tribes with a beneficial interest in three contracts for the delivery of water from Painted Rocks Reservoir and Lake Como, both located in the Bitterroot Basin. These existing rights are the only rights that would be recognized for the Tribes in the Bitterroot Basin. The Compact recognizes no instream flow rights east of the Continental Divide, where the Tribes could assert claims in the absence of the Compact.

## **B. Protection of On-Reservation Existing Water Uses**

Another fundamental and closely related issue for the State in negotiating the Compact was how to recognize the Tribes' water rights while again protecting existing state law-based water rights whose priority dates were junior to the Tribes'. Of particular concern here was the water rights for the FIIP, the largest consumptive water user on the Reservation, serving predominantly non-Indian irrigators. Rights to the FIIP had been asserted by both the United States on behalf of the Tribes and the Flathead Joint Board of Control (a representational entity that no longer exists). Addressing questions related to the Project's water rights took up a significant portion of the Parties' negotiations. The Compact protects existing uses by ensuring that verified historic farm deliveries from the Project were met subject to the Tribes' Minimum Enforceable Instream Flows, Target Instream Flows, and Minimum Reservoir Pool Elevations under Article IV.D.1.e.

The Compact also protects valid Existing Uses of water as decreed by the Water Court or permitted by the DNRC. It also provides a mechanism to protect existing domestic and stock uses of groundwater that are generally exempt from the State's permitting process.

### **C. Administration of Water Rights on the Reservation**

A series of Montana Supreme Court decisions beginning in 1996 divested the State of jurisdiction over the permitting of new water rights on the Reservation and called into question the State's ability to administer existing state law-based water rights. Consequently, another major question facing the State in the negotiations was how future water rights administration on the Reservation would be handled. The Tribes early on expressed a preference for a unitary management system, one which would regulate both federal and state law-based water rights together rather than the traditional Montana compact model of dual administration, with DNRC retaining primary administrative jurisdiction over state law-based water rights, with the respective tribal government having primary jurisdiction over uses of their tribes' water rights.

The Compact establishes a Flathead Reservation Water Management Board to administer the Compact and Ordinance on the Reservation under a unitary management model—meaning it is the administrative body for both state law-based water users as well as water users under the Tribal Water Right. The Compact provides the framework for the administration of water rights on the Reservation through the Unitary Administration and Management Ordinance (or “Ordinance”). The Ordinance describes the process to:

- (1) register Existing Uses of water;
- (2) change water rights;
- (3) provide for new water development; and
- (4) enforce water rights between non-FIIP water users as specified under Ordinance § 3-1-101(1).

## **II. NEGOTIATIONS**

### **1. Initial Negotiations with the CSKT and the United States of America (1979-1981)**

Following the creation of the Montana Reserved Water Rights Compact Commission in 1979, the Chairman of the Compact Commission sent a “Request to Initiate Negotiations and to Designate Representatives” to each tribe in Montana seeking to initiate water rights negotiations.<sup>25</sup> The Confederated Salish and Kootenai Tribes were one of the first tribes to enter into negotiations.<sup>26</sup> At that time, the Commission viewed the commencement of negotiations as occurring when authorized representatives were named by the respective

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<sup>25</sup> Request to Initiate Negotiations and to Designate Representatives, to Tom Pablo, Chairman, Confederated Salish and Kootenai Tribes, from Henry Loble, Chair, Reserved Water Rights Compact Commission, dated August 17, 1979; Mont. Code Ann. §85-2-702(1).

<sup>26</sup> Memorandum, from Scott Brown to Urban Roth, DISCUSSION BY COMMISSION CONCERNING; THE FLATHEAD JURISDICTION SUIT - PORTION OF MEETING OF JULY 25, 1985, dated September 9, 1985.



tribes.<sup>27</sup> In early 1980, the Tribes designated, by resolution, their authorized representatives for negotiation with the Commission.<sup>28</sup>

Two informational meetings were held with the Tribes in 1979<sup>29</sup> and 1980,<sup>30</sup> and two negotiation sessions took place in 1980<sup>31</sup> and early 1981.<sup>32</sup> The issues discussed were strictly preliminary in nature.<sup>33</sup> In May 1981, the Compact Commission received a letter from the Tribes that the “Council is terminating further discussion or negotiations with the Compact Commission. . . .”<sup>34</sup> No explanation was provided; however, later that year the Tribes filed suit in federal court challenging the validity Montana’s statewide adjudication in regard to the Tribes’ water rights claims.<sup>35</sup>

## 2. Litigation History (1979-2002)

Contemporaneous litigation generally has a detrimental effect on compact negotiations and diverts limited financial and staff resources from negotiations to litigation. While this Staff Report will not cover the multiple rounds of water and natural resources-related litigation that occurred during the decades of negotiation in detail, the substance and timing of litigation did affect compact negotiations.

### A. Challenges to Montana’s Water Adjudication

In April 1979, the United States on its own behalf and on behalf of the Tribes, their members and Allottees, filed suit in federal district court for the quantification of federal Indian reserved

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<sup>27</sup> “Water Rights from the Murky Depths,” Outline of Talk by Henry Loble, Chair, Reserved Water Rights Compact Commission, Great Falls, October 4, 1980.

<sup>28</sup> Confederated Salish and Kootenai Tribes of the Flathead Reservation, Resolution No. 5753 – Delegating State Water Rights Compact Commission Delegates, dated January 11, 1980 (delegates appointed were Thomas E. Pablo, Tribal Council Chairman; Vic Stinger, Tribal Secretary; E.W. Morigeau, Councilman, Rhonda Camel, Bureau of Indian Affairs Rights Protection Officer; and, Evelyn Stevenson, Tribal Attorney); Letter to Members of the Commission, from Henry Loble, Chair, Reserved Water Rights Compact Commission, dated February 5, 1980. Members of the Compact Commission Negotiating Team at that time were: Dan Kemmis, Steve Brown and Jack Galt. Memorandum to Reserved Water Rights Compact Commission, from Henry Loble, Meeting of March 18, 1980, dated March 19, 1980.

<sup>29</sup> Information Meeting on Procedure, Helena, Montana, October 4, 1979.

<sup>30</sup> Introductory Session with Confederated Salish and Kootenai Tribes, Billings, Montana, June 18, 1980. See transcript of meeting on page 302 of “SKT-GEN-154738-Correspondence-1979-1986.pdf” in DNRC digital records.

<sup>31</sup> Negotiation Session, Pablo, Montana, September 6, 1980.

<sup>32</sup> Negotiation Session, Helena, Montana, January 12, 1981.

<sup>33</sup> Minutes of Helena Meeting, Water Rights – State/Tribal Compact Commission, Evelyn M. Stevenson, Tribal Attorney, dated October 4, 1979; Memorandum to Henry Loble, Chairman, and Members of the Commission, from Scott Brown, Program Manager and David Ladd, Attorney, dated August 28, 1981

<sup>34</sup> Letter to Henry Loble, Chairman, Reserved Water Rights Compact Commission, from R. Anthony Rogers, Wilkinson, Cragun and Barker, dated May 9, 1981.

<sup>35</sup> In October 1981, the Tribes filed a suit in Federal District Court in Missoula seeking a declaratory judgment that the Water Use Act of 1973 and the adjudication system created in 1979 by Senate Bill 76 were invalid and unconstitutional as applied to the Flathead Reservation. The Tribes simultaneously discontinued negotiations with the Compact Commission. Memorandum, to Compact Commission Members, from David Ladd, Settlement of Flathead Suit Extension of Filing Deadline, dated December 30, 1981. See, *Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation v. Montana*, 616 F.Supp. 1299 (Mont. Dist. Ct. 1985). See also, Flathead Tribes’ First Annual Water Conference, October 6-7, 1981, Ronan, Montana. [transcript located at G:\WATER\_MG\COMPACT\Z - RWRCC Scanned Records\CSKT RWRCC Box 154734.]

water rights for the Tribes (as well as the other tribes with reservations in Montana).<sup>36</sup> In November, 1979, the federal district court dismissed the consolidated cases for adjudication of reserved water rights for the Montana Indian tribes.<sup>37</sup> The United States and the Tribes appealed to the Ninth Circuit.

In February 1982, the Ninth Circuit Court of Appeals overturned the District Court's dismissal and ordered of the lower court to exercise jurisdiction over those suits.<sup>38</sup> The State of Montana appealed to the U.S. Supreme Court where the case was consolidated with two other Ninth Circuit cases. The U.S. Supreme Court ultimately decided that the McCarran Amendment<sup>39</sup> encouraged the quantification of federal and Indian reserved water rights as part of a state's comprehensive water rights adjudication and that concurrent federal proceedings were likely to be duplicative and wasteful.<sup>40</sup> The U.S. Supreme Court held open the question of whether the state court had jurisdiction under its own state laws and whether the state adjudication process was adequate, under the terms of the McCarran Amendment, to adjudicate federal and Indian reserved water rights.<sup>41</sup> The case was remanded to the Ninth Circuit, after rehearing, ordered the judgment of the District Court vacated and the cause remanded and stayed until state court proceedings were concluded.<sup>42</sup>

Rather than wait until state adjudication proceedings were concluded to address these foundational issues, the Montana Attorney General petitioned the Montana Supreme Court for a writ of supervisory control of the Montana Water Court to determine whether the state courts in fact had jurisdiction under Montana law to adjudicate Indian reserved water rights and whether the Montana Water Use Act process was adequate to adjudicate federal and Indian reserved water rights. The Montana Supreme Court accepted original jurisdiction based on the potentially "profound and far-reaching" effects to water rights in Montana.<sup>43</sup>

The Court limited the issues to be considered to a determination of the subject matter jurisdiction of the Water Court over Indian reserved water rights claims and whether the Water Use Act is adequate to adjudicate federal and Indian reserved water rights.<sup>44</sup> The Tribes ultimately participated in this proceeding as a respondent. The Montana Supreme Court found that the "disclaimer clause" in the Montana Constitution<sup>45</sup> was not a bar to state jurisdiction because the McCarran Amendment and the 1973 Water Use Act provided the consent of both Congress and the people of Montana to state jurisdiction to adjudicate federal and Indian

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<sup>36</sup> United States v. Abell, No. CV-79-33 (D. Mont. filed April 5, 1979), consolidated with other cases in *Northern Cheyenne Tribe v. Tongue River Water Users Ass'n*, 484 F. Supp. 31 (Mont. Dist. Ct. 1979) (cases dismissed), *rev'd*, *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982), *rev'd*, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (dismissals upheld). For the history of this litigation, see, D. MacIntyre, Quantification of Indian Reserved Water Rights in Montana: State Ex rel. Greely in the Footsteps of San Carlos Apache Tribe, Pub. Land L. Rev. 33 (1987).

<sup>37</sup> United States v. Abell, No. CV-79-33 (D. Mont. filed April 5, 1979), consolidated with other cases in *Northern Cheyenne Tribe v. Tongue River Water Users Ass'n*, 484 F. Supp. 31 (Mont. Dist. Ct. 1979) (cases dismissed), *rev'd*, *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982), *rev'd*, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (dismissals upheld).

<sup>38</sup> *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982).

<sup>39</sup> McCarran Amendment, 66 Stat. 560, 43 USC § 666.

<sup>40</sup> *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

<sup>41</sup> *Id.* at 570, n. 20.

<sup>42</sup> *Northern Cheyenne Tribe v. Adsit*, 721 F.2d 1187 (9th Cir. 1983).

<sup>43</sup> State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 214 Mont. 143, 155, 691 P.2d 833, 840 (1984) (amended January 14, 1985).

<sup>44</sup> State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 219 Mont. 76, 82, 712 P.2d 754, 758 (1985).

<sup>45</sup> Montana Constitution, Art. I (1972).

reserved water rights.<sup>46</sup> The Montana Supreme Court also found that the Montana Water Use Act<sup>47</sup> is adequate on its face to adjudicate Indian and federal reserved water rights.<sup>48</sup> The question of whether the Water Use Act is adequate as applied by the Water Court and DNRC to any given federal reserved water rights claim requires a factual record, and the Montana Supreme Court reserved ruling on that issue.<sup>49</sup>

Therefore, CSKT (and all Montana Indian tribes) were held subject to state jurisdiction for adjudication of their federal Indian reserved water rights.

## **B. Other Concurrent Litigation**

Besides the challenges to Montana's adjudication of Indian reserved water rights discussed above, litigation of several other issues was on-going during the period of negotiations with the Tribes. These included: ownership and regulatory authority over the bed and banks of the southern half of Flathead Lake;<sup>50</sup> the recognition and protection of on-Reservation instream flows; the operation and control of FIIP;<sup>51</sup> the Tribes' regulatory authority concerning water quality<sup>52</sup> and streambed protection;<sup>53</sup> the management of fish and wildlife, including but not limited to hunting and fishing regulation;<sup>54</sup> and, as discussed more extensively below, the State of Montana's authority to issue water right permits or change authorizations within the exterior boundaries of the Flathead Reservation.

Another case that had direct potential implications for water rights settlement negotiations over the Tribes' off-Reservation water rights claims was the suit brought by the State against Atlantic Richfield Company concerning the Milltown/Clark Fork Basin Superfund Complex.<sup>55</sup> As part of the resolution of that suit, the Tribes received damages and participated in remediation plans.<sup>56</sup>

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<sup>46</sup> State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 219 Mont. at 88-89, 712 P.2d at 762.

<sup>47</sup> Mont. Code Ann. Title 85.

<sup>48</sup> State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 219 Mont. at 99, 712 P.2d at 768.

<sup>49</sup> Id.

<sup>50</sup> Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951 (9th Cir. 1982).

<sup>51</sup> Joint Board of Control v. United States, CV-86-216 (Mont. Dist. Ct. 1986); Joint Board of Control v. United States, CV-86-217 (Mont. Dist. Ct. 1986); Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States, 30 Fed. Cl. 287 (Ct. Cl. 1993), *aff'd*, 59 F.3d 180 (Fed. Cir. 1995) (Claim that both the Irrigation and Power Divisions of the federal Project were subject to turnover of operation and control under the 1908 Act, 35 Stat. 444, 448-50 and a challenge to the P.L. 638 agreement with the Tribes over the Power Division of the FIIP entered into in 1986. Claims dismissed for either lack of jurisdiction or failure to state a claim.); Flathead Joint Board of Control v. United States, No. CV-9-14-00088 DLC (Mont. Dist. Ct. 2015) (complaint partially dismissed), *aff'd*, Case No. 15-35701 (9th Cir. 2018) (Case concerning the operation of the Irrigation Division of the FIIP because the FJBC had "effectively dissolved" and BIA had resumed operation and management based on an "emergency" provision of a 2010 Transfer Agreement. Claims dismissed for either lack of jurisdiction or failure to state a claim.).

<sup>52</sup> Montana v. U.S. Environmental Protection Agency and the Confederated Salish and Kootenai Tribes of the Flathead Reservation, 941 F. Supp. 945 (Mont. Dist. Ct. 1996), *aff'd*, 137 F.3d 1135 (9th Cir. 1998), cert denied, 525 U.S. 921 (1998).

<sup>53</sup> Middlemist, et al. and Joint Board of Control v. Secretary of U.S. Dept. of Interior and the Confederated Salish and Kootenai Tribes of the Flathead Reservation, 824 F. Supp. 940 (Mont. Dist. Ct. 1993), *aff'd*, 19 F.3d 1318 (9th Cir. 1994), cert denied, 513 U.S. 961 (1994).

<sup>54</sup> Confederated Salish and Kootenai Tribes v. Montana, 750 F. Supp. 446 (Mont. Dist. Ct. 1990).

<sup>55</sup> Montana v. Atlantic Richfield Company, No. CV-83-317-HLN-PGH (Mont. Dist. Ct.) (Order of January 20, 1997); Montana v. Atlantic Richfield Company, 266 F.Supp.2d 1238 (Mont. Dist. Ct. 2003).

<sup>56</sup> See Montana and Confederated Salish and Kootenai Tribes v. Atlantic Richfield Company, No. CV-83-317-HLN-PGH (Mont. Dist. Ct. 1999); United States v. Atlantic Richfield Company, No. CV-89-317-BU-SHE (Mont. Dist. Ct. 2005) (Consent Decree for the Milltown Site entered). See, Mont. Code Ann. § 85-20-1901, Art. III.D.5.

On August 1, 1985, the Tribes filed a motion for temporary restraining order against the Bureau of Indian Affairs (“BIA”) alleging that the FIIP irrigation diversions threatened to cause irreparable injury to the tribal fisheries to which the Tribes had a (yet unquantified) reserved water right.<sup>57</sup> A temporary restraining order was granted to ensure that there was sufficient waters left in identified streams and reservoirs to maintain and preserve the native and wild trout fishery before the BIA could withdraw water for irrigation. Although the Court found that the Tribes had adequately demonstrated probable success on the merits as to its treaty rights to fisheries flows, the Court did not qualify or quantify any minimum instream flow.<sup>58</sup> The proceedings for preliminary injunction at that time were dismissed as moot based on a stipulation accepted by all parties establishing minimum stream flows and reservoir water levels for the 1985 irrigation season. Thus began a series of cases concerning the existence, nature, and extent of the Tribes’ instream flow reserved water right within the Reservation.

On August 4, 1986, the Flathead Joint Board of Control (“FJBC”)<sup>59</sup> filed an action for injunctive relief, claiming the BIA had failed to consider the rights and interests of FIIP irrigators in developing an interim operating strategy for the 1986 irrigation season that provided minimum stream flows and reservoir levels.<sup>60</sup> The District Court directed the BIA to allocate water in accordance with a “just and equal distribution” and requirements for “close cooperation” between Indian and other water project users.<sup>61</sup> On appeal, the Ninth Circuit Court of Appeals reversed the District Court indicating the validity of the Tribes’ claims to minimum stream flow and pool levels to preserve Tribal fishing rights under the Hellgate Treaty.<sup>62</sup> If such rights were established, the priority date would be “time immemorial,” predating all competing rights asserted by the FJBC for irrigation.<sup>63</sup> The Ninth Circuit held:

The action of the BIA in establishing stream flow and pool levels necessary to protect tribal fisheries is not unreviewable. In making its determination, however, the BIA is acting as trustee for the Tribes. Because any aboriginal fishing rights secured by treaty are superior to all irrigation rights, neither the BIA nor the Tribes are subject to a duty of fair and equal distribution of reserved fishery waters. Only after the fishery waters are protected does the BIA, acting as Officer-in-Charge of the irrigation project, have a duty to distribute fairly and equitably the remaining waters among irrigators of equal priority.<sup>64</sup>

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<sup>57</sup> Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Montana v. Flathead Irrigation and Power Project and Joint Board of Control, 616 F. Supp. 1292 (Mont. Dist. Ct. 1985).

<sup>58</sup> Id. at 1297.

<sup>59</sup> On September 26, 1981, a contract was signed between the Flathead, Mission and Jocko Irrigation Districts of the FIIP creating the Flathead Joint Board of Control under § 85 7 1601, MCA. See FJBC discussion in section II 2, 3,4,7,8 and 9.

<sup>60</sup> Joint Board of Control of Flathead, Mission and Jocko Irrigation Districts v. U.S. and the Confederated Salish and Kootenai Tribes, 646 F. Supp. 410 (Mont. Dist. Ct. 1986), *rev'd*, 832 F.2d 1127 (9th Cir. 1987).

<sup>61</sup> Id., 646 F. Supp. at 425-26.

<sup>62</sup> Joint Board of Control of Flathead, Mission and Jocko Irrigation Districts v. U.S. and the Confederated Salish and Kootenai Tribes, 832 F.2d 1127, 1131 (9th Cir. 1987).

<sup>63</sup> Id. The 9<sup>th</sup> Circuit Court of Appeals held that, until quantified, the Tribes’ claimed instream flow rights are senior to and must be satisfied before the FIIP irrigation right. A “time immemorial” priority date is premised on an aboriginal right for uses predating a reservation associated with traditional activities. *Adair*, 723 F.2d at 1414.

<sup>64</sup> Id. at 1132 (emphasis in original).

### C. Litigation Over Water Management Authority on the Flathead Reservation

The litigation that perhaps most directly affected the negotiations was the series of cases challenging DNRC's issuance of water right permits and changes in use for fee land within the Flathead Reservation. The Tribes felt that the DNRC's "pernicious efforts" to regulate water use on the Flathead Reservation "cast a cloud" over the negotiations between the Tribes and the Commission.<sup>65</sup>

The first case in what would later be termed the "Ciotti trilogy" involved DNRC's authority to issue permits for new water rights on the Reservation.<sup>66</sup> DNRC determined that it had jurisdiction to regulate the use of surplus water by non-Tribal owners of fee land within the Reservation, even though the Tribal reserved water right had not yet been quantified and issued permits for new water uses.<sup>67</sup>

On May 15, 1992, the Tribes contemporaneously filed a petition for judicial review of the DNRC order in the First Judicial District of the State of Montana,<sup>68</sup> and a complaint for injunctive relief in the United States District Court for the District of Montana.<sup>69</sup> The state district court concluded that DNRC had jurisdiction under the Water Use Act to issue new permits prior to final adjudication or completion of compact negotiations.<sup>70</sup> On appeal, the Montana Supreme Court reversed.<sup>71</sup> The Court held that "DNRC does not have authority to grant water use permits on the [Flathead] reservation until that quantification [of the Tribes' reserved water right] is complete."<sup>72</sup> The Clinch decision in 1999 reached the same conclusion despite the Montana Legislature's efforts to make statutory changes to address the Court's ruling in Ciotti. Finally, in the 2002 Stults<sup>73</sup> decision, the Court clarified that DNRC likewise did not have authority over permits and changes from groundwater sources.<sup>74</sup>

These decisions collectively created a regulatory void on the Reservation for new water right permits and change authorizations. At that time, the Tribes did not have a federally approved water code, water use plan, or other comprehensive regulatory framework. Nor was it clear to the State whether, even if the Tribes did have a water use code, such a code could be applied to non-tribal members on fee land within the Reservation boundary.<sup>75</sup> During the approximately

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<sup>65</sup> Confederated Salish and Kootenai Tribes v. Clinch, 2007 MT 63, n. 3, 336 Mont. 302, 158 P.3d 377.

<sup>66</sup> In the Matter of Beneficial Water Use Permit Nos. 66459-G76L, Ciotti: 63574-S76L, Flemings; 63023-S76L, Rasmussen; 64988-G76L, Starner; and Application for Change of Appropriation Water Right No. G15152-S79L, Pope, Department of Natural Resources and Conservation, Director's Order, April 30, 1990.

<sup>67</sup> Confederated Salish and Kootenai Tribes v. Clinch, 1999 MT 342, 297 Mont. 448, 992 P.2d 244 (Clinch)..

<sup>68</sup> In the Matter of Beneficial Water Use Permit Nos. 66459-G76L, Ciotti: 63574-S76L, Flemings; 63023-S76L, Rasmussen; 64988-G76L, Starner; and Application for Change of Appropriation Water Right No. G15152-S79L, Pope, Cause No. ADV 92-745 (Mont. Dist. Ct. 1995) (affirming DNRC's Final Order on Jurisdiction), *rev'd*, 278 Mont. 50, 923 P.2d 1073 (Mont. 1996).

<sup>69</sup> Confederated Salish & Kootenai Tribes v. Simonich, D.C. No. CV-92-00054-CCL (D. Mont. 1992), *aff'd*, 29 F.3d 1398 (9th Cir. 1994).

<sup>70</sup> In the Matter of Beneficial Water Use Permit Nos. 66459-G76L, Ciotti: 63574-S76L, Flemings; 63023-S76L, Rasmussen; 64988-G76L, Starner; and Application for Change of Appropriation Water Right No. G15152-S79L, Pope, Cause No. ADV 92-745 (Mont. Dist. Ct. 1995) (affirming DNRC's Final Order on Jurisdiction).

<sup>71</sup> In the Matter of Beneficial Water Use Permit Nos. 66459-G76L, 278 Mont. 50, 923 P.2d 1073 (Mont. 1996) (Ciotti).

<sup>72</sup> *Id.* at 61, 923 P.2d at 1080.

<sup>73</sup> Confederated Salish and Kootenai Tribes v. Stults, 2002 MT 280, 312 Mont. 420, 59 P.3d 1093 (Stults).

<sup>74</sup> *Id.* See also, Confederated Salish and Kootenai Tribes v. Clinch, 2007 MT 63, 336 Mont. 302, 158 P.3d 377, regarding change in use applications, although the Compact ultimately superseded the resolution of that case.

<sup>75</sup> See, Brief of the State of Montana in Response to Application for Original Jurisdiction, or in the Alternative, for a Writ of Supervisory Control or Other Appropriate Writ, Confederated Salish and Kootenai Tribes v. Clinch, Supreme

25 years of regulatory void between the Ciotti decisions and the Effective Date of the Compact in 2021, however, water users continued to file applications for domestic wells within the Reservation with the Kalispell and Missoula regional offices of DNRC. DNRC accepted these applications and partially entered them into its centralized records database, but they were given a “Suspended” status and were not processed. The Ordinance negotiated in conjunction with the Compact created a path for these filings to be processed by the Compact-created Flathead Reservation Water Management Board.

### **3. Early Negotiation History**

On July 19, 1984, the Compact Commission attended an informal meeting with the Tribes to discuss the possibility of resuming negotiations.<sup>76</sup> The following month, the Tribes officially designated representatives for negotiations,<sup>77</sup> and formal negotiations resumed in the fall of 1984.<sup>78</sup> During a negotiating session held on November 19, 1984, the parties discussed ongoing litigation and the Tribes raised the issue of claims for off-Reservation aboriginal rights.<sup>79</sup> The Tribes agreed to develop a general outline of the scope of aboriginal rights that would be claimed. The Tribes also suggested that technical staff meet and determine what baseline information necessary for successful negotiations was already available to the parties and what additional information might need to be developed. The Compact Commission agreed to have the technical staff begin work.

Compact Commission resources were stretched thin during this period due to active negotiations with the Assiniboine and Sioux Tribes of the Fort Peck Reservation and with the Northern Cheyenne Tribe, but the Compact Commission did meet with the Tribes twice in 1985. A meeting of technical staff took place in Missoula on September 26, 1985.<sup>80</sup> The meeting resulted in a fairly comprehensive identification of available technical information, including what studies were currently being conducted and their anticipated completion dates, what information was being collected on an ongoing basis, and what new information the parties anticipated they would need to develop for negotiations.

The technical staffs determined that technical information was necessary for negotiations, including completed soil surveys, land ownership summaries, an inventory of existing uses, instream flow requirements, and the status and operation of the FIIP. As with other federal Indian reserved water right compacts, this technical information would form the factual basis for defining the nature and extent of the Tribal Water Right agreed to in the Compact.

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Court Case No. 97-609 (January 15, 1998); Confederated Salish and Kootenai Tribes v. Clinch, 2007 MT 63, n. 3, 336 Mont. 302, 158 P.3d 377.

<sup>76</sup> Water Court Report, dated May 28, 1985.

<sup>77</sup> On August 16, 1984, the Tribes appointed: Council Chairman Joseph Felsman, Councilmen Michael Pablo and Ron Therriault, and attorneys Daniel Decker and James Goetz. Water Court Report, dated May 28, 1985.

<sup>78</sup> Letter to Joseph Felsman, Tribal Chairman, Confederated Salish and Kootenai Tribes, from W. Gordon McOmber, Reserved Water Rights Compact Commission, dated August 3, 1984.[G:\WATER\_MG\COMPACT\Z -RWRCC Scanned Records\RWRCC Box 154760\Corr.-Memos- Summary of Communication w-Tribes and Feds 1980's -July 15, 1986 Update.]

<sup>79</sup> Water Court Report, dated May 28, 1985.

<sup>80</sup> Memorandum, to Gordon McOmber, Compact Commission Chairman, Urban Roth, Special Counsel, from Scott Brown, Program Manager, Summary of Meeting of Technical Advisers to the Reserved Water Rights Compact Commission and the Confederated Salish and Kootenai Tribes, September 26, 1985, dated October 7, 1985.

The Tribes hosted a tour of the Flathead Reservation for the Commission's technical staff in 1986. The tour included the storage reservoirs, primary and secondary irrigation canals, diversions of tributaries to the Flathead River, the pumping station on the Flathead River, and Kerr Dam (renamed Selis' Ksanka Q'ispe' Dam in 2015).<sup>81</sup> During this time, Commission staff also conducted research to identify the water rights claims being made on the Reservation, preliminarily researched the complex legal, technical, and historical questions raised by the Tribes' claims,<sup>82</sup> and monitored the various relevant lawsuits filed during this period.

In 1987, Senate Bill 92 was introduced in the Montana Legislature at the direction of the Water Policy Interim Committee. This bill extended the sunset date for federal reserved water right claim filing until 1993.<sup>83</sup> The bill also provided additional funding for expansion of the Commission staff and acquisition of technical data to support the Commission's work.<sup>84</sup> Representatives of the Tribes appeared in support of this legislation.<sup>85</sup> In 1987, the Montana Legislature directed the Commission to focus "to the maximum extent possible" on negotiations involving the Milk River, including negotiations with the Blackfeet Tribe, the Fort Belknap Indian Community, the Chippewa-Cree of the Rocky Boys Reservation, and the U.S. Fish and Wildlife Service for Bowdoin National Wildlife Refuge.<sup>86</sup> This mirrored the Legislature's mandate to the Montana Water Court in the 1985 session that it prioritize the adjudication of the Milk River basins.<sup>87</sup>

#### **A. Open-meeting Agreements Pertaining to Negotiations**

One of the immediate challenges faced by the parties was the relationship between the Compact Commission's obligation to conform to state open meeting and public record laws, the Tribes' desire for confidentiality, and how to facilitate the free give and take of good faith negotiations. The history of dealing with these issues is described in some detail in this Staff Report because it is illustrative of the complexity the Commission faced in conducting its negotiations with the Tribes.

The Montana Constitution contains three sections in Article II, the "Declaration of Rights" that speak directly to the public's rights to governmental transparency: right of participation; right to know; and right of privacy. These three constitutional provisions and their implementing statutes

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<sup>81</sup> Water Court Report, dated July 15, 1986.

<sup>82</sup> Water Court Reports, dated January 15, 1987 and July 15, 1987.

<sup>83</sup> S.B. 92, 50th Leg. (Mont. 1987). Colloquially, the term "sunset" was thought to refer to the cessation of the Commission's authority to conduct negotiations. But, that statutory provision in fact establishes the date upon which the suspension of the filing requirement of claims for federal and Indian reserved water rights in the adjudication ends. Nothing in statute formerly precludes the continuation of negotiations after the end of the suspension. But since the suspension was the primary incentive the Montana statutory scheme offered to tribes and the United States with the Commission, the popular conflation of these two concepts is understandable. This Staff Report uses the term "sunset" to encompass this statutory scheme.

<sup>84</sup> Memorandum, to Commission Members, from Marcia Rundle, Attorney/Program Manager, dated March 20, 1987. As a result of the 1987 legislation, DNRC Director Larry Fasbender, created a separate division within the DNRC for the Reserved Water Rights Compact Commission which separated out the Commissions' section of the budget from the rest of DNRC. At the time, the Commission was still officially attached to the Governor's Office. Memorandum, to Gene Etchart, from Susan Cottingham, RWRCC Chronology, dated December 14, 1994.

<sup>85</sup> Water Court Report, dated July 15, 1987.

<sup>86</sup> H.B. 754, 50th Leg. (Mont. 1987).

<sup>87</sup> H.B. 846, 49th Leg. (Mont. 1985).

are often collectively referred to as Montana's "Sunshine Laws."<sup>88</sup> Each of these provisions presented specific issues and procedural challenges for the State in negotiations with the Tribes.

The implications of Sunshine Laws for the Commission's policy regarding open/closed meetings and confidentiality requirements was raised as an issue in virtually every one of the Commission's initial negotiations.<sup>89</sup> The Commission's first Chairman, Henry Loble, voiced concerns early on about the efficacy of conducting public negotiating sessions.<sup>90</sup> The Tribes also expressed an early preference for closed meetings.<sup>91</sup> At a June 18, 1980 informal meeting between the Commission and the Tribes, a lawyer for the Tribes, Richard Anthony Baenen, acknowledged that issues of open meetings under Montana law involved "plowing new ground" and that negotiations with the State were, by their nature, a political process. There was also discussion at that informal meeting of holding separate public meetings instead of opening the negotiation sessions.<sup>92</sup>

To that point, no relevant case law concerning Montana's Sunshine Laws had yet been developed, so the Commission directed staff attorney David Ladd to examine the legality of closing the negotiation process to the public, and to analyze the legal framework that might govern confidentiality of information.<sup>93</sup> Mr. Ladd concluded "that the Open Meetings statute is applicable to the Commission as an entity."<sup>94</sup> That said, however, Mr. Ladd also concluded that

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<sup>88</sup> As it is used in this Staff Report, the term "Sunshine Laws" encompasses both the constitutional provisions and their implementing statutes.

<sup>89</sup> Memorandum, to Henry Loble, Chairman and Members of the Commission, from Scott Brown, Program Manager and Dave Ladd, Attorney, Assessment of each negotiating setting: the federal agencies, the Northern Cheyenne Tribe, the Sioux and Assiniboine tribes, the Assiniboine and Gros Ventre tribes, and the Confederated Salish and Kootenai tribes, dated August 28, 1981. "Listed below are those discussion topics that have arisen somewhat uniformly in every negotiating setting . . . (b) open meeting statutes, the Commission's policy regarding open/closed meetings, and confidentiality requirements." See p. 408 of "RWRCC-GEN-154759-Henry Loble Folder 1979-1982.pdf" in DNRC digital records.

<sup>90</sup> Transcript, Flathead Reservation, Billings, Montana; Inter-Tribal Policy Board Office, June 18, 1980; Transcript, Northern Cheyenne Indian Reservation, Lame Deer, MT, Office of Tribal Council President, June 17, 1980 (Loble: "[T]here is a real question in my mind whether negotiating sessions like this can be public without perhaps destroying the whole process.") [Z RWRCC Box 154763 Compact Commission – Internal Policies, Management Policies, Open Meetings, Confidentiality p. 196]

<sup>91</sup> Tribal concerns with open meetings were discussed at an informational meeting with Confederated Salish and Kootenai Tribes leadership on October 4, 1979. See, Minutes of Helena Meeting Water Rights – State/Tribal Compact Commission, October 4, 1979, Evelyn Stevenson, Tribal Attorney. See "1979-10-04\_JC to Faye 2.pdf" in DNRC digital records (Public Meetings folder). The issue is also referenced in a Memorandum from Henry Loble to the Reserved Water Rights Compact Commission, dated October 16, 1979. "He [Allen Chronister of the Attorney General's office] also mentioned that after Tony Rogers, the attorney for the Flatheads, had mentioned the need for secrecy, that Tom Pablo, the chairman of the Flathead tribe, had written a letter to the Missoulian in which he revealed that there had been a meeting between the Tribe and the Commission and also gave some of the details of the meeting. So apparently they are not so anxious for secrecy as they say. He is going to send me a copy of that letter written by Pablo to the Missoulian." See p. 489 of "See p. 408 of "RWRCC-GEN-154759-Henry Loble Folder 1979-1982.pdf" in DNRC digital records" in DNRC digital records.

<sup>92</sup> Mr. Loble continued to be concerned with erroneous press coverage. Loble: "There are places in Helena where, if we have meetings, like in the Governor's Reception, where the newspaper reporters drop in always because there is something going on. And there are other places where they would seldom go. I'm kind of inclined towards the latter. I've had some miserable experiences with newspaper reports where I've been reported as saying something I didn't say at all and don't even believe. . . ." Baenen: ". . . watch the Flathead area where the news stories are constantly erroneous." Id., p. 12.

<sup>93</sup> Minutes, Reserved Water Rights Compact Commission Meeting, July 24, 1980.

<sup>94</sup> Memorandum, to Henry Loble, from David Ladd, The Effects of Statutory Requirements for Public Participation in Governmental Operations on the Reserved Water Rights Compact Commission, (undated - after March 19, 1980 and before August 4, 1980).



because a compact is considered the settlement of litigation, under Mont. Code Ann. § 2-3-203(4), the meetings of the Commission itself could be closed if negotiating strategy was discussed. In his opinion, closed negotiating sessions were “crucial to the success of the compact process.”<sup>95</sup>

The topic of open meetings was discussed at the Commission Meeting on July 24, 1980, with Commission Vice Chairman Steve Brown, moving the Commission to officially adopt the following policy, which it unanimously did:<sup>96</sup>

All meetings and documents submitted to the Commission be open to public scrutiny except as follows:

(1) Negotiating sessions and documents submitted by a tribe or federal agencies are entitled to confidential treatment when the tribe or federal agency requests that the negotiating session or documents be treated as confidential and indicates that no further negotiations can occur unless the commission agrees to the request for confidentiality.

(2) All commission meetings will be open to the public except when the commission is discussing strategy for negotiating with the tribes or federal agencies, personnel matters, or other confidential matters in which the demands of individual privacy clearly exceed the merits of public disclosure.

The Constitutional provisions of the Montana Constitution allow confidentiality only when the “demand of individual privacy clearly exceeds the merits of public disclosure”. The Compact Commission wishes to protect the Tribes’ right to privacy. By keeping confidential only that information which the Tribe requires be kept confidential, the Compact Commission hopes to further the negotiating process and avoid a confrontation over confidentiality and open meeting issues with other interest groups.

As early discussions proceeded with the Northern Cheyenne Tribe in the early 1980s, confidentiality of documents became a major concern of the tribes’ representatives. In 1992, the Attorney General’s Office prepared a memorandum at the request of the Commission on the confidentiality of documents provided to the Commission.<sup>97</sup>

This very detailed legal memorandum provided guidance to the Commission about how to balance a party’s right to privacy with the public’s right to know. The memorandum suggested using a two-prong test developed by the Montana Supreme Court.<sup>98</sup> First: Does the party

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<sup>95</sup> Id.

<sup>96</sup> Minutes, Reserved Water Rights Compact Commission Meeting, July 24, 1980; Reserved Water Rights Compact Commission’s Position on Confidentiality in Negotiations (July 24, 1980). [Z RWRCC Box 154763 Compact Commission – Internal Policies, Management Policies, Open Meetings, Confidentiality p. 221]

<sup>97</sup> Confidential Attorney-Client Memorandum, to Susan Cottingham, Program Manager, Barbara Cosens, Legal Counsel Reserved Water Compact Commission, from Kimberly A. Kradolfer, Assistant Attorney General, Confidentiality of Documents, dated June 25, 1992. [Z RWRCC Box 154763 Compact Commission – Internal Policies, Management Policies, Open Meetings, Confidentiality p. 73.]

<sup>98</sup> *Missouliau v. Board of Regents*, 207 Mont. 513, 675 p.2d 962 (1984).

involved have a subjective expectation of privacy in the information sought? Second: If so, is the expectation of privacy one which society is willing to recognize as reasonable?<sup>99</sup>

To implement the memo's guidance under the Commission's existing confidentiality policy, a tribe or federal agency would need to affirmatively assert to the Commission the expectation that a document would be held in confidence to meet the first prong of the test. If the tribe or agency had disseminated the document to others outside the party's legal advisors or client group, then the Commission would not be able to recognize a right of privacy to protect such document.

In applying the second prong of the test, the Commission would need to analyze whether the subjective expectation of privacy of the party is one which society is willing to recognize as reasonable. That would require a factual analysis based upon the nature of the document and a balancing of the competing public policies of individual right of privacy and public right to know. The memorandum included a comprehensive checklist to aid the Commission in analyzing this balancing of rights.<sup>100</sup>

Also, to address the confidentiality concern, the Commission proposed that—since the negotiations were to settle matters that would otherwise be litigated—the parties enter into a formal agreement that Rule 408 of the Montana Rules of Evidence applies to the negotiations.<sup>101</sup> In negotiations with the Northern Cheyenne Tribe, the Commission agreed to keep confidential any sensitive data exchanged during the negotiations at the request of the tribe. However, the parties agreed that it was in everyone's best interest to keep meetings and documents open to the public unless there was a compelling reason to keep something confidential.<sup>102</sup> The Commission discussed entering into a similar 408 agreement with the Tribes,<sup>103</sup> but before anything was adopted the Tribes left the negotiation table.<sup>104</sup>

The Tribes returned to the negotiating table in the second half of 1984.<sup>105</sup> At a negotiating session held on September 11, 1985, the Tribes took the position that negotiating sessions must be closed to the public and confidentiality strictly enforced. Referring to Mr. Ladd's 1980 memorandum, the Tribes asked for an articulation of the Commission's current position with respect to closed negotiating sessions,<sup>106</sup> and whether the Commission's position on the issue

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<sup>99</sup> Id., 207 Mont. at 522, 675 P.2d at 967.

<sup>100</sup> Confidential Attorney-Client Memorandum, to Susan Cottingham, Program Manager, Barbara Cosens, Legal Counsel Reserved Water Compact Commission, from Kimberly A. Kradolfer, Assistant Attorney General, Confidentiality of Documents, dated June 25, 1992 (Appendix A).

<sup>101</sup> Memorandum, to Henry Loble, Chairman and Members of the Commission, from Scott Brown, Program Manager and Dave Ladd, Attorney, Assessment of each negotiating setting: the federal agencies, the Northern Cheyenne Tribe, the Sioux and Assiniboine tribes, the Assiniboine and Gros Ventre tribes, and the Confederated Salish and Kootenai tribes, dated August 28, 1981.

<sup>102</sup> Minutes, Negotiating Session with Northern Cheyenne, Billings, August 12, 1980. [Z RWRCC Box 154763 Compact Commission – Internal Policies, Management Policies, Open Meetings, Confidentiality, p. 222 August 12, 1980]

<sup>103</sup> September 16, 1980 Negotiating Session, reported in Water Court Report, dated September 5, 1985. [Z RWRCC Box 154760 Corr. – Memos p.88, September 5, 1985]

<sup>104</sup> See, supra note 35.

<sup>105</sup> November 19, 1984 Negotiating Session, reported in Water Court Report, dated September 5, 1985.

<sup>106</sup> Water Court Report, dated January 15, 1986. [Z RWRCC Box 154760 Water Court Report 1985 p.3 UPDATE: JANUARY 15, 1986]

was based on law or was just Commission policy.<sup>107</sup> Both the Tribes and the Commission agreed to research the issue.

Marcia Rundle, Commission Legal Counsel, subsequently prepared a memorandum on the open meetings and confidentiality issues.<sup>108</sup> By that time, the Montana Supreme Court had decided a handful of cases involving the constitutional and statutory provisions concerning the public's right to know. Ms. Rundle informed the Commission that none of these cases addressed the issue of closed negotiating sessions, nor did she find any cases directly on point in other jurisdictions, and thus no new law existed mandating a change to the Commission's previously established policy. She opined that Mr. Ladd's 1980 conclusions were legally sound but that closing negotiating sessions may have potential political costs. In addition, she concluded that, based on her review of the constitutional and statutory provisions and case law, negotiating sessions are not "meetings" within the meaning of the statute and, therefore, are not required by law to be open.<sup>109</sup>

At the November 18, 1985 negotiating session, Mr. Urban Roth, Special Counsel to the Commission, reported to the Tribes that the Commission was standing by its earlier position that all negotiating sessions should remain open, but that they could nonetheless be closed at the request of the other party when absolutely necessary to in order for negotiations to proceed.<sup>110</sup> The attorney for the FJBC went on the record opposing closed negotiating sessions.<sup>111</sup> The Tribes remained adamant that the sessions be closed. The parties caucused and decided that the remainder of that negotiating session would be closed.

The issue of open meetings with the Tribes was again discussed at a Commission meeting on December 3, 1985. The Commission maintained its position to enter each negotiating session with the presumption that the session will be open to the public but could be closed as to any agenda item upon the request of the Tribes and agreement by the Commission.

In early 1987, the FJBC threatened litigation if meetings were closed,<sup>112</sup> in no small part because it asserted that some or all of its claimed water rights stemmed from the same legal foundation as those claimed by the Tribes. The FJBC wanted to participate directly in the negotiations among the Commission, the Tribes, and the United States.<sup>113</sup>

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<sup>107</sup> Letter to Chairman Jack Galt and Members of the Commission, from W. Gordon McOmber, dated November 12, 1987. [Z RWRCC 154762 1987 General Correspondence]

<sup>108</sup> Confidential Memorandum, to Commission Members, from Marcia Rundle, Request from the Confederated Salish and Kootenai Tribes for clarification of the Commission's position on open negotiating sessions, dated November 6, 1985.

<sup>109</sup> Id.

<sup>110</sup> Minutes, Reserved Water Rights Compact Commission Meeting, December 3, 1985. [Z RWRCC Box 154763 Compact Commission – Internal Policies, Management Policies, Open Meetings, Confidentiality p. 234] Water Court Report, dated January 15, 1986. [Z RWRCC Box 154760 Water Court Report 1985 p.3 UPDATE: JANUARY 15, 1986]

<sup>111</sup> Minutes, Reserved Water Rights Compact Commission Meeting, December 3, 1985. [Z RWRCC Box 154763 Compact Commission – Internal Policies, Management Policies, Open Meetings, Confidentiality p. 234]

<sup>112</sup> Minutes, Reserved Water Rights Compact Commission Meeting, January 28, 1987; [Z RWRCC Box 154762 1987 p. 144 JANUARY 17, 1987] "[T]he Commission's policy [since 1980] is to conduct negotiations in open sessions except where they must be closed to protect confidential information." Letter to J. Daniel Hoven, Browning, Kaleczyk, Berry & Hoven, from Chris Tweeten, Vice-Chair, Reserved Water Rights Compact Commission, Re: Open Meetings, dated February 20, 1987.

<sup>113</sup> Memo to Brace Hayden, Governor's Office, from Marcia Rundle, Flathead Reservation Issues, dated March 6, 1987. [Z RWRCC 154762 1987 General Correspondence p.176]. The three irrigation districts comprising the FJBC (the Flathead Irrigation District, Mission Irrigation District, and the Jocko Irrigation District) were chartered under state

At a Commission meeting on January 28, 1987, the Commission explained its understanding of the Tribes' then-current position as not only being opposed to open meetings but also desirous of restricting the Commission's communication with the FJBC on matters of substance regarding the negotiations.<sup>114</sup> This issue persisted at least throughout 1987.

At the December 10, 1987 commission meeting, Commission Member Gordon McOmber expressed disbelief that the Commission "could presume to represent the people of Montana without some input from them or expect to get any compact through the legislature if the information was kept confidential up to that point . . . [T]he only way to get support of the water users is to bring them into the process, explain what you're doing, listen to what they have to say, and add that to the information from which you develop negotiating positions."<sup>115</sup> The Commission remained committed to making sure the public, including the FJBC, be informed during negotiations. Vice-Chairman Tweeten stated that he hoped to establish a position as to what the FJBC could legitimately expect the Commission to do in the process of negotiating a compact with the Tribes. He also said that before any serious negotiations could take place, the Tribes would have to evaluate their position on where the FJBC fit into negotiations since, in his opinion, a compact with the Tribes was not likely to be adopted by the legislature unless the FJBC's interests were accommodated.<sup>116</sup>

During this same time period, public participation issues were being raised in the context of MFWP's then-ongoing negotiations with the Tribes toward a state-tribal cooperative agreement<sup>117</sup> to address questions of fishing and hunting jurisdiction on the Flathead Reservation on fee land not owned by the Tribes.<sup>118</sup> These meetings were closed to the public because the Tribes had asserted privacy rights to protect the confidentiality of information supporting their positions in negotiations.<sup>119</sup>

Due to the 1987 Legislature's command that the Commission prioritize Milk River-related negotiations,<sup>120</sup> the ongoing litigation (discussed in Section II.2) between the FJBC and the

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law and represented owners of fee lands. These irrigation districts had within their jurisdiction approximately 116,000 acres of land, comprising approximately 3,000 family farms and ranches whose lands generated in excess of \$40 million in economic activity in the area each year.

<sup>114</sup> Minutes, Reserved Water Rights Compact Commission Meeting, May 11, 1987. ("Vice-Chairman Tweeten reminded the Commission members that at the January 28, 1987, meeting Dan Decker, attorney for the Confederated Salish and Kootenai Tribes, stated that the Commission is responsible for representing the Joint Board's interests, but cannot communicate with them on matters of substance regarding negotiations.")

<sup>115</sup> Minutes, Reserved Water Rights Compact Commission Meeting, December 10, 1987.

<sup>116</sup> Minutes, Reserved Water Rights Compact Commission Meeting, May 11, 1987; Subsequently the Compact Commission met with members of the Joint Board of Control of the Flathead Irrigation Districts twice in 1988 seeking to open a dialog on matters of concern to the Districts in order to present a unified front in discussions with the Tribes. Letter to Alan Mikkelsen, Secretary, Joint Board of Control, from Chris D. Tweeten, Vice-Chairman, Reserved Water Rights Compact Commission, dated December 22, 1987; Letter to Alan Mikkelsen, Secretary, Joint Board of Control, from Chris D. Tweeten, Vice-Chairman, Reserved Water Rights Compact Commission, dated January 15, 1988; Water Court Reports, dated July 15, 1988.

<sup>117</sup> The State-Tribal Cooperative Agreements Act, Title 18, Chapter 11, Mont. Code Ann. (1987).

<sup>118</sup> Minutes, Reserved Water Rights Compact Commission Meeting, May 11, 1987. [Z RWRCC Box 154764 Meeting Transcript 1987 2 p. 3]

<sup>119</sup> Memorandum, to Jack Galt, Chairman; Chris Tweeten, Vice-Chair, from Marcia Rundle, Counsel, Application of Open Meetings Statute to Negotiations with Indian Tribes, dated November 19, 1987. [Draft Memo Z RWRCC Box 154763 Compact Commission – Internal Policies, Management Policies, Open Meetings, Confidentiality p. 126]

<sup>120</sup> January 30, 1992 letter from RWRCC Chairman, Chris Tweeten, to Richard Whitesell, BIA Area Director. Compact Commission records box 157270 in a pdf titled "MRB-GEN-159270-General Correspondence.pdf". See also H.B. 754, 50th Leg. (1987).

Tribes, and DNRC and the Tribes, as well as the overall complexity of the issues surrounding the negotiations, another formal negotiating session between the Commission and the Tribes did not take place until May 3, 2000. Communications between representatives of the Commission and the Tribes continued on an informal basis, however. Representatives of the Tribes also attended Compact Commission meetings from time to time<sup>121</sup> and gave a presentation to the Commission in December 1998.<sup>122</sup> Tribal and State technical staff continued the process of information development and exchange.<sup>123</sup>

In addition, in 1995, a scoping meeting was held with the Tribes to discuss the Commission's workload and the goals of the Tribes for future negotiations.<sup>124</sup> The Tribes and the Commission also worked on drafting a Memorandum of Understanding for the negotiations process,<sup>125</sup> which was finalized in 1998.<sup>126</sup> This Memorandum reflected the Commission's policy that each negotiating session would be noticed, open to the general public, and recorded, and that public comments would be received. Negotiating sessions would only be closed to the public and held in executive session if the Parties agreed it was necessary to protect confidential or privileged information. Importantly, the Memorandum acknowledged that the Commission would have primary responsibility for maintaining communication with and soliciting information from state-based water users and other interested persons. The United States (referred to in this Staff Report as the United States or the federal negotiating team) and the Tribes had similar responsibility with Tribal members.<sup>127</sup>

On February 16, 2000, Governor Marc Racicot met with the Confederated Salish and Kootenai Tribal Council in Pablo and the Tribes requested that meetings with the Compact Commission be scheduled. Formal discussions between the Commission and the Tribes re-commenced with negotiation sessions on May 3, 2000, and September 13, 2000, which were duly noticed and open to the public.<sup>128</sup> Tribal and State technical staff teams had another group meeting on August 23, 2000.<sup>129</sup>

#### **4. 2001-2007 Settlement Proposal and Negotiations**

The Commission and the federal negotiating team received a settlement proposal from the Tribes in June 2001.<sup>130</sup> On June 29, 2001, the Commission sent a letter to various interested groups inviting comment on the Tribes' settlement proposal. From November 1 through December 18, 2001, the Commission met with the FJBC, the Lake County Conservation District, the Sanders County Conservation District, the Lake County Commissioners, the Flathead Basin Commission, representatives from the municipalities of Polson, Ronan, and Hot

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<sup>121</sup> Water Court Reports, dated July 15, 1987; July 15, 1988; July 15, 1989; July 15, 1990.

<sup>122</sup> Water Court Report, Update, dated January 15, 1999.

<sup>123</sup> Water Court Reports, Update, dated July 15, 1991; Update, dated January 15, 1992; Update, dated July 15, 2000.

<sup>124</sup> Water Court Report, dated July 15, 1995.

<sup>125</sup> Water Court Report, dated January 15, 1996.

<sup>126</sup> Memorandum of Understanding between the State of Montana Reserved Water Rights Compact Commission and the Confederated Salish and Kootenai Tribe of the Flathead Reservation and the United States of America, dated October 23, 1998.

<sup>127</sup> Id.

<sup>128</sup> Water Court Report, Update, dated July 15, 2001.

<sup>129</sup> Water Court Report, Update, dated July 15, 2001. At the September 13, 2000 Negotiation Session in Helena, Montana, DNRC gave a presentation of the claims examination process.

<sup>130</sup> A Proposal for Negotiation of Reserved and Aboriginal Water Rights in Montana, June 2001.

Springs, local legislators, and members of the Northwest Association of Realtors.<sup>131</sup> The Compact Commission also issued news releases and placed newspaper ads soliciting public comment on the 2001 proposal and providing notice of a scheduled February 7, 2002 negotiating session in Missoula, Montana, at which the proposal was to be discussed.

The Tribes' 2001 proposal included a Reservation-wide tribal water administration ordinance that would apply to all water users on the Reservation: "Fundamental to this approach is our assertion that all water on the Reservation is Tribal."<sup>132</sup> In the letter accompanying the 2001 proposal, the Tribes requested that the Commission provide its preliminary views on negotiating a single jointly developed system of Reservation-wide water administration.<sup>133</sup> The Commission agreed to consider the request at the next meeting of the full Commission, at which it decided not to respond to the substance of the June 2001 proposal until it had an adequate opportunity to solicit the views of key stakeholders and the interested public.<sup>134</sup>

Prior to the negotiating session on February 7, 2002, the Commission received dozens of comments from individuals and entities.<sup>135</sup> Most comments voiced concerns about the prospect of tribal control of all water on the Reservation. But perhaps the most significant issue the Commission saw with the 2001 proposal was the Tribes' statement in the proposal that the Tribes owned all the water on and under the Reservation. This was not a position the Compact Commission could negotiate over, as the Montana Constitution declares that all waters in Montana "are the property of the state, for the use of its people."<sup>136</sup>

At the negotiating session, the Tribes, the federal negotiating team, and the Commission (collectively, the "Parties") agreed to set aside the portion the Tribes' 2001 proposal that included ownership of water to instead focus on quantification and administration of the Tribes' water right.<sup>137</sup> The parties reserved the right of the Parties or any other person to litigate any issue or question not resolved by the Compact.<sup>138</sup>

The Parties agreed to form three separate working groups to move the negotiations ahead on other fronts.<sup>139</sup> One group would work toward an interim agreement for water development on the Reservation to try to fill the regulatory gap created by the Ciotti line of cases prior to the implementation of a final negotiated settlement: the "Interim Agreement Working Group." The second group was to focus on examining water rights claims on the Flathead Reservation filed

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<sup>131</sup> For a full listing of these meetings, see: Memorandum, to Flathead Negotiating Team, RWRCC, from Sonja Hoeglund, Staff, Summary of Flathead Meetings, November through December, 2001, dated January 9, 2002. See "CSKT RWRCC Box 154737," p 15-19 of document titled "SKT-GEN-154737-Meetings-Public-2001-02.pdf."

<sup>132</sup> A Proposal for Negotiation of Reserved and Aboriginal Water Rights in Montana, June 2001.

<sup>133</sup> Letter to Chris Tweeten, Chairman, Montana Reserved Water Rights Compact Commission, from D. Fred Matt, Tribal Chairman and Head of the Tribal Water Rights Negotiation Team, dated June 13, 2001.

<sup>134</sup> Letter to D. Fred Matt, Confederated Salish and Kootenai Tribes, from Chris Tweeten, Chairman, Montana Reserved Water Rights Compact Commission, dated June 21, 2001.

<sup>135</sup> DNRC records WRDDATA(\DNRHLN2371)(G:)COMPACTZ -RWRCC Scanned Records\CSKT RWRCC Box 154740-Public Comment.

<sup>136</sup> Montana Constitution, Art. IX, Part IX, Sec. 3(3) (1972).

<sup>137</sup> Memorandum, to Susan Cottingham, Staff Director, RWRCC, from Sonja Hoeglund, Project leader and Stan Jones, Hydrologist, Notes from CSKT Negotiating Session on February 7, 2002, dated February 18, 2002.

[file:///G:/WATER\\_MG/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20154735/SKT-GEN-154735-Correspondence-Misc-1998-2013.pdf](file:///G:/WATER_MG/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20154735/SKT-GEN-154735-Correspondence-Misc-1998-2013.pdf) p 126]

<sup>138</sup> Section 85-20-1901, Art. V(B)(6), MCA.

<sup>139</sup> Memorandum to Susan Cottingham, Staff Director, RWRCC, from Sonja Hoeglund, Project Leader and Stan Jones, Hydrologist, RWRCC, Notes from CSKT Negotiating Session on February 7, 2002, dated February 18, 2002.

in the Montana general adjudication and on verifying permits approved post-July 1, 1973: the “Claims Examination/Verification Working Group.”<sup>140</sup> The third group was to focus on other data collection and technical work: the “Legal/Technical Working Group.”<sup>141</sup>

#### **A. Interim Agreement Working Group**

As part of the package of statutory changes enacted in 1997 in response to the Ciotti decision, the Montana Legislature provided limited authority to DNRC to enter into water administration interim agreements with tribes in Montana prior to the final adjudication of the tribes’ water rights. Section 85-2-708, MCA (1997). The Interim Agreement Working Group, which began to meet in 2002, was an effort by the negotiating Parties to utilize this authority.

The Interim Agreement Working Group met regularly for several months to formulate the details of an interim plan to provide legal protections for the development of some new domestic and municipal water rights on the Reservation while overall negotiations were ongoing.<sup>142</sup> In August 2002, the federal negotiating team took the position that any interim agreement must be unilaterally revocable at-will by the Tribes and that all interim licenses would be null and void if the agreement terminated or expired prior to a final settlement agreement going into effect.<sup>143</sup> The Tribes also took the position that any interim agreement could not apply to applications for changes in use (such as the one at issue in the Axe case). On November 18, 2002, the Commission formally notified DNRC that changes in use would not be included in any interim agreement that might be reached so that the agency could seek to move the Axe litigation forward.<sup>144</sup>

In an effort to expand the negotiators’ flexibility in reaching an interim agreement, the Compact Commission sought legislation during the 2003 legislative session to modify § 85-2-708, MCA. As introduced, Senate Bill 194 provided authorization for the State to enter into a joint plan with the Tribes and that the Governor must approve any interim plan. The Legislature amended this bill to include a more expansive list of requirements for any interim plan (including several

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<sup>140</sup> Note that “examination” is a term historically used by the DNRC to refer to claims examination which is a relatively extensive look at whether the full extent of the claimed use had been developed. The term “verification” was chosen for an analysis of post-’73 water rights which, being more recently approved, were more likely to be current and accurate and thus needed a more simple verification that the permitted use had in fact been perfected.

<sup>141</sup> Memorandum to Susan Cottingham, Staff Director, RWRCC, from Sonja Hoeglund, Project Leader and Stan Jones, Hydrologist, RWRCC, Notes from CSKT Negotiating Session on February 7, 2002, dated February 18, 2002. [file:///G:/WATER\\_MG/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20154735/SKT-GEN-154735-Correspondence-Misc-1998-2013.pdf](file:///G:/WATER_MG/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20154735/SKT-GEN-154735-Correspondence-Misc-1998-2013.pdf) p. 126]

Both the Claims Examination Work Group and Data and Technical Work Group met several times in 2002. At the December 18, 2002 Negotiating Session, the Tribes informed the Commission that the, as far as the Tribes were concerned, the 2001 Settlement proposal was not put aside and was still on the table and that they wanted to cease joint efforts at claim examination and technical work and proceed with that work on their own. Water Court Report, January 15, 2003. Despite the rocky start, eventually the members of each working group were appointed and work plans were developed.

<sup>142</sup> Water Court Reports January 15, 2002 and July 15, 2002.

<sup>143</sup> August 14, 2002 and November 5, 2002 Interim/Administration Working Group Meetings, Helena, Montana, DNRC records G:\WATER\_MG\COMPACT\Z -RWRCC Scanned Records\CSKT RWRCC Box 154741\Corr. 2002.

<sup>144</sup> Letter to Don D. MacIntyre, Esq., Chief Legal Counsel, Department of Natural Resources and Conservation, from Susan Cottingham, Program Manager, Reserved Water Rights Compact Commission, dated November 18, 2002.

requirements that were unacceptable to the Tribes). Senate Bill 194 was signed by the Governor on April 24, 2003.<sup>145</sup>

The Interim Agreement Working Group met in June 2003 and multiple times in 2004 to discuss a plan for authorizing new uses for domestic and municipal water rights on the Reservation.<sup>146</sup> During this time the Parties also considered hiring a mediator.<sup>147</sup> In November 2004, the Parties released a draft interim agreement and held informational open houses in the area to solicit public comment.

Ultimately, the Parties were unable to reach agreement on the at-will revocability issue posed by the United States' position and issued a joint press release in 2005 that work on a possible interim agreement had been suspended.<sup>148</sup> The Parties agreed to continue work on the long-term settlement of the Tribes' reserved water rights with the goal of taking a compact to the 2009 legislative session.<sup>149</sup>

## **B. Claims Examination/Permit Verification Working Group (2001-2007)**

The second group formed from the 2001 proposal, the Claims Examination/Verification Working Group, focused on the examination of water rights claims in the general statewide adjudication for non-Indian water uses within the Flathead Reservation and the verification of post-July 1, 1973 permits.<sup>150</sup> The goal of this exercise was for the Parties to obtain a common understanding of then-current water use on the Reservation.

DNRC is the entity with jurisdiction under state law to issue permits and change in use authorizations starting on July 1, 1973. Jurisdiction to adjudicate claims with a priority date prior to July 1, 1973, lies with the Montana Water Court in conducting the Montana general stream adjudication. See Title 85, Chapter 2, MCA. For adjudication purposes, DNRC is responsible for examining the filed claims on a basin-by-basin basis as ordered by the Water Court pursuant to the Montana Supreme Court's claims examination rules. Under these rules, DNRC reviews each filed claim and identifies any issues suggesting there may be discrepancies between a claim as filed and how it has historically been used. This data was useful both to ensure the accurate adjudication of filed claims and to inform compact negotiators about the scope of filed claims on a given reservation. Likewise, a verification of uses permitted since 1973 would complete the snapshot.

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<sup>145</sup> This was not the only piece of compact-related legislation introduced during the 2003 session. Senate Bill 417 would have required that political subdivisions of the State have a seat at the negotiating table. Like similar legislation introduced in 1987, the bill failed to pass the Legislature.

<sup>146</sup> DNRC Records G:\WATER\_MG\COMPACT\CSKT\General\Meetings\Public Meeting\MINUTES 2007\Meeting summary.

<sup>147</sup> Water Court Report July 15, 2004.

<sup>148</sup> Water Court Report July 15, 2005. The United States' position was that any water use authorized under an interim agreement must be unilaterally revocable by the Tribes.

<sup>149</sup> Letter to Clayton Matt, Tribal Natural Resources Department Head, Confederated Salish and Kootenai Tribes, from Chris Tweeten, dated August 8, 2005.

<sup>150</sup> Memorandum, to Susan Cottingham, Staff Director, RWRCC, from Sonja Hoeglund, Project Leader and Stan Jones, Hydrologist, RWRCC, Notes from CSKT Negotiating Session of February 7, 2002, dated February 18, 2002 [file:///G:/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20154735/SKT-GEN-154735-Correspondence-Misc-1998-2013.pdf p.126]



At a September 13, 2000 negotiating session in Helena, the Commission made a presentation to the Tribes on the state process for examining filed water right claims.<sup>151</sup> Reliable data on reservation water uses, under both existing pre-1973 uses and post-1973 permits and certificates, was important for the Commission to be able to evaluate the impacts a potential agreement might have on existing water users and ways that protections for those users could be accomplished.

The Commission urged the Tribes to agree to allow claims examination to proceed for the two Water Court basins encompassing portions of the Flathead Reservation (Basin 76L (Clark Fork River) and 76LJ (Flathead River including Flathead Lake)). Since formal DNRC claims examination would eventually need to be conducted as part of the Water Court's adjudication of those basins, it would be duplicative and inefficient for the Commission or a contractor to conduct its own claims evaluation. It also would have taxed the already stretched resources of the Commission's staff given the existence of several other active negotiations at this time. Additionally, DNRC claims examination work was generally familiar to and trusted by the Water Court, the Commission, and the public and therefore would provide a valuable data set for the negotiations.<sup>152</sup>

The claim examination/permit verification processes were extensive due to the fact that there is so much fee land within the Reservation. Further, both the United States and the FJBC had filed essentially duplicative claims for water rights for the FIIP.

The Parties agreed that the Claims Examination/Verification Working Group would draft a proposed Water Court order directing claims examination for the Jocko River sub-basin within Basin 76L.<sup>153</sup> That sub-basin seemed a reasonable starting point because it contained fewer than 500 total claims—a more manageable number that might allow the Parties to develop a template for the on-Reservation claims examination process more broadly. On July 3, 2003, at the request of the Parties, the Montana Water Court issued an order directing DNRC to examine certain claims in the Jocko River Hydrologic Sub-basin within the Flathead Indian Reservation.<sup>154</sup> This order was amended in 2003 and 2005 to refine the examination approach.

After significant progress had been made towards finalization of the claims examination in the Jocko River sub-basin, the Water Court issued an order on August 11, 2006, directing DNRC to examine select other claims in Basin 76LJ (Flathead River including Flathead Lake).<sup>155</sup> The Water Court then issued an Order on March 3, 2008 (superseding the December 9, 2005 Order) extending claims examination to all claims filed in 76L Basin (Clark Fork), except for claims filed by the Tribes, Tribal corporations, agencies of the Tribes, other Tribal organizations or entities; or federal reserved or aboriginal water rights claimed by the Tribes or the United States on

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<sup>151</sup> Memorandum, Minutes of Confederated Salish & Kootenai Tribe Negotiating Session, September 13, 2000, Helena. [G:\COMPACTZ -RWRCC Scanned Records\CSKT RWRCC Box 154735. The portion of the document in which the presentation is described is pages 215-217.]

<sup>152</sup> Memorandum, Minutes of Confederated Salish & Kootenai Tribe Negotiating Session, September 13, 2000, Helena. [G:\COMPACTZ -RWRCC Scanned Records\CSKT RWRCC Box 154735, p. 214]

<sup>153</sup> Commission Update – CSKT, Claims Examination, dated November 15, 2002. [RWRCC SKT General 154741 Correspond 2002]

<sup>154</sup> Montana Water Court, Claim Examination Order, In re Examination of Claims Performed by Montana Department of Natural Resources and Conservation in the Jocko River Hydrologic Sub-basin in Basin 76 Wholly or Partially within the Flathead Indian Reservation, filed July 3, 2003.

<sup>155</sup> Montana Water Court, Consolidated Order Directing DNRC to Examine Claims in Basins 76L and 41Q, filed August 11, 2006.

behalf of the Tribes or itself.<sup>156</sup> The Water Court directed DNRC to assign eight full time employees to examine this Basin. The order provided procedures for coordinating with the Tribes and United States in supplying information during and after the claims examination process and providing notice and opportunity to accompany DNRC staff during field investigations.

As negotiations progressed, the Tribes accepted the Commission's position that all verified current uses of water under color of state law within the Reservation would need to be recognized and protected under any final agreement.<sup>157</sup> Therefore, in addition to the information needed about the pre-1973 claims within the Water Court's jurisdiction, the Parties also needed data on current water uses associated with rights developed on or after July 1, 1973.

In 2008, the Parties entered into an agreement to establish a process to verify water right permits and changes issued or pending and certificates issued or pending for exempt groundwater use under state law.<sup>158</sup> This process was based on DNRC's Verification/Certification Procedures Manual with possible modifications and clarifications as appropriate to the specific circumstances of the Flathead Reservation. The agreement also directed DNRC to commit resources to conduct the verification for purposes of data collections to be used in negotiations. This verification formed a vital factual basis to move forward with negotiations.

### **C. Legal/Technical Working Group**

The third group, the Legal/Technical Working Group, met regularly between formal negotiating sessions to carry out assignments given to it by the negotiators throughout the process. Negotiating sessions routinely featured presentations of legal and technical work, and at the end of each session, the Parties directed future work of the legal and technical teams.

Technical teams were first appointed on September 11, 1985, during the second meeting of the Commission and the Tribes in Pablo. At that time, the technical advisers for both parties were instructed to meet in order to ascertain what kinds of technical information would be required for the negotiations to be successful.<sup>159</sup> During the long hiatus in formal negotiations, legal and technical work slowed as well, though it never fully ceased.

In 2007, the Legal/Technical Working Group was revitalized and started meeting with increased frequency until state passage of the Compact in 2015. It would be hard to overstate the amount of technical work that informed the Parties during negotiations.<sup>160</sup> A sense of the scope of

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<sup>156</sup> Montana Water Court, Second Amended Claim Examination Order, In re Examination of Claims Performed by Montana Department of Natural Resources and Conservation in the Jocko River Hydrologic Sub-basin in Basin 76 Wholly or Partially within the Flathead Indian Reservation, filed March 3, 2008.

<sup>157</sup> Agreement and Protocol for Verification of State-based Water Use on the Flathead Indian Reservation for Purposes of Negotiation, Basins 76L and 76LJ, dated October 8, 2008.

<sup>158</sup> Agreement and Protocol for Verification of State-based Water Use on the Flathead Indian Reservation for Purposes of Negotiation, Basins 76L and 76LJ, dated October 8, 2008. [Z RWRCC [RWRCC-LEG-159305-CSKT-Agreement-2008.pdf](#)]

<sup>159</sup> Memorandum, to Gordon McOmber, Compact Commission Chairman and Urban Roth, Special Counsel, from Scott Brown, Program Manager, Summary of Meeting of Technical Advisers to the Reserved Water Rights Compact Commission and the Confederated Salish and Kootenai Tribes, September 26, 1985, dated October 7, 1985.

<sup>160</sup> As an example of the frequency of technical staff meetings, in the first part of 2008 the Technical Teams met on January 17, 2008, February 7 & 8, 2008, March 3 & 4, 2008, and May 28 & 29, 2008. The Parties held negotiating

technical work gathered and undertaken by the Parties for this settlement can be achieved by perusing the voluminous records DNRC's Compact Implementation Program has archived in the technical category of Compact-related records. Evaluation topics included: surface water hydrology and natural flow models, groundwater models, land ownership inventories, irrigated lands mapping, soil surveys, crop analysis, evapotranspiration and crop net irrigation requirements, canal seepage, return flows, instream flow requirements, wetland/riparian requirements, and water availability modeling with forecasting tools to evaluate water allocation scenarios.<sup>161</sup>

#### **D. Flathead Indian Irrigation Project Transfer**

Also of note during this period of negotiations was the development and acceptance by the Parties of the concept of a cooperative management entity, a body jointly administered by appointed FJBC and Tribal representatives, to take over management of the Project. It had long been anticipated that control of the FIIP would eventually transfer to the irrigators themselves, but numerous attempts had proven unsuccessful. In the 1980s, there had been unsuccessful attempts to get the Secretary of the Interior to approve proposed scenarios of FIIP management under a new co-management entity populated by the Tribes and the FJBC as well as an FJBC proposal to have management transferred to the Bureau of Reclamation before going to the FJBC. In the 1990s, numerous legislative attempts were made to transfer project control to the non-Indian irrigators or FJBC, but all failed.<sup>162</sup>

By 2004, the final retirement of FIIP's construction debt neared and the FJBC and Tribes began discussing a new transfer scenario. On March 21, 2003, the FJBC and the Tribes sent a joint letter to the then-Secretary of the Interior, Gale Norton, announcing that they had agreed on a concept for joint management.<sup>163</sup> Under this conceptual agreement framework, the FIIP Irrigation Divisions' management functions would be transferred to a joint management entity comprised of representatives from the Tribes and the FJBC through an enforceable contractual agreement with the United States. This joint entity would be called the Cooperative Management Entity ("CME"). Later, the "Water Use Agreement", an agreement separate from the Compact which would govern FIIP management, would be developed and appended to the 2013 proposed Compact. The CME administered the FIIP right from 2010 to 2013. Up until the dissolution of the FJBC and the failure of the 2013 proposed Compact in the 2013 Legislature,

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sessions every month except January in 2008 and the technical teams met and/or exchanged information in between each negotiating session.

<sup>161</sup> See, Flathead Indian Reservation Water Rights Negotiations, Tribal/Federal/State Legal/Technical Work Session, July 30, 2007. As an example of the magnitude of technical work required - to evaluate water availability this joint technical plan called for development of separate HYDROSS models. The plan for the HYDROSS model for the Jocko River alone called for the following elements: 42 model nodes, 2 reservoirs, 33 existing irrigation diversions, 9 existing operational diversions, 23 potential diversions, 11 interim instream flow nodes, 28 new instream flow nodes, 1 import (Placid Canal), 1 export (Tabor Feeder Canal), stream seepage loss/gain modeled for 4 reaches, natural groundwater inflow (spring), and 23 calibration nodes. [file:///G:/COMPACT/CSKT/General/Reports%20-%20Summaries/2007-07-30\_Flathead%20IR%20Water%20Rights%20Negotiations.pdf p. 24]

<sup>162</sup> See SB 1186 from 1995, SB 1425 from 1997, and SB 630 in 1999. Also see Memorandum, to Susan Cottingham, Anne Yates, Sonja Hoeglund, from Joan Specking, Historian, Confidential Draft of chronological information on the CSKT, dated October 25, 2001.

<sup>163</sup> Letter, to Honorable Gale Norton, Secretary, U.S. Department of the Interior, from D. Fred Matt, Chairman – Tribal Council, Confederated Salish and Kootenai Tribes and Walt Schock, Chairman, Flathead Joint Board of Control, dated March 21, 2003. [file:///G:/WATER\_MG/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20154735/SKT-GEN-154735-Correspondence-Misc-1998-2013.pdf, p. 94]

this CME concept was considered to be the framework that would administer the FIIP right, separate from the Tribal Water Right.

## 5. Negotiations 2007-2009

By the end of the 2007 legislative session, compacts had been approved or were nearly ready for legislative approval for all the Indian reservations in Montana except the Flathead Reservation,<sup>164</sup> and compact negotiations with the Tribes intensified, ahead of the scheduled expiration of the claims filing stay in 2009. The Commission wanted 2009 to be a legitimate deadline for reaching an agreement and reasoned that if the Parties made significant progress in the intervening two years, an extension could be sought in the 2009 legislative session if an agreement was close, but incomplete, at that point. At the request of the Tribes, however, Senator Carol Juneau introduced Senate Bill 450 in 2007 to extend the claims filing suspension sunset date from July 1, 2009 to July 1, 2013, and to extend the post-sunset deadline for filing claims in the Water Court from 6 to 24 months.<sup>165</sup> The Governor's Office, the Attorney General's Office, and the Commission all opposed the bill, which passed out of the Senate but died in the House Natural Resources Committee. After the conclusion of the 2007 legislative session, the Tribes contacted the Commission to reinvigorate compact negotiations.<sup>166</sup>

At a negotiating session held on July 11, 2007, the Tribes presented an oral proposal with overarching points for negotiation.<sup>167</sup> This proposal consisted of general concepts and principles—many of which had been raised previously<sup>168</sup> or in interim agreement discussions—and was intended to establish a general framework that would guide the development of the specific provisions of an agreement and the sharing or developing of data that would serve as the basis for moving forward with detailed and expedited negotiations. Primary among these was the concept of a unitary administration system for the entire Reservation. The proposal also included the protection of verified existing uses and sharing shortages during low-water years. Under this unitary system, the FIIP users would have a “shared priority date,” making administration less complicated. Modeling and illustrations from the Jocko basin were used to describe, in microcosm, a process where water freed up by rehabilitation of project infrastructure could become available to a variety of uses, including that of ecologically and culturally significant instream flows, something described as a “driving force” motivating the Tribes.

The federal negotiating team expressed that the United States did not wish to end up in the water administration business in a three-party system but was willing to help the Tribes to

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<sup>164</sup> The Turtle Mountain Band of Chippewa Indian Reservation is in North Dakota, there are scattered trust allotments for Turtle Mountain Tribal Members in Montana.

<sup>165</sup> 2007 Legislative Session, Senate Bill No. 450, Introduced by C. Juneau, Augare, Cordier, Jayne, A Bill for an Act Entitled: “An Act Extending the Period for Suspension of Adjudication Proceedings During Negotiations of Federal Indian and Non-Indian Reserved Water Rights; Extending the Time for a Tribe or Federal Agency to File All of Its Claims for Reserved Rights After Termination of Negotiations; Amending Sections 85-2-217, 85-2-702, 8 and 85-2-704, MCA; and Providing an Effective Date.”

<sup>166</sup> Meeting Minutes, Reserved Water Rights Compact Commission, May 17, 2007.

<sup>167</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from July 11, 2007 Negotiating Session, Pablo, Montana, dated July 11, 2007.

<sup>168</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from October 03, 2007 Negotiating Session, Missoula, Montana, dated October 11, 2007 (presentation by John Carter, Tribal Attorney). [file:///G:/WATER\_MG/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20154735/SKT-GEN-154735-Correspondence-Misc-1998-2013.pdf]

develop the details of the 2007 proposal so they could evaluate how a unitary administration system would work.<sup>169</sup> The federal negotiating team's ultimate objective was to assist the Tribes in recognizing their sovereign rights and governance over their resources. The federal negotiating team also pledged to work with the FIIP transfer teams for a smooth transfer and in resolving how FIIP quantification and management would interface with the compact.<sup>170</sup>

The Tribes' 2007 proposal reinvigorated the pace of the negotiations. Negotiation sessions were held every month in 2008, except for January. Legal and technical teams also met routinely during this period.<sup>171</sup> One of the key decisions that allowed the negotiations to move forward at a faster pace was the commitment by the Tribes and the Compact Commission to have the technical teams use a common data set. This required data sharing (which had previously been a sticking point) and agreement as to what additional data was needed and who would develop the data.<sup>172</sup> Much of the technical work was done jointly by the parties' technical staffs, though consultants were also utilized on multiple occasions. Information developed by consultants was generally shared among the Parties so that each party could independently review and understand the technical work and procedures used. This identification and development of a commonly accepted base of technical information has always been a necessary part of the Commission's ability to reach a successful settlement, and the compact negotiations were no different.

The Parties also agreed to reach out to other agencies that had information and expertise in areas helpful for the negotiations. For example, they involved the U.S. Fish and Wildlife Service ("USFWS") concerning flow needs for bull trout; the Bureau of Reclamation ("Reclamation") for hydrology expertise, groundwater test wells, and modeling of the effects of contemplated releases from Hungry Horse Reservoir; and the Natural Resources Conservation Service for snowpack forecasting tools.<sup>173</sup> The Parties also worked together to determine what information could be gathered by contracting with various experts and who would pay for each contract.

## **6. 2009 Extension**

The Parties made a good-faith effort to negotiate a compact in time to have it ratified in the 2009 Legislature, but the complexity of both the terms of an agreement as well as the need for further technical work to allow the negotiators to fully assess the potential effects of various settlement permutations ultimately made that timeframe unrealistic. Additionally, claims examination and permit verification work had not been sufficiently completed and analyzed—an important piece

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<sup>169</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from March 12, 2008 Negotiating Session, Pablo, Montana, dated March 12, 2008.

<sup>170</sup> Memorandum, to CSKT Negotiating Team, Jay Weiner, Susan Cottingham; Sonja Hoeglund, Bill Greiman, Stan Jones, from Joan Specking, CSKT Negotiating Session, September 25, 2008, Pablo, Montana, dated September 25, 2008.

<sup>171</sup> The Tribes had excellent technical staff and consultants. The Commission had experienced technical people and had good buy-in to the process from MFWPFWP and DNRC to contribute resources to the Technical Team. The core members of the States' Technical Team consisted of: Stan Jones, hydrologist; Bill Greiman, agricultural engineer; Sonja Hoeglund, GIS specialist; Ethan Mace, DNRC surface water hydrologist from Missoula Water Resources; and Brian Marotz, MFWP fisheries biologist and instream flow specialist from Kalispell; Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from, Joan Specking, Draft CSKT Minute Summary from February 8, 2008 Negotiating Session, Pablo, Montana dated February 08, 2008.

<sup>172</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from February 8, 2008 Negotiating Session, Pablo, Montana dated February 08, 2008.

<sup>173</sup> Id.

to the puzzle of how much water was available to bargain over. Consequently, the Parties, with the support of the FJBC, sought legislation extending the sunset of federal reserved claim filing to 2013. Senate Bill 39, sponsored by Senator Carol Juneau, was enacted in the 2009 legislative session and extended the sunset date to June 30, 2013. It also extended the period of time available to file claims after the sunset expired from 6 to 24 months, meaning that if there was no further legislative action to extend the sunset and a compact had not been ratified by June 30, 2013, the Tribes and the United States would have until June 30, 2015, to file their claims for the Tribes' water rights in the Montana's statewide general adjudication.<sup>174</sup>

## **7. Negotiations 2009–2013 and 2013 Compact submittal to the Montana Legislature**

Following the 2009 legislative session, the Parties continued technical work and discussions on unitary management. The frequency of meeting accelerated even further, with the goal of submitting a proposed compact to the 2013 Legislature for ratification.

After the CME took over management of the FIIP Irrigation Division, the FJBC and the Tribes accepted the Commission's suggestion and agreed to work independently but in parallel with the Compact negotiations to define the nature and extent of the FIIP water right. The FJBC represented fee land owners served by the FIIP. So while the FJBC and the Tribes updated the Commission during legal/technical meetings, formal negotiating sessions, and Commission meetings on the status and substance of their discussions, those negotiations proceeded on a track formally independent of the Commission's negotiations.<sup>175</sup> The FJBC and the Tribes spent 2011-2012 negotiating a water use agreement for the operation and management of the FIIP, which the Commission intended to incorporate as an integral part of a final water rights settlement.

Given the complexity and scale of the proposed Compact, public engagement required significant outreach. The Commission and Commission staff met with a host of groups and individuals, held public meetings, and took both oral and written comments throughout the process. Negotiating sessions were noticed and open to the public with comments taken. (see Section II.8 for details of public involvement.)

The Commission approved the proposed Confederated Salish and Kootenai – Montana Compact for submission to the 2013 Legislature on February 26, 2013, by a vote of 8 to 1.<sup>176</sup> Approximately 100 people attended the Commission meeting. Twenty-four people provided comments as proponents and six people provided comments as opponents.<sup>177</sup>

The proposed 2013 Compact that went to the Montana Legislature consisted of the Compact and the Unitary Management and Administration Ordinance. A separate Water Use Agreement addressed the use of the water rights for the FIIP (not private rights held by individual irrigators) and CSKT instream flow rights for streams supplying the FIIP. This was an agreement separate

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<sup>174</sup> S.B. 39, 60th Leg. (Mont. 2009).

<sup>175</sup> For example, Meeting Minutes, Reserved Water Rights Compact Commission, May 17, 2007 (presentation by Steve Hughes).

<sup>176</sup> Compact Commission member and Montana State Senator Debbie Barrett cast the sole dissenting vote in Compact Commission history in opposition to the CSKT Compact.

<sup>177</sup> Montana Reserved Water Right Compact Commission Meeting, Helena, Montana, February 26, 2013. [RWRCC-GEN-154760-Meeting February 26,2013]

from the Compact between the FIIP, the Tribes, and the United States. Though the Compact, to some extent, depended upon this being in place to resolve the FIIP management question. In May of 2013, FJBC elections changed the composition of FJBC members.<sup>178</sup> Several board members that had supported the Water Use Agreement were replaced with board members who opposed it. In December 2013, two of the three irrigation districts comprising the FJBC—the Mission and Jocko irrigation districts—voted to withdraw from the FJBC, and the FJBC was effectively dissolved. This consequently dissolved the CME, leaving the Water Use Agreement in limbo.

Commission member Representative Kathleen Williams introduced House Bill 629 which contained the 2013 proposed Confederated Salish and Kootenai – Montana Compact as well as some other language to aid in implementing other compacts.<sup>179</sup> The bill was tabled in the House Judicial Committee. A motion on the House floor to take it from committee failed on a 51 to 47 vote.<sup>180</sup> This marked the first time a compact recommended to the Legislature by the Commission had failed to be approved.

Another piece of legislation, Senate Bill 265, introduced by Senator Verdell Jackson in the 2013 session would have required the Water Policy Interim Committee (“WPIC”) to conduct a study of issues related to the proposed 2013 water rights settlement and to extend the claim filing suspension sunset to July 1, 2015.<sup>181</sup> Senate Bill 265 passed the House 62 to 38 with amendments and the Senate passed the bill as amended by a vote of 27 to 23. However, Governor Bullock ultimately vetoed the bill. In a letter explaining the reasons for the veto, the Governor pointed out that the Legislature created the Commission to be the state entity responsible for negotiating water right quantification agreements with Indian tribes and the United States, and nothing in the bill altered that arrangement.<sup>182</sup> The Governor concluded that inserting WPIC into the process was unnecessary and could delay the adjudication.

In his letter, the Governor also directed the Commission, working with DNRC, the Tribes, the FJBC, the United States, and other interested parties to prepare a comprehensive report addressing the questions raised about the Compact during the 2013 legislative session.<sup>183</sup> This report was submitted to WPIC well in advance of the 2015 legislative session and was made available for public review on DNRC’s website. The intent behind this process was to ensure legislators and the public had a full and accurate understanding of the settlement’s contents and the potential risks and benefits to settlement or litigation should a compact with the CSKT be considered during the 2015 legislative session.<sup>184</sup>

In addition to directing the Commission to prepare a report addressing questions raised during the 2013 legislative session about the Compact, Governor Bullock wrote to the Tribes inviting

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<sup>178</sup> See *Flathead Irrigation Dist. v. Jewell*, 121 F. Supp. 3d 1008 (Mont. Dist. Ct. 2015).

<sup>179</sup> H.B. 629, 63rd Leg. (Mont. 2013).

<sup>180</sup> *Id.*

<sup>181</sup> S.B. 265, 63rd Leg. (Mont. 2013).

<sup>182</sup> Letter from Governor Steve Bullock to Secretary of State Linda McCulloch (May 3, 2013), <https://leg.mt.gov/bills/2013/AmdHtmS/SB0265GovVeto.pdf>.

<sup>183</sup> “Report on the Proposed Water Rights Compact Between the State of Montana and The Confederated Salish and Kootenai Tribes of the Flathead Reservation,” January 2014. Digital report available in DNRC digital files and at the following URL: <http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/docs/rwrcc-watercompactreport2013.pdf/>.

<sup>184</sup> *Id.*

them back to the negotiating table to discuss how to proceed following the dissolution of the FJBC.<sup>185</sup> The Tribes agreed to a limited reopening of negotiations.<sup>186</sup>

During 2014, formal negotiations with the Tribes resumed with six negotiating sessions held and meetings conducted on the Reservation and beyond (see Section II.8). During this time, the Tribes and federal negotiating team were also forced to spend time on preparing the claims that would be pursued on behalf of the Tribes in the statewide general adjudication if a settlement could not be agreed to by all parties. The filing deadline for these claims was extended by Senate Bill 39 from 2013 to June 30, 2015.

## 8. Negotiations 2013–2015

Between 2013 and 2015, WPIC requested extensive legal analyses and technical studies of the proposed agreement. Specifically, WPIC asked the Committee's legal counsel from Montana Legislative Services Division, Legal Services Office ("LSO") to evaluate legal questions raised by Representatives Nancy Ballance and Keith Regier regarding the proposed water Compact with the Tribes.<sup>187</sup>

These WPIC legal questions fell within four primary topic areas:

1. the purpose of the Flathead Indian Reservation;<sup>188</sup>
2. the State's authority to adopt the proposed Unitary Administration and Management Ordinance;
3. the legal basis for the proposed off-Reservation instream flow rights; and
4. Compact ratification and administration.

The LSO concluded that the proposed Compact and Ordinance conformed with applicable law and was legally justified.<sup>189</sup> The Commission's legal counsel also provided additional analysis for WPIC.<sup>190</sup> Analyses conducted by both the Commission and the LSO concluded that the

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<sup>185</sup> Letter, to Ron Trahan, Chairman, Confederated Salish and Kootenai Tribes, from Governor Steve Bullock, dated March 31, 2014. ("The State believes that negotiations concerning FIIP water use should be based upon the same premise that motivated the initial negotiations - namely that irrigation deliveries will be protected and that water saved through upgrades and repairs to the FIIP will be allocated to Tribal instream flows.") file:///G:/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20159474/SKT-LEG-159474-Yates-Misc%20Legal%20File.pdf

<sup>186</sup> Letter, to Steve Bullock, Governor of Montana, from Ron Trahan, Chairman, Confederated Salish and Kootenai Tribes, dated April 17, 2014. [CSKT/Legal/Correspondence 2014-04-23\_Trahan ltr re reopener.pdf]

<sup>187</sup> Memorandum To: Water Policy Interim Committee From: Representatives Nancy Ballance and Keith Regier Subject, Review of the Proposed CSKT Compact, dated April 28, 2014. (This memorandum requests economic, legal/constitutional, and environmental analysis of the proposed CSKT Compact prior to its consideration in the legislature.)

<sup>188</sup> Under Winters and its progeny, federal reserved water rights for tribes are to be quantified based on the amount necessary to satisfy the purpose or purposes for which the reservation was created. For federal enclaves, the law is clear that the quantification standard is the minimum amount of water necessary to fulfill the primary purpose of the reservation. *United States v. New Mexico*, 438 U.S. 696 (1978).

<sup>189</sup> Memorandum, to Water Policy Interim Committee, from Helen Thigpen, Staff Attorney, Responses to legal questions submitted by Representatives Ballance and Regier regarding the proposed water Compact with the Confederated Salish & Kootenai Tribes, dated August 22, 2014. [CSKT/General/WPIC/2014/ CSKT-Thigpen\_review.pdf]

<sup>190</sup> Letter, to Senator Chas Vincent, Chairman, Water Policy Interim Committee, from Melissa Hornbein, Staff Attorney, Montana Reserved Water Rights Compact Commission, dated March 3, 2014; Letter, to Senator Chas



unitary management approach was a rational and legally defensible way to administer water resources on the Reservation.

To answer questions raised about relevant scientific and technical aspects of the proposed agreement, WPIC asked John Metesh, Director of the Montana Bureau of Mines and Geology (“MBMG”) to assemble a work group with technical expertise to analyze technical work related to water modeling and on-reservation water use demands that formed the basis of the settlement. A six-member technical working group was formed with two members from MBMG, two members from MFWP, and two members from DNRC (administrative support was provided by Legislative Services).

The six members of the technical working group had professional experience in the areas of hydrology, geohydrology, irrigation, and instream flows. The Report of Findings produced by the technical working group covered technical issues, including: the use of HYDROSS modeling and input and output data as part of the Compact’s technical foundation; irrigation water demand and use; aquifer characterizations (values and impacts to groundwater wells); evaluation of instream flow levels; changes in legal water demand resulting from the proposed Compact; and responses to other questions raised by Representatives Ballance and Regier at previous WPIC meetings.<sup>191</sup> This independent report served to validate the results of the technical work of the negotiating parties’ Legal/Technical Working Group and consultants and recognized the enormous amount of scientific information supporting the proposed Compact and Water Use Agreement.<sup>192</sup>

In early October 2014, a group of irrigators purporting to represent the FJBC<sup>193</sup> submitted a position statement to WPIC and the negotiating parties<sup>194</sup> with a set of proposed amendments to the Compact and Water Use Agreement. These proposals included having the FIIP right be in the name of the FJBC and the respective irrigation districts rather than the Tribes (as the proposed Compact had it defined). In the Commission’s opinion, having the ownership of the FIIP right in the FJBC’s or irrigation districts’ names would be unacceptable to the Tribes and would also present a host of legal and technical challenges to implement given the variety of priority dates that would have to be taken into account within the Project.<sup>195</sup> Since the lands served by the FIIP are a mixture of trust, allotted, and homesteaded land, the possibility of different priority dates within the FIIP was a central issue. WPIC voted to generally support the

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Vincent, Chairman, Water Policy Interim Committee, from Melissa Hornbein, Staff Attorney, Montana Reserved Water Rights Compact Commission, dated December 16, 2013.

<sup>191</sup> Report of Findings, CSKT Compact Technical Working Group, Technical review of proposed CSKT water rights Settlement for the Water Policy Interim Commission, dated September 23, 2014.

<sup>192</sup> Id.

<sup>193</sup> However, Judge James Manley of Lake County District Court later ruled in on February 2, 2018, that since the group of irrigators seeking to re-form the FJBC in 2014 did not hold an election of irrigators as required by Montana Code Annotated 85-7-1602, they were not a valid government entity and therefore remained dissolved as of December 12, 2013.

<sup>194</sup> “Proposals of the Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts for modifications to the existing Water Use Agreement of the Flathead Compact for consideration by the 2015 Montana Legislature, October 8, 2014. Url: <https://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/October-2014/FJBC-Position%20Statement%202014.pdf>

<sup>195</sup> Historically, the Project allocated water based on available supply without regard to the priority date that might be asserted by individual irrigators. Having the Project make delivery by priority would require a slew of management changes that BIA, the Tribes, and many Project irrigators believed would be difficult or impossible. Moreover, differentiating by priority date would also make the Commission’s task of protecting exiting water users more difficult as compared to treating the Project as a single for water administration purposes.

Compact Commission continuing on its then-contemplated path of building Project protections directly into the Compact rather than through the vehicle of a separate Water Use Agreement.

On October 30, 2014, WPIC provided recommendations to the Parties for the conclusion of compact negotiations between the Tribes, the United States, and the State of Montana. The Parties discussed the recommendations and incorporated several changes in the proposed Compact.<sup>196</sup> The Parties made changes to various provisions in response to recommendations from the WPIC.<sup>197</sup>

## **9. 2015 Compact Proposal**

A significant issue that needed to be renegotiated in 2014 related to the dissolution of the FJBC and reassumption of FIIP management by the BIA, which left the Compact without protections for FIIP irrigators that were previously negotiated through the Water Use Agreement. On March 31, 2014, Governor Bullock sent a formal letter to Tribal Chairman Trahan for the purpose of renegotiating to resolve that issue so that legislation could be presented to the 2015 Legislature. The FIIP-specific portion of the Compact was reconfigured between 2013 and 2015 and the Compact that was eventually ratified by the three sovereigns differs in its treatment of the FIIP right from what was proposed in the defunct 2013 water use agreement.

The Parties negotiated issues involving allocation of water between CSKT instream flows on the Reservation and FIIP water rights. Ultimately, the 2015 Compact defines and protects both historical farm delivery volumes and CSKT Instream Flows through a combination of storage water in Hungry Horse Reservoir, water savings from project efficiency improvements, and the identification of Rehabilitation and Betterment projects.<sup>198</sup> The Compact includes delivery entitlements for assessed land within the FIIP, a Shared Shortages provision to meet water demands in low-water years, and Adaptive Management provisions. The Parties also agreed to create a technical team that would be responsible for water allocation, implementation of project improvements, and carrying out other adaptive management tasks.

The Commission voted unanimously on January 12, 2015, to submit the revised Compact to the Legislature for approval.

In the 2015 legislative session, Senator Chas Vincent (who had chaired WPIC during the 2013-2015 Interim) introduced Senate Bill 262 to ratify the proposed Compact.<sup>199</sup> The bill was heard in the Senate Judiciary Committee and passed out of Committee on an 8 to 4 vote. It was tabled in the Senate Finance and Claims Committee, but the full Senate voted 33 to 17 to take it out of Committee and bring it to the floor for Second Reading. The Senate ultimately voted 31 to 19 to pass the bill, which then went to the House Judiciary Committee. That Committee unsuccessfully attempted to amend the bill, which then failed to pass out of Committee on a vote of 11 to 10. The full House then voted 52 to 48 to take the original bill out of Committee

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<sup>196</sup> Letter, to Senator Chas Vincent, Chairman, Water Policy Interim Committee, from Chris Tweeten, Chairman, Montana Reserved Water Rights Compact Commission, dated December 12, 2014. [[wpic-2014-12-12\\_revised\\_wpic\\_response.pdf](#)]; Letter to Chris Tweeten, Chairman RWRCC, from Senator Chas Vincent, Chairman, WPIC, dated October 30, 2014.

<sup>197</sup> Summary of the Proposed Compact and Ordinance for the Flathead Reservation Water Rights Settlement, dated January 8, 2015. [[2015-1-8 Summary of Proposed Compact and Ordinance.pdf](#)].

<sup>198</sup> Note: defined terms in the Compact are capitalized in this Staff Report. See Article II.

<sup>199</sup> S.B. 262, 64th Leg. (Mont. 2015).

and place it on the floor for Second Reading. After several more unsuccessful attempts to amend the legislation, the House passed it on a 53 to 47 vote. Governor Bullock signed the legislation on April 24, 2015.

The Compact is codified in Mont. Code Ann. § 85-20-1901 - Water rights Compact entered into by the CSKT of the Flathead Reservation, Montana, the State of Montana, and the United States ratified. The Ordinance is codified in Mont. Code Ann. § 85-20-1902 - Unitary Administration and Management Ordinance.

## **10. Inventory of Negotiation Sessions with the CSKT and the United States of America – Public Involvement**

Negotiating sessions between the Compact Commission, the Tribes, and the United States were held on:

- October 4, 1979 (Helena, Montana (informational meeting))
- June 18, 1980 (Billings, Montana (informational session also attended by Northern Cheyenne representatives))
- September 16, 1980 (Pablo, Montana)
- January 12, 1981 (Helena, Montana)
- July 19, 1984 (Pablo, Montana (informational meeting))
- November 19, 1984 (Pablo, Montana)
- September 11, 1985 (Pablo, Montana)
- November 18, 1985 (Helena, Montana)
- May 20-21, 1986 (Flathead Reservation (tour of the Reservation))
- January 25, 1995 (Helena, Montana (informal status meeting))
- July 10-11, 1995 (Flathead Reservation (tour of the Reservation))
- May 3, 2000 (Polson, Montana)
- September 13, 2000 (Helena, Montana)
- December 10, 2001 (Conference Call)
- December 11, 2001 (Missoula, Montana (informal clarification meeting))
- January 7, 2002 (Conference Call)
- February 7, 2002 (Missoula, Montana)
- June 17, 2002 (Polson, Montana)
- July 17, 2002 (Polson, Montana)
- December 18, 2002 (Polson, Montana)
- June 25, 2003 (Polson, Montana)
- July 11, 2007 (Polson, Montana)
- October 3, 2007 (Missoula, Montana)
- December 12, 2007 (Pablo, Montana)
- February 8, 2008 (Pablo, Montana)
- March 12, 2008 (Pablo, Montana)
- April 30, 2008 (Pablo, Montana)
- May 28, 2008 (Polson, Montana)
- June 25, 2008 (Polson, Montana)
- July 30, 2008 (Polson, Montana)
- August 27, 2008 (Polson, Montana)

- September 25, 2008 (Pablo, Montana)
- October 22, 2008 (Polson, Montana)
- November 19, 2008 (Pablo, Montana)
- December 17, 2008 (Polson, Montana)
- January 28, 2009 (Helena, Montana)
- March 18, 2009 (Pablo, Montana)
- April 29, 2009 (Polson, Montana)
- May 27, 2009 (Polson, Montana)
- July 22, 2009 (Polson, Montana)
- September 30, 2009 (Polson, Montana)
- December 9, 2009 (Polson, Montana)
- February 24, 2010 (Polson, Montana)
- April 28, 2010 (Polson, Montana)
- May 26, 2010 (Pablo, Montana)
- June 30, 2010 (Polson, Montana)
- August 18, 2010 (Polson, Montana)
- September 29, 2010 (Pablo, Montana)
- November 3, 2010 (Polson, Montana)
- January 25, 2011 (Helena, Montana)
- March 16, 2011 (Polson, Montana)
- April 27, 2011 (Polson, Montana)
- May 24-25, 2011 (Pablo, Montana)
- June 29, 2011 (Polson, Montana)
- August 31, 2011 (Polson, Montana)
- September 28, 2011 (Polson, Montana)
- October 26, 2011 (Polson, Montana)
- November 30, 2011 (Polson, Montana)
- February 29, 2012 (Polson, Montana)
- April 4, 2012 (Polson, Montana)
- April 25, 2012 (Polson, Montana)
- May 30, 2012 (Polson, Montana)
- June 27, 2012 (Polson, Montana)
- September 5, 2012 (Polson, Montana)
- October 3, 2012 (Polson, Montana)
- October 24, 2012 (Polson, Montana)
- July 24, 2013 (Missoula, Montana)
- November 29, 2013 (location unknown, Montana)<sup>200</sup>
- September 3, 2014 (Missoula, Montana)
- October 15, 2014 (Polson, Montana)
- October 27, 2014 (Missoula, Montana)
- November 5, 2014 (Polson, Montana)
- December 1, 2014 (Missoula, Montana)
- December 10, 2014 (Polson, Montana).

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<sup>200</sup> Compact Commission records are incomplete as to the city in which this meeting was held.

Notice of all formal negotiation sessions was sent by first-class mail to each individual and entity on the Commission mailing list, and (as technology evolved) on the Commission website. Some negotiation sessions were also published in local newspapers. Negotiating sessions were open to the public and public comment was received at each negotiating session. Public meetings, both noticed general meetings and meetings with individual groups, took place during the entire course of the negotiations.

From 1986 through 2015, the Commission and/or Commission staff held innumerable meetings and presentations with interested stakeholders and other groups and entities. Some of these entities include city and county local governments, conservation districts, Chambers of Commerce, local legislators, and the Northwest Montana Association of Realtors. Throughout the decades of negotiations with Tribes, the Commission received hundreds of public comments at negotiation sessions, and public meetings; and through letters, emails, and phone calls.

### **III. PROVISIONS OF THE COMPACT**

This section provides explanatory commentary following the structure of the Compact itself, providing context and additional information about specific provisions.

#### **ARTICLE I – RECITALS**

The “Recitals” listed in Article I of the Compact cite the authority of the compacting Parties to enter into the settlement agreement. The authority for the Commission to negotiate on behalf of the Governor settlements of claims to Indian reserved water rights within the State of Montana is set out in §§ 2-15-212, 85-2-228(3) and 85-2-702, MCA.

The Confederated Salish and Kootenai Tribes have authority to negotiate the Compact and the Tribal Council has the authority to execute the Compact pursuant to Art. 6, § 1(a), (c), (u), of the Constitution and Bylaws of the Tribes.

The Secretary of the Interior has the authority to execute the Compact on behalf of the U.S. Department of the Interior.<sup>201</sup>

#### **ARTICLE II – DEFINITIONS**

Article II of the Compact contains definitions, some of which are included here with additional context. Defined terms are capitalized when used in the Compact to alert the reader that the term is defined. Terms defined in the Compact are also capitalized in this Staff Report. Where relevant, specific relevant definitions are discussed in other sections of this Staff Report.

**“Compact Implementation Technical Team” or “CITT”** means the entity established by the Compact to plan and advise the Project Operator on the implementation of FIIP Operational

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<sup>201</sup> 43 U.S.C. § 1457 (1986, Supp. 1992) and Division DD of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, 3008-38 (Montana Water Rights Protection Act) at Section 4(b).

Improvements, Rehabilitation and Betterment, and Adaptive Management. The CITT duties and responsibilities are defined in more detail in [Compact] Appendix 3.5. This was introduced in the 2015 Compact proposal and merged the functions of the interim technical team (proposed by the State) and the adaptive management team (proposed by the Tribes).

**“Court of Competent Jurisdiction”** – The Compact defines the Court of Competent Jurisdiction as a Federal court by default unless the Parties to the dispute consent to State or Tribal court jurisdiction. The 2013 proposed compact did not define “Court of Competent Jurisdiction.” Under *Montana v. U.S.*, 450 U.S. 544 (1981), there is a general presumption against tribal courts exercising jurisdiction over non-members acting on fee land within the exterior boundaries of a reservation. A concern expressed by the Committee was that a non-tribal party to litigation brought in tribal court would have to exhaust their remedies in tribal court before being able to invoke State jurisdiction. The Tribes were willing to accept a modified definition to reflect that the parties to litigation would have to consent to the exercise of both State and Tribal court jurisdiction.

**“Effective Date”** means the date on which the Compact is finally approved by the Tribes, by the State, and by the United States, and on which the Law of Administration has been enacted and taken effect as the law of the State and the Tribes, whichever date is latest. The Effective Date is September 17, 2021, the date Secretary of the Interior, Deb Haaland, signed a release of claims and waivers.

**“FIIP Influence Area”** means the lands influenced by the operations of the FIIP as identified on the map attached [to the Compact] as Appendix 2. It was important for negotiators to clearly delineate the lands served and influenced by the FIIP right, the largest right in volume included under the umbrella of the Tribal Water Right, to quantify River Diversion Allowances.

## **ARTICLE III – WATER RIGHTS OF THE TRIBES**

The negotiation of a Tribal Water Right was an important issue to resolve and an extremely complicated process. The need to interface quantification with an administrative scheme provided difficulties and challenges, as already discussed.<sup>202</sup> The water use picture on the Reservation is complex, with mixed land ownership, a major irrigation project (FIIP), a National Bison Range in the middle of the Reservation,<sup>203</sup> a major hydroelectric facility on Tribal land,<sup>204</sup> native endangered fish species, and accelerating growth in the area with people and development coming onto the Reservation. Further, the Tribes have a treaty that could support claims for off-Reservation instream flow rights.

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<sup>202</sup> Memorandum, to CSKT Negotiating Team, Jay Weiner, Susan Cottingham; Sonja Hoeglund, Bill Greiman, Stan Jones, from Joan Specking, CSKT Negotiating Session, September 25, 2008, Pablo, Montana, dated September 25, 2008; Memorandum, to CSKT Negotiating Team, Jay Weiner, Susan Cottingham; Sonja Hoeglund, Bill Greiman, Stan Jones, from Joan Specking, Draft Summary of November 19, 2008 CSKT Negotiating Session, Pablo, Montana, dated November 21, 2008; Meeting Minutes, Montana Reserved Water Rights Compact Commission, Helena, Montana.

<sup>203</sup> As part of the federal legislation ratifying the settlement, ownership of the National Bison Range was transferred from U.S. FWS to the Tribes.

<sup>204</sup> During the pendency of the negotiations and pursuant to a term included in the 1985 Federal Energy Regulatory Commission renewal of the license for the then-called Kerr Dam, the Tribes took ownership of the dam and renamed it Selis’ Ksanka Qlispé Dam.

## 1. Article III.A. Religious or Cultural Uses

The Tribal Water Right described in this Article III includes all traditional religious or cultural uses of water by Confederated Salish and Kootenai Tribal members within the Reservation.

## 2. Article III.B. Abstracts of Water Right

This section addresses the water right abstracts that were prepared by the Parties.<sup>205</sup> Water right abstracts are the documents maintained in the DNRC water rights database that identify the specific elements of water rights (such as priority date, point of diversion, place of use, period of use, and flow rate or volume) as decreed by the Montana Water Court or permitted by DNRC. They also serve an important notice function when people query the DNRC database to identify what water rights may exist on a particular source. Prior compacts with Montana tribes had not focused on describing the rights being quantified with the same level of particularity as commonly found in water rights abstracts, which created some implementation challenges when it came time to incorporate the compacted rights into the DNRC database. Learning from that experience, and because of the complexity of the rights being recognized in the Compact developing abstracts to embody the specific descriptions and definitions of the water rights being compacted became a key part of the negotiations.<sup>206</sup>

## 3. Article III.C.1.a Flathead Indian Irrigation Project

The FIIP is a federal irrigation project located almost entirely on the Flathead Indian Reservation. Encompassing approximately 134,790 irrigated acres,<sup>207</sup> the FIIP is responsible for an estimated 90-96% of the surface water use within the Reservation<sup>208</sup> and is the largest irrigation project in Montana. As the FIIP water use right and the on-Reservation Instream flow water rights utilize the same water supply, these rights could only be resolved in tandem. The FIIP serves allotted lands, homestead lands, and trust lands.<sup>209</sup> Approximately 10 percent of the irrigated land within the FIIP is held in trust for the Tribes and a small number of Tribal members.<sup>210</sup> Most of the irrigated land served by the FIIP is owned by non-Indian irrigators. Of

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<sup>206</sup> See § 85-20-1901, Art. III.B, MCA.

<sup>207</sup> Draft Environmental Assessment for the Operation and Maintenance of the Flathead Indian Irrigation Project Upon Transfer, U.S. Department of the Interior, Bureau of Indian Affairs, dated September 2008, [[file:///G:/COMPACT/CSKT/Technical/Documents/draft\\_fiip\\_ea\\_september\\_2008.pdf](file:///G:/COMPACT/CSKT/Technical/Documents/draft_fiip_ea_september_2008.pdf)]; [Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from October 03, 2007 Negotiating Session, Missoula, Montana, dated October 11, 2007 \(presentation by John Carter, Tribal Attorney\). \[file:///G:/WATER\\_MG/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20154735/SKT-GEN-154735-Correspondence-Misc-1998-2013.pdf\]](#)

<sup>208</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from October 03, 2007 Negotiating Session, Missoula, Montana, dated October 11, 2007 (presentation by John Carter, Tribal Attorney);\_Response of Flathead Joint Board of Control to June 13, 2001 Water Rights Compact Proposal of the Confederated Salish and Kootenai Tribes, Walter Schock Chairman, Flathead Joint Board of Control, dated October 26, 2001. [<file:///G:/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20154735/SKT-GEN-154735-Correspondence-Misc-1998-2013.pdf>]

<sup>209</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from October 03, 2007 Negotiating Session, Missoula, Montana, dated October 11, 2007 (presentation by John Carter, Tribal Attorney). The checkerboard pattern within the FIIP consists of Tribal, individual Tribal member, non-Indian, State of Montana, Bureau of Indian Affairs, and Fish and Wildlife Service owned lands.

<sup>210</sup> Bureau of Indian Affairs, United States Department of the Interior, Results of Scoping for the Environmental Impact Statement for the Proposed Operation and Maintenance of the Flathead Indian Irrigation Project upon Transfer, Final,

the non-Indian irrigated land within the FIIP, approximately half is formerly allotted land and approximately half homesteaded land.<sup>211</sup> As an entity, the FIIP consists of two operating divisions – the Irrigation Division and the Power Division – that operate as distinct entities. The pumps, canals, and laterals of the Irrigation Division deliver water to roughly 2,600 customers. The generating plants, transmission lines, and sub-stations of the Power Division deliver electricity to about 14,000 customers.<sup>212</sup> The FIIP Irrigation Division includes 16 reservoirs (with a combined capacity of approximately 160,500 acre-feet), four pump facilities, over 1,300 miles of canals and laterals, one inter-basin transfer (from 76LJ to 76L – North Fork Placid Creek to Upper Jocko Lake) and over 10,000 structures for diversion, control and delivery of water.<sup>213</sup> The nature, extent, and ownership of the water rights for the FIIP was a particularly contentious issue in the negotiations.

Ultimately, the Parties reached agreement on encompassing the FIIP water use right within the Tribes' compacted water rights (with a single priority date for the whole Project of July 16, 1855) while keeping the ownership and operation in the hands of the United States, much like any other BIA irrigation project. Under the umbrella of the Tribal Water Right but under the control of the Project Operator (a BIA employee after the collapse of the CME), the FIIP water use rights<sup>214</sup> would be governed by the senior priority instream flows and operated under the concept of River Diversion Allowances (“RDAs”). RDAs are quantified diversion amounts from various sources across the Reservation whose volumes are set to one of three tiers annually based on the water supply available in any given year. These wet, normal, and dry conditions are defined in Compact Appendix 3.2; the process for making the determination of wet, normal, or dry, is laid out in Compact Appendix 3.5. In the Compact, the Parties, in general, agreed to abide by a concept of “Adaptive Management,” meaning a system heavily based on continuous water measurement and study, along with operational improvements to allocation practices and Rehabilitation and Betterment projects geared toward making the project’s infrastructure more efficient and thereby freeing up water for availability to both Instream Flows and project use. Detailed prescriptions for exercise of the FIIP right are set forth in Compact Article IV.D through F. For FIIP water use provisions and safeguards for the FIIP water supply, see Section IV.7 - Exercise of the FIIP Water Use Right.

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dated December 1, 2004. See pages 1-27 of “SKT-GEN-154738-Flathead Indian Irrigation Project-JBC Transfer-2004.pdf” in DNRC digital records.

<sup>211</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from October 03, 2007 Negotiating Session, Missoula, Montana, dated October 11, 2007 (presentation by John Carter, Tribal Attorney). BIA records concerning land ownership and irrigation were out of date. “The last official Project land redesignation was conducted by the United States in 1963.” Briefing Paper, Water Rights Settlement Proposal, presented by the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, dated July 27, 2010; Redesignation was ongoing during negotiations. Memorandum, to Susan Cottingham, Anne Yates, Sonja Hoeglund, from Joan Specking, Historian, Confidential Draft of chronological information on the CSKT, dated October 25, 2001 (“November 21, 1997. Report of the Redesignation Committee, commissioned by the Agency Superintendent, Flathead Irrigation Project.”) See pages 1-42 of “SKT-GEN-154737-Confidential Folder.pdf” in DNRC digital records.

<sup>212</sup> Comprehensive Review Report, Flathead Indian Irrigation Project, prepared at the Direction of the Secretary of the Interior, Volume 3 of 3, dated October 1986. See document entitled “SKT-GEN-154738-Flathead Indian Irrigation Project-Reports-1985-II.pdf” in DNRC digital records.

<sup>213</sup> A comprehensive description of the history of the FIIP irrigation construction, irrigation divisions, reservoirs, and other facilities is contained in the report: The Flathead Project, The Indian Projects, Garrit Voggesser, Bureau of Reclamation, dated 2001. [<https://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Committee-Topics/CSKT-workgroup/BuRec-TheFlatheadProject.pdf>]

<sup>214</sup> See appendix 5 for the three full abstracts composing the FIIP reserved right. Available here: <http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/confederated-salish-and-kootenai-tribes-compact>.



#### **4. Article III.C.1.b Existing Uses**

Section I.3.B and II.2.C above, discussed negotiation around the protection of existing state-law based uses on the Reservation, culminating in a registration process addressed in §§ 2-1-106 through 2-1-108 of the Ordinance. Another category of Existing Uses recognized by the Compact in Article III.C.1.b are Existing Uses by the Tribes, their members, and Allottees. Unlike the state law-based uses described above, these are components of the Tribes' rights recognized in the Compact and have a 5-year registration period following the Effective Date of the Compact. The Ordinance lays out the process for filing in §§ 2-1-101 through 2-1-105. This is a unique route for incorporating Existing Uses into a tribal compact and stems from the unitary administration scheme embodied by the Ordinance. Other tribal compacts, like the Crow and Blackfeet compacts, laid out a process for the tribe to submit a list of current or existing uses to DNRC after compact approval.

The CSKT-Montana Compact, on the other hand, establishes an independent process under the auspices of the Flathead Reservation Water Management Board ("Board") for the recording of Existing Uses. These existing tribal uses may include, but are not limited to, uses such as irrigation, stock, domestic, commercial, municipal, and industrial purposes. One of the Tribes' contractors, HKM Engineering, developed existing use data from 1992 that was shared with the Commission and updated to serve a source to help determine the existing Tribal and individual Tribal member uses for irrigation on the Reservation.<sup>215</sup> The Compact Commission and the Tribes worked with the federal team to get updated information on water delivered by the FIIP. Commission staff worked to review and digitize the various sources of data to make this information available to the Parties.<sup>216</sup> Consequently, the Parties felt comfortable with the available datasets about overall on-Reservation water use. But coming up with more granular identifications of current water uses by the Tribes and Tribal members was more challenging. The registration process in the Ordinance was intended to fill these gaps.

The Tribes' own existing consumptive uses are included in Art.III of the Compact and detailed in abstracts incorporated in the Compact.

#### **5. Article III.C.1.c Flathead System Compact Water**

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

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<sup>215</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from, Joan Specking, Draft CSKT Minute Summary from February 8, 2008 negotiating session, Pablo, Montana, dated February 08, 2008. HKM had contracted with other Montana tribes in water right negotiations and the firm knew what technical information was necessary for a factually supported settlement and the Commission had always found their work of high quality.

<sup>216</sup> The specifics of the work of the Parties' technical teams are covered in the Commission's CSKT Technical Report.

The Diversion Means and Purposes are uniquely flexible for this water right, a design that accommodates the diverse host of potential future and Existing Uses to be supplied by this water right. The Compact provides that 11,000 acre-feet of the Flathead System Compact Water can be used for off-Reservation mitigation purposes for new or existing water uses. This is designed to address existing limitations of legal water availability in some areas of the Clark Fork Basin. The Tribes are obligated to lease water from the Flathead System Compact Water to supplement RDAs during periods of Shared Shortages as set forth in Article IV.C through F of the Compact. It provides water for the Tribes for existing and future water needs.

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

## **6. Article III.C.1.d Instream Flow and other non-consumptive Rights on the Reservation**

As discussed previously, claims for instream flows and other non-consumptive water rights to support treaty resources are based on the language in the Hellgate Treaty between the United States and the Tribes. (See Section II.2.B.) Court decisions acknowledged these treaty-based instream flow rights and found that these rights carried a “time immemorial” priority date. Indeed, the Ninth Circuit Court of Appeals, while not specifically quantifying the rights, recognized that, at least on the Flathead Reservation, they were “pervasive.”<sup>217</sup> Rulings from Pacific Northwest states involving tribes with similar treaty language confirming time-immemorial instream flow rights further underlined the likelihood that the Tribes’ instream claims, if pursued through litigation, had the potential to displace much if not all of the existing junior uses of water on the Reservation.<sup>218</sup> Consequently, the Commission focused intensively on how to recognize the Tribes’ on-Reservation instream flow rights in a manner that would still provide protection for junior, non-Indian water users.

As part of the negotiations, the Tribes sought to identify minimum instream flows, explore how more optimum flows could be achieved, and wanted mechanisms that would also provide for periodic flushing flows to maintain and improve channel morphology and to match the variability of a more natural hydrograph. This desire for variability, and the Commission’s goal of preserving water supplies for existing consumptive users meant that water management rules would need to be supple enough to allow water managers to adapt to water availability.<sup>219</sup> This balance was reflected in the Compact’s Shared Shortage provisions as well as the calculation rules for River Diversion Allowances in wet, normal, and dry years.

The Compact defines Natural Instream Flows (Instream Flows for Reservation streams, abstracted in Compact Appendix 10), FIIP Instream Flows (Instream Flow rights that contribute to and are partly bypassed by FIIP diversions, abstracted in Compact Appendix 11), Other Instream Flows (which become enforceable only after promulgation of an Instream Flow

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<sup>217</sup> See, *supra* notes 62-63.

<sup>218</sup> *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).

<sup>219</sup> Memorandum, to CSKT Negotiating Team, Jay Weiner, Susan Cottingham; Sonja Hoeglund, Bill Greiman, Stan Jones, from Joan Specking, CSKT Negotiating Session, September 25, 2008, Pablo, Montana, dated September 25, 2008.

schedule as outlined in § 2-1-115 of the Ordinance, and abstracted in Compact Appendix 12), and Interim Instream Flows (flow levels for FIIP Instream Flow streams before they become fully enforceable per Article IV.C of the Compact, as described in Compact Appendices 13 and 14). The priority date for all categories of Instream Flow is time immemorial.

Reclamation model runs<sup>220</sup> comparing base scenarios (including FIIP diversions but without factoring in new tribal diversions) to the scenario of adding new tribal diversions (including Instream Flows) illustrated that without mitigation water or some other mechanism for protecting at least some quantum of FIIP diversions could leave FIIP wholly without water in certain water years. The modeling further showed that deploying the 90,000 acre-feet per year storage allocation as part of the Flathead System Compact Water could ensure minimum flows and baseline FIIP supplies during most low water years. This is precisely the sort of compromise the Commission strove to obtain through its negotiations.

The Compact builds in a deferral period ahead of full development of the on-Reservation Instream Flow water rights recognized in the Compact. This sort of deferral approach has been used in other compacts with Montana tribes (such as the Blackfeet Tribe-Montana Compact) to allow for mitigation or other measures to reduce or eliminate the impacts to existing junior users from the recognition of the Tribes' legal entitlements to water. Article IV.C – F of the Compact lays out a process for fully implementing the Tribes' Instream Flow rights that involves starting with Minimum Enforceable Flow levels and Minimum Reservoir Pool elevations, with Target Instream Flows to be met only after River Diversion Allowances of the project have been satisfied. For streams impacted by FIIP canal intersections, the Compact puts in place special interim Instream Flows to govern the period of time until Project efficiency improvements (Operations Improvements) can be implemented to keep the existing users whole while freeing up more water to augment the Tribes' protectable Instream Flow levels. Over time, as the Parties complete Operational Improvements in project management and Rehabilitation and Betterment projects that make more water available, the Target Instream Flows can become fully enforceable. Operational Improvements are scheduled according to Compact Appendix 3.4. Rehabilitation and Betterment projects are listed and ranked in order of importance in Appendix 3.6 and depend on securing federal funding.

## **7. Article III.C.1.e Minimum Pool Elevations**

Like the concept of Minimum Enforceable Instream Flows, the Minimum Reservoir Pool Elevations<sup>221</sup> as set forth in the table and abstracts in Compact Appendix 15 are rights to support treaty resources that become enforceable at a later date (see Compact Appendix 3.4 for schedule). Full enforceability is deferred until the schedule outlined in that Appendix 3.4 is accomplished, including Operational Improvements that make more water available. Until that time, interim reservoir pool elevation levels identified in Compact Appendix 15 will control. Consistent with existing case law, the priority date for these rights is also time immemorial.

## **8. Article III.C.1.f Wetlands**

The Tribes have the right to “all naturally occurring water necessary to maintain the Wetlands identified in the abstracts of water right” in Appendix 16.<sup>222</sup> This inventory of wetlands was

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<sup>220</sup> See Appendix 7 to the Compact: “Bureau of Reclamation Modeling Report”

<sup>221</sup> See Article III.C.e. of the Compact.

<sup>222</sup> Compact Article III.C.f. describing the Wetland Water Right.

based on current classifications of wetland areas of the time, heavily relying on that of the USFWS National Wetlands Inventory. This non-consumptive right supports the maintenance of natural wetlands and the treaty resources that rely on them. The priority date for these rights is also time immemorial.

#### **9. Article III.C.1.g High Mountain Lakes**

The Tribes have the right “to all naturally occurring water necessary to maintain the High Mountain Lakes”<sup>223</sup> which are identified in Compact Appendix 17, also to protect the treaty resources that rely on them. These natural lakes are mostly in the Mission Mountains but include some lakes in the Little Bitterroot drainage and on the southern border of the Reservation. The priority date for these rights is also time immemorial.

#### **10. Article III.C.1.h Flathead Lake**

The Tribes have the right to naturally occurring water necessary “to maintain the level of the entirety of Flathead Lake at an elevation of 2,883 feet” which is described in the abstract in Compact Appendix 18.<sup>224</sup> As the elevations in Flathead Lake are primarily governed by a schedule included as a condition on the FERC license for Selis’ Ksanka Q’lispé Dam, and are generally kept much higher than this elevation, the right recognized in the Compact is an elevation that should routinely be satisfied without triggering Call on other water users, and reflects an important compromise in service of the Parties; respective desires to recognize the Tribes’ legal entitlements to water while protecting existing water users to the greatest extent possible. Since this right is also predicated on the treaty-protected resources, the priority date for this right is time immemorial.

#### **11. Article III.C.1.i & j Boulder Creek Hydroelectric Project and Hellroaring Hydroelectric Projects**

The Tribes have the right to the water necessary to operate the Boulder Creek and Hellroaring Hydroelectric Projects as identified, respectively, in the abstracts in Compact Appendices 19 and 20. The priority date for both projects is July 16, 1855.

#### **12. Article III.C.1.k Wetlands Appurtenant to Lands Owned by Montana FWP**

Under this provision, the Tribes will be added as a co-owner to three wetland water rights and one inlake water right held by MFWP and appurtenant to lands on the Reservation. The wetland rights are abstracted in Compact Appendix 21 and the inlake right in Compact Appendix 22. The Compact also provides that the Tribes will become co-owners of any other Fish and Wildlife or Wetland water rights acquired by MFWP appurtenant to lands on the Reservation. This water rights co-ownership does not confer on the Tribes authority over the management of MFWP-owned lands but commits the Parties to a relationship where the Tribes and MFWP regularly meet to discuss and plan for the exercise of these rights. The priority dates for each of these rights are as described in the water right abstracts for each right.

#### **13. Article III.C.1.l Wetlands Appurtenant to Lands Owned by USFWS**

Under this provision, the Tribes and the USFWS have the right to all naturally occurring water necessary to maintain the Wetlands in the Crow and Mission Creek area watersheds described

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<sup>223</sup> Compact Article III.C.g.

<sup>224</sup> Compact Article III.C.h.

in the two abstracts that comprise Compact Appendix 23. The priority date of these rights is time immemorial. Additionally, the Tribes are to be added as co-owners of three state-law based rights with a recreation purpose appurtenant to USFWS lands within the Reservation and are to be expeditiously added as co-owners to water rights with wetland or fish and wildlife-purposes appurtenant to land acquired by USFWS on the Reservation in the future. This co-ownership does not confer to the Tribes authority over management of the USFWS-owned lands or water rights but rather commits the Parties to a relationship where the Tribes and USFWS regularly meet to discuss and plan for the exercise of these rights.

#### **14. Article III.D Instream Flow Water Rights Off of the Reservation**

The settlement of the Tribes' off-Reservation Instream Flow claims was a particularly delicate aspect of the negotiations. As noted above, no other Indian tribe in Montana is party to a Stevens Treaty and thus the Commission had not previously needed to address extensive Instream Flows claims in prior negotiations. Moreover, while existing caselaw made clear that the Tribes were justified in asserting instream flow claims, the law was less clear on the quantification standard that ought to be applied to such claims or exactly what sort of evidence the Tribes might need to present to prove up such claims in a litigated scenario. The Tribes' position was strengthened on that latter point by the fact that the Montana adjudication statutes confer on every filed claim a prima facie presumption of validity,<sup>225</sup> meaning that the burden would potentially be on an objector to disprove the validity of a filed claim rather than on the Tribes (or the United States for claims it filed on behalf of the Tribes) to prove the validity of the claim. The Commission therefore sought to identify a path forward for the off-Reservation water rights that would be politically acceptable to both the Tribes and to the Montana Legislature, and therefore requested the opportunity to make the first proposal on this subject rather than having the Tribes present one.<sup>226</sup>

Recognizing the Tribes treaty rights and potential for colorable instream flow claims with time immemorial priority dates, the Commission saw value in developing the initial off-Reservation Instream Flow water rights proposal, with quantifications and conditions that would protect existing water users through deferral periods, Call provisions, and Call protections to maintain the status quo of existing state-based water rights to the maximum extent practical. After coordinating closely with MFWP, the Commission presented its initial proposal to the Tribes on July 20, 2011, and while the Parties negotiated intensively and received extensive public comments on the off-Reservation water rights question, the broad contours of the Commission's proposal remained the framework for the rights ultimately recognized in the Compact.<sup>227</sup>

#### **15. Article III.D.1 Mainstem Instream Flow Right in the Kootenai River (Basin 76D)**

The Compact recognizes an off-Reservation right for Instream Flow in the mainstem of the Kootenai River as set forth on the abstract in Compact Appendix 25. The measurement point for this right is USGS streamflow gage #12305000 at Leonia, Idaho. Because the flow rate of

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<sup>225</sup> Section 85-2-227, MCA. For the application of this presumption to filed claims for tribes' claims for federal reserved water rights, see §85-2-702(3).

<sup>226</sup> Memorandum, to CSKT File, CSKT RWRCC Team and MOU Group Meeting, November 3, 2009, unknown location. See p. 5 comment from Susan Cottingham. See "11-3-09 CSKT MOU meeting minutes.doc" in DNRC digital records, Public Meeting 2009 folder.

<sup>227</sup> See "The State of Montana's Proposal for the Resolution of the Off-Reservation Water Rights Claims of the Confederated Salish & Kootenai Tribes," July 20, 2011 (p. 241-254 of "SKT-LEG-154745-Off Reservation Rights Correspondence and Misc..pdf" located in: CSKT RWRCC Box 154745).

this right is lower than the minimum flow required to be released from Libby Dam under that facility's FERC license, this right only becomes enforceable if either Libby Dam is removed at some point in the future or if the Army Corps of Engineers' operations of the dam cease to be operated under the 2008 Federal Columbia River Power System Biological Opinion, as updated in 2010 and in the 2014 Supplemental Opinion. The priority date of this right is time immemorial.

#### **16. Article III.D.2 Mainstem Instream Flow Right in the Swan River (Basin 76K)**

The Compact recognizes an off-Reservation right for Instream Flow in the mainstem of the Swan River as set forth on the abstract in Compact Appendix 26. The measurement point for this right is the USGS streamflow gage #12370000 located right below Swan Lake. The right to make Call with this right is limited to surface irrigation rights and groundwater irrigation rights with a flow rate greater than 100 gallons per minute upstream of the protected reach. The priority date is time immemorial.

#### **17. Article III.D.3 Mainstem Instream Flow Right in the Lower Clark Fork River (Basins 76M and 76N)**

The Compact recognizes an off-Reservation 5,000 cubic feet per second ("cfs") right for Instream Flow in the mainstem of the Clark Fork River as set forth on the abstract in Compact Appendix 27. The measurement point for this right is the USGS streamflow gage #12391950 located below Cabinet Gorge Dam. The right to make Call with this right is limited to upstream surface irrigation rights from the mainstem of the Clark Fork River and groundwater irrigation rights with a flow rate greater than 100 gallons per minute. The priority date is time immemorial. For so long as Cabinet Gorge and Noxon Dams remain in existence, the enforceable level is equal to the lesser of 5,000 cfs or the minimum flow level established by the FERC as a condition on the license for either dam.

#### **18. Article III.D.4 Co-ownership of Instream and Public Recreation Water Rights Held by MFWP**

Under this provision, the Tribes become a co-owner of Montana FWP rights under state law for Instream Flow and recreation purposes identified in Appendices 28 and 29. The Appendix 28 rights are to be decreed as part of the Compact since they had already been through the preliminary decree and objection process in Montana's general stream adjudication through the Montana Water Court while the Appendix 29 rights will be decreed under the standard Montana Water Court basin decree process, separate from the Compact, since these existing rights had not yet gone through the preliminary decree process at the time of ratification of the Compact. However, as part of the finalization of the federal Montana Water Rights Appropriations Act,<sup>228</sup> co-ownership to 36 of these water rights in the Upper Flathead basin was waived by the Tribes. The Tribes and MFWP will meet on a biennial basis to confer on the exercise of the rights identified in these appendices with a goal of establishing a joint plan for their exercise.

#### **19. Article III.D.5 Co-ownership of Water Right Number 76M 94404-00 (Milltown Dam) in Basin 76G (Upper Clark Fork)**

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<sup>228</sup> As per Division DD of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, 3008-38 (Montana Water Rights Protection Act) at Section 10(a)(4), the Tribes have waived co-ownerships of 36 water rights for the Flathead River-Mainstem, North Fork Flathead River, Middle Fork Flathead River, and South Fork Flathead River. These waivers are not an amendment of the Water Rights Compact.

Following the removal of Milltown Dam and in light of the Tribes' interest in establishing some off-Reservation Instream Flow rights to streams in Western Montana, the Parties used the opportunity of altering the existing Milltown hydropower right to fit the Tribes interest in protecting flows in such a way as to have as little effect on existing water use as possible. The Parties understood that changing the purpose and attributes of the Milltown hydropower right to Instream Flow purposes through the compact process was a favorable process as it would provide a known outcome with agreed to quantifications. These changes when made through the compact would also allow the Legislature to authorize the changes and bypass the Water Use Act's usual change process.

Negotiators developed the concept of splitting the hydropower right associated with Milltown Dam (through the Compact) into two separate and enforceable Instream Flow rights for the Blackfoot and Clark Fork Rivers, the combined flow rates of which would be less than that of the former Milltown Dam hydropower right. In the case of the Blackfoot River, which had an active and voluntary basin-wide drought planning effort in place through the Blackfoot Challenge, the Instream Flow rates (which followed a hydrograph) were quantified to be commensurate with the target flows already being implemented by the Blackfoot Challenge Drought Response Plan. These numbers were based on an existing Murphy right for the lower Blackfoot River, but the new Instream Flow right would have the Milltown priority date (December 11, 1904) instead of the 1970s priority of the Murphy right, so more water users would have the possibility of being called.<sup>229</sup> On the whole, though, the status quo would be largely maintained on the Blackfoot.

The Upper Clark Fork basin, however, had no such basin-wide drought response planning (or Murphy right) in place, and therefore the Compact imposed a ten-year deferral period to allow the water users in the basin to plan for full implementation of the newly compacted right. The flow rates of both rights were based on existing minimum flow estimates for healthy fisheries, but the Upper Clark Fork, parts of which were recognized by MFWP as being chronically dewatered, would be the area most in need of the deferral period.<sup>230</sup> Call is limited to junior surface irrigation rights or junior groundwater irrigation rights with a flow rate greater than 100 gallons per minute. The priority date is December 11, 1904. Potential impacts to off-Reservation water users were analyzed by DNRC in a technical document that focused on the new Instream Flow rights created from the Milltown hydropower right.<sup>231</sup>

## **20. Article III.D.6 Contract Rights to Stored Water Held by MFWP in Basin 76H (Bitterroot)**

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<sup>229</sup> In 1969, the Montana Legislature enacted legislation granting the Montana Fish and Game Commission authority to appropriate unappropriated waters on 12 streams to maintain instream flows for the preservation of fish and wildlife habitat. These are known as Murphy rights after Representative James E. Murphy, who sponsored the measure. 1969 Mont. Laws ch. 345 (1969); Rev. Codes Mont. § 89-301(2).

<sup>230</sup> See "The State of Montana's Proposal for the Resolution of the Off-Reservation Water Rights Claims of the Confederated Salish & Kootenai Tribes," July 20, 2011 (p. 241-254 of "SKT-LEG-154745-Off Reservation Rights Correspondence and Misc..pdf" located in: CSKT RWRCC Box 154745). Also see the State's follow up in "Detailed Explanation of the State of Montana's Proposal for the Resolution of the Confederated Salish & Kootenai Tribes' Claims to Off-Reservation Tribal Water Rights," January 30, 2012 (p. 279-298 of "SKT-LEG-154745-Off Reservation Rights Correspondence and Misc.pdf" located in: CSKT RWRCC Box 154745). The Tribes' response is available in "CSKT Off-Reservation Water Rights May 15, 2012." (p. 295-304 of "SKT-LEG-159474-Yates-Misc Legal File.pdf" located in: CSKT RWRCC Box 159474)

<sup>231</sup> "Proposed 2015 CSKT Compact: Analysis of Potential Impacts to Off-Reservation Water Users," by Ethan Mace, Surface Water Hydrologist (MT DNRC), February 2015. [[http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/confederated-salish-and-kootenai-tribes-compact/docs/cskt/off-reservation\\_impact\\_analysis\\_2-2015.pdf](http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/confederated-salish-and-kootenai-tribes-compact/docs/cskt/off-reservation_impact_analysis_2-2015.pdf)]

For historical reasons, the Tribes had strong legal bases to make claims in the Bitterroot (76H) Basin, an already water-stressed basin and one for which the introduction of enforceable time immemorial instream flow claims would have been hugely disruptive to existing users. Consequently, as part of the balance of compromises struck in the Compact, the Parties found a different approach to recognizing the Tribes' interests in this basin. MFWP has contracts for water from two storage facilities in the Bitterroot Basin, Painted Rocks (which is owned by DNRC) and Lake Como (which is owned by Reclamation). As part of the Compact, MFWP committed to managing those contracts a "prudent, biologically based and environmentally sound manner" to support the Tribes' interests in instream flow and aquatic habitat conditions in the basin. The Tribes will also be co-owners of these MFWP contract rights, and the Tribes and MFWP will meet and confer on a biennial basis regarding the management of these contract rights. (Appendices 32, 33, and 34).

**21. Article III.D.7 Instream Flow Right on the North Fork of Placid Creek (Basin 76F)**

The Tribes have an Instream Flow right under this provision for the upper part of North Fork Placid Creek as abstracted in Appendix 35. The Tribes are limited to making Call to protect this right on junior surface irrigation rights or groundwater irrigation rights with a flow rate greater than 100 gallons per minute. The priority date is time immemorial.

**22. Article III.D.8 Instream Flow Rights on Kootenai River Tributaries (Basin 76D)**

The Tribes have Instream Flow rights for four tributaries of the Kootenai River as abstracted in Appendix 36. Water rights of the U.S. Forest Service under its water rights compact with the State of Montana are not subject to Call by the Tribes or the United States on behalf of the Tribes. This Instream Flow right does not confer on the Tribes any authority over management of National Forest System lands within the basin.<sup>232</sup> The priority date is time immemorial.

**23. Article III.E Period of Use**

The period of use of the Tribal Water Right is January 1 to December 31 of each year, provided however, that any portion of that right that is dedicated to seasonal use, including irrigation, shall have a period of use as set forth in the abstracts in Compact Appendix 5.

**24. Article III.F Points and Means of Diversion**

The points and means of diversion of the Tribal Water Right are as set forth in the abstracts of water rights appended to this Compact or as provided for under the Ordinance.

**25. Article III.G.1 Call Protection, Non-Irrigators**

As part its commitment to protect existing state law-based water users, the Commission bargained hard to exempt as many water users as possible from the impacts of the Tribes' senior water rights. The Tribes also wanted to avoid the administrative hassles occasioned by having to try to make Call against small water users. Consequently, as part of the Compact, the Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in the Compact, and the United States, on behalf of the Tribes, agreed to relinquish their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose purpose(s) do(es) not include irrigation.

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<sup>232</sup> Section 85-20-1401, MCA.



## **26. Article III.G.2 Call Protection, Groundwater Irrigators with Flow Rates Less Than or Equal to 100 Gallons Per Minute**

For similar reasons as the Call protection discussed above, the Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in the Compact and the United States, on behalf of the Tribes, agreed to relinquish their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose purpose is irrigation and whose source of supply is Groundwater and whose flow rate is less than or equal to 100 gallons per minute.

## **27. Article III.G.3 Call Protection, Irrigators Within the FIIP Influence Area**

Securing protections for the larger irrigation water users was a more complicated task given the potential conflict between significant irrigation diversions and the Tribes' goals for improved Instream Flows. Recognizing the voluntary agreements were likely to be more readily implementable and potentially more durable than a situation driven by a top-down/one-size-fits-all approach, the Compact created a path for larger irrigators to obtain some protection against the possibility of a Tribal Call by entering into consensual agreements per Compact Article III.G.3 in the amount equal to the quantity of water established as the annual FIIP quota for the irrigation season, or the equivalent farm delivery amount within the FIIP as implemented by the Project Operator within the RDA Area, or the quantity allowed under a claim decreed by the Montana Water Court should owners have entered into a consensual agreement, whichever is less. Water users who declined to enter into such agreements would remain potentially subject to a Tribal Call if conditions were such that the Tribes' enforceable rights were not being satisfied and the Tribes chose to exercise their right to make Call.

## **28. Article III.G.4 Call Protection, Water Rights Upstream of the Reservation (Basins 76I, 76J, and 76LJ)**

Through the public meeting and stakeholder outreach process that the Commission led during the negotiations, see Section II.10 above, it became clear that minimizing or eliminating the potential impacts of the rights being recognized in the Compact on water users upstream of the Flathead Reservation was going to be critical to the viability of the Compact before the Montana Legislature. Consequently, after intensive negotiations, the Parties agreed that none of the Compact rights could be exercised to make a Call against any water right located upstream of the Flathead Reservation in Basins 76I, 76J, and 76LJ, except for surface irrigation rights on the four forks of the Flathead River (mainstem, South, Middle, and North) and groundwater irrigation rights with a flow right greater than 100 gallons per minute.

## **29. Article III.G.5 Call Protection, Water Rights on the Little Bitterroot River Outside the Reservation (Basin 76L)**

A similar dynamic to the one described directly above applied to the situation on the Little Bitterroot River. Consequently, after intensive negotiations, the Parties agreed that none of the Compact rights could be exercised to make Call against any water right whose point of diversion is outside the Flathead Reservation and whose source of supply is the Little Bitterroot River or its tributaries.

## **30. Article III.G.6 Maintenance of Call Protection Status Quo**

Because the Call protections were intensely negotiated and relied in no small part on the Parties' mutual understanding of the rights to be protected and those that were to remain

susceptible to Call, the Parties negotiated an additional provision preventing larger water rights from escaping susceptibility to Call by changing their purpose. Consequently, Article III.G.6 provides that any irrigation right that does not qualify for the Call protections set forth above remains susceptible to Call even if the owner of such right changes the purpose of the right to something other than irrigation (which would otherwise entitle that water right to Call protection under Article III.G.1).

### **31. Article III.H Water Rights Arising Under State Law Appurtenant to Lands Acquired by the Tribes**

For lands acquired by the Tribes within the Reservation, the Tribes have the right to any Water Right Arising Under State Law appurtenant to that land. If, after the Effective Date, the Tribes acquire such land, the Tribes can file a Trust Transfer Form with the newly-created Board to transfer the appurtenant right to the Tribal Water Right with a priority date of July 16, 1855.

## **ARTICLE IV – IMPLEMENTATION OF COMPACT**

The first provisions in Article IV of the Compact mirror provisions found in prior compacts the Commission negotiated with other Montana tribes. These common provisions include recognition of the trust status of the Tribal Water Right and that non-use of any portion of the Tribal Water Right does not constitute abandonment, relinquishment, or forfeiture.

However, much of Article IV is unique to the Compact because of the unitary administration system agreed to by the Parties, the settlement-specific protections built into the Compact for the exercise of the FIIP right, and the interrelationship between that right and the Tribes' on-Reservation Instream Flow rights. These Compact-specific provisions are discussed in more detail below.

### **1. Article IV.B.3 Review of Registration of Existing Uses of the Tribal Water Right**

Other tribal compacts have not included such a detailed process agreement within the compact itself for incorporating Existing Uses into the compacted right and have instead relied on separate process agreements negotiated during the implementation stage of those compacts. Applying lessons learned from those other compacts and due to the complexity of the issues implicated by the Compact and the political sensitivity surrounding it, the Parties opted to be as detailed as possible in the memorialization of the terms of the settlement. As part of this effort, the Registration process for existing Tribal Water Right uses set forth in the body of the Compact and Ordinance is very detailed.

Registrations of Existing Uses of the Tribal Water Right, as discussed above, proceed along a different track than registrations of existing state-based uses. For the Tribal registrations, a period of five years from the Effective Date of the Compact is allowed for the Board to compile and report to DNRC on this category of uses. Additionally, DNRC is given six months after receipt of the Board's report of the Tribal registrations to agree, agree in part, or disagree with the report. If DNRC takes no action, the report is considered approved. If the DNRC disagrees, the Parties will meet within 90 days of issuance of DNRC's notice of disagreement in an effort to resolve the issue(s). If an agreement is not reached within 180 days, the issues must be brought to before the Board.

## **2. Article IV.B.4 Changes in Use of the Tribal Water Right**

In other compacts, changes in use of the Tribal Water Right are within the sole jurisdiction of the respective tribe, subject only to a requirement that such a change cannot adversely affect an existing state law-based water user. In the Compact, by contrast, and in keeping with the unitary management framework agreed to by the Parties, Changes in Use of the Tribal Water Right (as with changes in use of state law-based water rights) must be approved by the Board pursuant to Article IV.I.4.b of the Compact and the Ordinance.

## **3. Article IV.B.5 New Development of the Tribal Water Right**

As with changes in use, new developments of a Tribal Water Right in other compacts are within the sole jurisdiction of the respective tribe, subject only to a requirement that such a new development cannot adversely affect an existing state law-based water user. In the Compact, by contrast, and in keeping with the unitary management framework agreed to by the Parties, new development of the Tribal Water Right on the Reservation must be approved by the Board. For a new use of Flathead System Compact Water, there is the additional requirement of obtaining approval from the Tribes for that use directly, before applying for an Appropriation Right from the Board. In the case of developing a new use of the Flathead System Compact Right off the Reservation, the applicant would not apply for an Appropriation Right to the Board but would still need approval from the Tribes before going through the State of Montana change application process under state law. In general, the Tribes, or any person with authorization from the Tribes, seeking to use Flathead System Compact Water off the Reservation must comply with state requirements for diversion, site permitting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water.

## **4. Article IV.B.6.a Lease of the Tribal Water Right**

Generally, the Tribes may Lease, for use on or off the Reservation, certain portions of the Tribal Water Rights, specifically those that have been developed for consumptive use and those associated with the Boulder Creek and Hellroaring hydroelectric projects. Off-Reservation uses will be approved through the state change application process.

## **5. Article IV.B.6.c. Lease of the Flathead System Compact Water Right**

Growing the water budget through the deployment of Flathead System Compact Water was an important component of the balance of compromises struck in the settlement, particularly for the Call protections secured by the Commission as well as the State's desire to find a block of water to mitigate the impacts to existing water users of additional domestic, commercial, municipal, and industrial water development off the Reservation in western Montana.<sup>233</sup> Consequently, ensuring clear and implementable rules for the use of that water was a common goal of the Parties. These leasing provisions provide that the Tribes may lease Flathead System Compact Water for use on or off the Reservation, provided that they, or their lessee, comply with the Ordinance and the relevant provisions of Article IV.B.6.c, during Shared Shortages periods, the Tribes must make available Flathead System Compact Water for short-term lease within the FIIP or FIIP Influence Area. Additionally, and of particular importance to the State, is the

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<sup>233</sup> Independent of the Compact negotiations, DNRC had long tried to negotiate a water supply contract with Reclamation for a block of mitigation water from Hungry Horse Reservoir. When those direct negotiations proved fruitless, the Compact Commission took on the task of trying to access Hungry Horse water to meet State needs.

requirement that 11,000 Acre-Feet per Year of Water from the Flathead System Compact Water right stored in Hungry Horse Reservoir is to be made available for lease off the Reservation to mitigate net depletion of new or existing state law-based uses of domestic, commercial, municipal and/or industrial water. As described above in Section III.5. The various conditions for use of Flathead System Compact Water, including those related to the 11,000 acre-feet per year block of water, essentially mandate that it mitigate its own depletive use with Hungry Horse Reservoir storage water, thereby protecting other existing water uses (regardless of purpose) from depletions associated with Flathead System Compact Water use.

## **6. Article IV.C. Exercise of Certain Portions of the Tribal Water Right Related to the FIIP**

As described above, an important concept initially proposed by Tribes as part of their unitary management proposal was a uniform priority date for the FIIP and unitary management plan. It would be a Reservation-wide system that would make water management much simpler and more efficient.<sup>234</sup> The FIIP is the largest consumptive water user on the Reservation, with water rights that potentially had many priority dates. Some of irrigated parcels are on trust lands. Many of the parcels had “Walton” water right claims derived from an original Indian allotment where the claimant can prove water development with certain time constraints as well as continuous use.<sup>235</sup> Some of the non-Indian water right claimants claimed a “secretarial” water right, which are potential rights based on the Secretary of Interior’s recognition that land was irrigated prior to construction of the FIIP and thereafter these lands were serviced by the FIIP. The significance of the Secretarial recognition was uncertain.<sup>236</sup> Other irrigated parcels within the FIIP were homesteaded. If litigated, the Tribes maintained that the FIIP could end up with a variety of different priority dates but with physical constrains that would make it nearly impossible to distribute the right. In this concept, the Tribes initially proposed the concept of unitary administration which included making the FIIP rights part of the Tribal Water Right in the Compact, as with other Montana compacts, for example the Crow and Blackfeet Compacts.

The Compact provides for a priority system of the FIIP right. The following relative priorities among the rights apply:

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<sup>234</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from October 03, 2007 Negotiating Session, Missoula, Montana, dated October 11, 2007 (presentation by John Carter, Tribal Attorney).

<sup>235</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from July 11, 2007 Negotiating Session, Pablo, Montana, dated July 11, 2007.

<sup>236</sup> For an analysis of the history and possible implications of “Secretarial Water Rights” was prepared by the Commission by Susan Cottingham. See, Memorandum, to Marcia Rundle, Staff Attorney/Program Manager, from Susan Cottingham, Research Specialist, “Secretarial Water Rights”/Joint Board Legislative Proposal, dated January 15, 1987. [[Z RWRCC RWRCC-GEN-154763-Susan Cottingham-Correspondence 1987.pdf](#)] The Proposed 2013 Water Use Agreement used this definition: “‘Secretarial Water Rights’ means those interests in irrigation water represented by written statements of historic water use on Reservation land compiled and published by the United States Department of Interior under authority of a June 27 1912, letter of the Acting Commissioner of Indian Affairs, C.F. Hauke, entitled ‘Field-irrigation, 20512-1912 16332- 1912 McG C, Private Ditches’ to document irrigation water use that pre-existed the construction of the Flathead Indian Irrigation Project. The written statements were produced by several three-member committees appointed by the Acting Commissioner of Indian Affairs during the first two decades of the twentieth century. The several committees were comprised of the Flathead Agency Superintendent of the Bureau of Indian Affairs, a Tribal representative selected by the Tribal Council and an Engineer for the United States Reclamation Service.” Proposed Agreement Between the Confederated Salish and Kootenai Tribes of the Flathead Nation, the United States, Acting Through the Bureau of Indian Affairs of the United States Department of the Interior, and the Flathead Joint Board of Control, of the Flathead, Mission and Jocko Valley Irrigation Districts, dated January 17, 2013.

1. Minimum Enforceable Instream Flows;
2. Minimum Reservoir Pool Elevations;
3. River Diversion Allowances; and
4. Target Instream Flows. Once the Target Instream Flows are satisfied, reallocated water is split between the TIFs and RDAs.

## 7. Article IV.D. Exercise of the FIIP Water Use Right

The nature, extent, and administration of FIIP water right were fundamental to the negotiations, but other FIIP-related issues complicated the process. These included the status of the irrigators' obligations to repay the construction and maintenance costs of the irrigation project and the future relationship between the Irrigation and Power Divisions of the project. These issues were intimately related because the revenues from the power division had long been used to defray the construction and maintenance costs of both the Power and the Irrigation Divisions. Some of the important provisions in the Compact related to the Flathead Indian Irrigation Project are summarized below:

- Leaves administration and distribution of water within the FIIP to the Project Operator.
- Provides an evaluation process to ensure that modeled RDAs<sup>237</sup> meet Historic Farm Deliveries.<sup>238</sup> Under the Compact (Art. IV .D.1.e), during implementation, the RDAs “shall be evaluated to ensure their adequacy to meet Historic Farm Deliveries” and deliveries can be increased if needed by increasing water pumped from Flathead Lake (Art. IV .D.1.e.ii.).
- Entitles an irrigator to receive a FIIP Delivery Entitlement Statement, which is a document issued by the BIA verifying that a tract of land (so long as the water user is in compliance with all applicable BIA/FIIP rules and guidelines) is entitled to the delivery of water by the Project Operator. The Delivery Entitlement Statement runs with the land and is valid so long as the land remains assessed.
- Provides for continued FIIP access to the low-cost block of power and net revenue provisions regarding Séliš, Ksanka and Qíispé Dam (formerly known as Kerr Dam).
- Includes a process to measure and allocate water and provide for within year adjustments to the enforceable levels of the Tribes' on-Reservation instream flow rights and to the RDAs in response to on-the-ground climatic and hydrologic conditions. Sets out a schedule for the implementation of Operational Improvements and Rehabilitation and Betterment projects and a process to incrementally increase the enforceable level of the Tribes' on-Reservation instream flow rights as these projects are implemented.

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<sup>237</sup> “River Diversion Allowance” means initially the volume of water identified in Appendix 3.2 and defined for wet, normal and dry Natural Flow years that is necessary to be diverted or pumped to supply the FIIP Water Use Right. As Reallocated Water is made available through Rehabilitation and Betterment, the RDA is the amount defined in Appendix 3.2, reduced by the volume of Reallocated Water made available by a particular Rehabilitation and Betterment project.

<sup>238</sup> “Historic Farm Deliveries” means the aggregate annual volume of water for irrigation and Incidental Purposes on the FIIP that was delivered to all farm turnouts within an individual River Diversion Allowance Area prior to the date the ratification of the Compact by the Montana Legislature takes effect under State law. Historic Farm Deliveries include historic crop consumption and estimated standard rates of on-farm conveyance and irrigation application inefficiencies and are used to evaluate RDA values pursuant to Article IV.D.1.e. Historic Farm Delivery volumes are specified in Appendix 3.3.

Water saved through increased FIIP efficiency will be split between instream flows and irrigation uses once the Tribes' target instream flows are satisfied.

- Provides, through CITT, irrigators and the FIIP Project Operator a role in water management and the implementation of these projects.

## 8. Article IV.E. Shared Shortages Provision

The Parties recognized from the onset that it may not be possible in water-short years to fully meet the water demands after development of the Tribal Water Right and began discussing a possible “shared shortages” provision.<sup>239</sup> To maintain the status quo on the Reservation and devise a plan for shared shortages, it also became clear the need for a joint technical work and administrative proposal.<sup>240</sup> The Parties began the process of jointly developing hydrographs that could accurately depict stream flows and water use throughout the year.

The first effort was developing a water model that mirrored actual water use on the Reservation. This established the status quo and would ensure that existing and permitted water use were identified and accurate. Tribal uses were also included. This hydrograph modelling of the current water availability and uses on the Reservation was called the Level 1 Hydrograph. The technical teams used a variety of tools that looked at actual stream flows, water diversions, and water depletions for consumptive uses over the course of a year. The goal was to develop a model that accurately predicted how much water would be available to meet current water demands in any given year. The Tribes had been gathering stream flow data and other data for years. With the approval of the Tribal Council, the Tribes shared this data with the technical teams.<sup>241</sup> The Parties worked to add further details to the water model by expanding stream gaging and incorporating FIIP records, BIA assessment records, canal seepage studies, groundwater studies, and evapotranspiration studies.<sup>242</sup> The goal of the Level I Hydrograph was to have the ability to look at the water situation at any given point in the water year and predict water availability precisely enough to implement an agreed to management scheme.<sup>243</sup>

The Tribes conducted studies in the Jocko basin which showed the interface between surface water and groundwater in that area was pervasive and very sensitive, thereby requiring conjunctive management.<sup>244</sup> The negotiating parties recognized that water managers would

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<sup>239</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from October 03, 2007 Negotiating Session, Missoula, Montana, dated October 11, 2007.

<sup>240</sup> Memorandum, to Susan Cottingham; Jay Weiner; Sonja Hoeglund; CSKT Negotiating Team, from Joan Specking, RWRCC CSKT Minute Summary from July 30, 2008 Negotiating Session, Arlee, Montana, dated July 30, 2008.

<sup>241</sup> Memorandum, to Susan Cottingham; Jay Weiner; Sonja Hoeglund; CSKT Negotiating Team, from Joan Specking, RWRCC CSKT Minute Summary from July 30, 2008 Negotiating Session, Arlee, Montana, dated July 30, 2008.

<sup>242</sup> Memorandum of Agreement Between the Montana Reserved Water Rights Compact Commission, Department of Natural Resources and Conservation, and the University of Idaho Research and Extension Center - Dr. Richard G. Allen, concerning Funds for Training and Assistance to Produce Satellite-Based Maps of Evapotranspiration on the Flathead Indian Reservation to Facilitate a Water Rights Compact (2008); Note, Selection of images for METRIC processing for the Flathead Indian Reservation, Montana, by J. Kjaersgaard and R.Allen, University of Idaho. July 2008; [Z RWRCC [SKT-GEN-154736-Meetings-July & August 2008.pdf](#)] See, Allen, Richard G.; Tasumi, Masahiro; and Trezza, Ricardo (July/August 2007), Satellite-Based Energy Balance for Mapping Evapotranspiration with Internalized Calibration (METRIC)—Model, *Journal of Irrigation and Drainage Engineering*, 380.

<sup>243</sup> Memorandum, to CSKT Negotiating Team, Jay Weiner, Susan Cottingham; Sonja Hoeglund, Bill Greiman, Stan Jones, from Joan Specking, Draft Summary of November 19,2008 CSKT Negotiating Session, Pablo, Montana, dated November 21, 2008.

<sup>244</sup> Memorandum, to Susan Cottingham; Jay Weiner; Sonja Hoeglund; CSKT Negotiating Team, from Joan Specking, CSKT Minute Summary from April 30, 2008 Negotiating Session, Pablo, Montana, dated May 14, 2008.

have to be able to set up a yearly surface water budget, groundwater budget, and wetland area water budget, implementing shared shortages if necessary.

The Parties further recognized that there would be periods of water shortages. The Parties agreed to a science-based system to arrive at a just allocation between various uses. This approach was a departure from Montana's prior appropriation doctrine. The Tribes proposed that water be administered in such a way as to share the fluctuations of the water supply.<sup>245</sup> The Commission agreed with a science-based system allocating Shared Shortages between water uses on the Reservation. Careful management of stored water and potential supplemental water could protect against reduced consumptive use in below average water supply years. However, the Commission also recognized that there was a minimum base flow for fisheries that below that level consumptive uses would have to be curtailed.<sup>246</sup>

To determine whether the approach of preserving the status quo using the Level 1 Hydrographs was feasible, the Parties also agreed to develop a Level 2 Hydrograph that could evaluate water availability based on water saving measures from improved infrastructure and management efficiencies. Additional studies in potential water savings from FIIP Rehabilitation and Betterment, including improved measurement, improved diversion structures and turnouts, possible canal lining, and more precise management and enforcement were necessary part of the Level 2 Hydrograph. In addition, the Level 2 Hydrograph had improved forecasting abilities (requiring experts from other federal agencies). The Level 2 Hydrograph was used to evaluate the estimated volume and timing of water savings, the quantification of the Tribes' future needs, water available for future development, and the need for supplemental water to bridge the gap between the Level 1 Hydrograph and the Level 2 Hydrograph.

The Shared Shortages provision of the Compact ultimately establishes a process to measure and allocate water and provide for adjustments in response to climatic and hydrologic conditions. The provision outlines a process to meet both RDAs and Instream Flows in low water years.

## **9. Articles IV.F and G. Adaptive Management and the Compact Implementation Technical Team**

Adaptive Management and the CITT go hand in hand. The concept of Adaptive Management—an ongoing process of decision making based on extensive water measurement and accounting to continuously manage and improve the allocation between ecological rights under the Tribal Water Right and the FIIP right—required a dedicated body devoted to CITT obligations, and making technical recommendations for accomplishing this ambitious management concept. This Compact provision establishes the CITT to allow planning for and implementation of Operational Improvements, Rehabilitation and Betterment, and Adaptive Management in general.

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<sup>245</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from February 8, 2008 Negotiating Session, Pablo, Montana, dated February 8, 2008.

<sup>246</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from February 8, 2008 Negotiating Session, Pablo, Montana, dated February 8, 2008.

## 10. Article IV. H. Power Provisions

A low-cost block of power was important to the FIIP for pumping needs. The Parties agreed to the State's proposal which called for a delivery of 19,178,000 kilowatt hours of electricity per year, and generally supplies electricity necessary to pump approximately 46,000 acre-feet of water per year to the FIIP.

## 11. Article IV.I. Establishment of Flathead Reservation Water Management Board

As noted in Section II.5 above, as part of the resumption of substantive negotiations in 2007, the Tribes made it clear that providing for the unitary administration of all water rights on the Reservation was one of their key settlement objectives. The Commission and the federal negotiating team did not immediately endorse or accept the general proposal or any specific element of the proposal but agreed to continue discussions about it.<sup>247</sup> The unitary management concept was particularly unique, as nothing like it had ever been incorporated into a reserved water rights settlement in Montana or anywhere else in the country.<sup>248</sup> The Commission pointed out the approach that was used in the other six tribal compacts involved dual administration with the tribal water rights managed by the respective tribe and the state water rights managed by the State and a compact board established to referee disputes between the two sovereigns. The Commission thought this approach would work on the Flathead Reservation as well but expressed a willingness to work through possible details and how the pieces of the Tribes' proposal might fit together.<sup>249</sup>

The Commission believed that a new unitary system created from the ground up must meet certain objectives from the State's perspective: the unitary management approach must be fair, predictable, and administrable. Any compact must clearly define the recognition and protection of existing uses,<sup>250</sup> since a fundamental goal of the Commission in this and all of its other negotiations was to achieve the protection of existing water uses to the greatest extent possible. The Commission also expected that any viable unitary management system would provide a clear understanding of all parties' rights and how future development could occur. The Commission also thought that the system should interface efficiently with irrigation use on the FIIP and ensure reliable access for municipal and domestic water use.<sup>251</sup>

Since the mid-1980s, the Commission had operated under a memorandum of understanding with the Attorney General's Office, MFWP, the Governor's Office, and DNRC that required interagency consultation to provide input to the Commission's negotiations. This consultation ensured that the Commission's negotiating positions had been vetted by these potentially-affected state agencies and the Governor's Office. The Commission informed the Tribes and the federal negotiating team that it would meet with the state group to determine if the Tribes'

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<sup>247</sup> Memorandum, to CSKT Negotiating Team, Jay Weiner, Susan Cottingham; Sonja Hoeglund, Bill Greiman, Stan Jones, from Joan Specking, CSKT Negotiating Session, September 25, 2008, Pablo, Montana, dated September 25, 2008. [[file:///G:/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20154736\\_SKT-GEN-154736-Meetings-Sep\\_2008.pdf](file:///G:/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20154736_SKT-GEN-154736-Meetings-Sep_2008.pdf)]

<sup>248</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from March 12, 2008 Negotiating Session, Pablo, Montana, dated March 12, 2008.

<sup>249</sup> Meeting Minutes, Montana Reserved Water Rights Compact Commission, Helena, Montana (November 20, 2008).

<sup>250</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from, Joan Specking, Draft CSKT Minute Summary from February 8, 2008 Negotiating Session, Pablo, Montana, dated February 08, 2008.

<sup>251</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from March 12, 2008 Negotiating Session, Pablo, Montana, dated March 12, 2008.



proposal was something it should continue to negotiate on and discuss what potential issues were raised by the proposal.<sup>252</sup> The Commission also noted that the Tribes' proposed unitary approach would require very active participation of these agencies during negotiations, especially DNRC and MFWP, since their role in water management could significantly change under this proposed agreement.<sup>253</sup>

On December 20, 2007, the Tribal Council authorized sending an outline of a unitary administration to the federal negotiating team and the Commission. The outline reflected the principle of protecting Existing Uses and began to lay out a framework for how to accomplish that in practice as well as for authorizing new uses and enforcement.<sup>254</sup> The Tribes directly linked these protections to improvements in the efficiency and management of the FIIP Irrigation Division (which accounted for the majority of the consumptive water use of the Reservation). As presented, the unitary administrative ordinance was to be included in Article IV of the Compact,<sup>255</sup> which is traditionally where administration issues have been addressed in other tribal-state water rights compacts. The Tribes stated that all issues were open to negotiation, and that the outline represented a work in progress intended as a means to focus discussions.<sup>256</sup>

The Commission's openness to discussing unitary administration was also informed by the fact that, unlike the recognition of significant senior water rights on and off the Reservation, unitary administration was an objective that there was no prospect of the Tribes obtaining through litigation. Consequently, the prospect of agreeing to unitary administration was a vital leverage point the Commission possessed for trying to secure protections for existing water users, particularly for those on the Reservation whose rights were otherwise at great risk of being displaced by what the Ninth Circuit had already described as the Tribes' "pervasive" rights. That said, the Commission would only consider agreeing to a unitary administration approach if it could be designed and implemented in an even-handed manner.

One of most important and difficult parts of the negotiated ordinance was determining the makeup and duties of the proposed water management board.<sup>257</sup> In 2008, the Parties agreed that if there was to be unitary administration under the authority of a water management board,

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<sup>252</sup> Id.

<sup>253</sup> Id.; Memorandum, to CSKT Negotiating Team, Jay Weiner, Susan Cottingham; Sonja Hoeglund, Bill Greiman, Stan Jones, from Joan Specking, Draft Summary of November 19, 2008 CSKT Negotiating Session, Pablo, Montana, dated November 21, 2008.

<sup>254</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from February 8, 2008 Negotiating Session, Pablo, Montana, dated February 8, 2008. [Z RWRCC SKT-GEN-154735-Meetings-2008 03 12.pdf – all 2008 Minutes]. The Tribes had previously pointed out that rehabilitation of the FIIP facilities could potentially free up water otherwise non-beneficially used and would be in the best interest of all water users, but such improvements would require substantial monetary contributions to settlement from both the State and the United States. Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from Joan Specking, Draft CSKT Minute Summary from July 11, 2007, Negotiating Session, Pablo, Montana, dated July 11, 2007. [SKT-GEN-154739-Minute Summary 7-11-2007.pdf].

<sup>255</sup> Memorandum, to Susan Cottingham; Jay Weiner; Sonja Hoeglund; CSKT Negotiating Team, from Joan Specking, RWRCC CSKT Minute Summary from July 30, 2008 Negotiating Session, Arlee, Montana, dated July 30, 2008. [file:///G:/COMPACT/Z%20-RWRCC%20Scanned%20Records/CSKT%20RWRCC%20Box%20154736/SKT-GEN-154736-Meetings-July%20&%20August%202008.pdf]

<sup>256</sup> Memorandum, to CSKT Negotiating Team, Jay Weiner, Susan Cottingham; Sonja Hoeglund, Bill Greiman, Stan Jones, from Joan Specking, CSKT Negotiating Session, September 25, 2008, Pablo, Montana, dated September 25, 2008.

<sup>257</sup> Memorandum, to Susan Cottingham; Jay Weiner; Sonja Hoeglund; CSKT Negotiating Team, from Joan Specking, RWRCC CSKT Minute Summary from July 30, 2008 Negotiating Session, Arlee, Montana, dated July 30, 2008.

that board would need to be a freestanding body composed of an equal number of State and Tribal appointees tasked with managing all water use on the Reservation. From the Commission's perspective, it was important that the board stand as an independent entity that was not exclusively attached to either the State or the Tribe. The consensus was that it would be a mutually staffed board, independent of decision-making by either the Tribal Council or the State. However, for administrative and budgetary purposes only, it would have some sort of attachment to those respective governing bodies but not in a decision-making capacity.<sup>258</sup> There was also no disagreement that any actions taken by the board and staff must be open and transparent to the public. All proceedings of the board must remain open pursuant to open meeting laws as required under both State law and Tribal administrative procedures.<sup>259</sup>

The Tribes viewed the draft ordinance that they put together as a template for how the unitary ordinance and water management board would operate. Under the proposed ordinance, the water management board would have a variety of powers. The Tribes stated that proposed water management board was modeled after other joint management entities on the Reservation where other resources were jointly managed. The water management board would keep an inventory of Existing Uses; review all applications for new permits and determine whether a permit should be issued; and develop a water resources conservation and development plan intended to guide future development on the Reservation.<sup>260</sup> The board's duties would include enforcing the terms of a final decree of the water court for Existing Uses, the terms and conditions of verified permits, and the certificates issued for groundwater. The board would have the power and authority to declare a water use abandoned. The board would also enforce use of the Tribal Water Right outside the FIIP (within the Reservation).

The Parties ultimately agreed to establish the Flathead Reservation Water Management Board to achieve these goals. The Board is composed of five voting members: two selected by the Governor, two selected by the Tribal Council, and one member selected by the other four members.<sup>261</sup> The Board has the exclusive jurisdiction over issuance of new Appropriation Rights, Changes in Use, and any Enforcement actions on the Reservation. The Board also has the exclusive jurisdiction to resolve any controversy over the interpretation of the Compact on the Reservation and any controversy over the right to use the water as between the Parties or between holders of Appropriation Rights and Existing Uses on the Reservation (except for disputes related to the CITT pursuant to Article IV.G.5). The Board also have the authority to hold hearings related to the administration of water on the Reservation, employs the Water Engineer, and appoints water commissioners on the Reservation. Decisions by the Board may be appealed to a Court of Competent Jurisdiction.

The Parties realized that the Board would need technical staff and a water management engineer and would need accurate, up-to-date flow information.<sup>262</sup> The Parties agreed that the Board would be staffed through the Office of the Engineer by personnel with expertise that the board would need for managing day-to-day water management issues and that Tribal and State

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<sup>258</sup> Memorandum, to Susan Cottingham; Jay Weiner; Sonja Hoeglund; CSKT Negotiating Team, from Joan Specking, CSKT Minute Summary from April 30, 2008 Negotiating Session, Pablo, Montana, dated May 14, 2008.

<sup>259</sup> Id.

<sup>260</sup> Memorandum, to Susan Cottingham; Jay Weiner; Sonja Hoeglund; CSKT Negotiating Team, from Joan Specking, RWRCC CSKT Minute Summary from July 30, 2008 Negotiating Session, Arlee, Montana, dated July 30, 2008.

<sup>261</sup> Compact Article IV.I.2.

<sup>262</sup> Memorandum, to CSKT Negotiating Team, Jay Weiner, Susan Cottingham; Sonja Hoeglund, Bill Greiman, Stan Jones, from Joan Specking, CSKT Negotiating Session, September 25, 2008, Pablo, Montana, dated September 25, 2008.

technical personnel would assist within the limits of their respective expertise and resources.<sup>263</sup> Work of the Office of the Engineer includes managing the authorization of water rights, changes in use, enforcement and overseeing other day-to-day management.<sup>264</sup>

In close coordination with DNRC, given its expertise administering the Montana Water Use Act, the Commission, the Tribes, and the federal team painstakingly negotiated the standards and rules that the Board would have to apply, essentially drafting a customized Water Use Act specifically for the Reservation which became the Unitary Administration and Management Ordinance (“Ordinance”).<sup>265</sup>

The Ordinance governs water administration on the Reservation from the Effective Date was a key part of the Compact package passed concurrently with the Compact.<sup>266</sup> The Ordinance was needed primarily because, while other compacts set up a dual administration system in which the State administers state-based water rights and the tribes administer the federal reserved right under the compact, this Compact set up a unitary administration framework jointly administered by Tribal and State Board appointees.

Additionally, tribal compacts had traditionally anticipated a tribal water code being prepared after state and federal approval of the compact itself. However, since the Compact was unique among other tribal compacts in having a joint state-tribal water administration system, it seemed prudent to have the equivalent of a water code prepared ahead of ratification so that the details would themselves be bargained over and carefully considered aspects of the Compact that lawmakers could review all provisions at the outset. Thus, the Ordinance is composed not only of an administrative structure in its establishment of the Office of the Engineer (i.e., the Board’s professional staff) but of a framework for the water right applications that are under the Board’s authority, standards for considering an application to be correct and complete, and process guidance for hearings, appeal, and other administrative functions.

## **ARTICLE V – DISCLAIMERS AND RESERVATION OF RIGHTS**

As with other compacts, the Compact contains disclaimers concerning its lack of effect on the resolution of other federal reserved water rights claims and other general disclaimers, reservation of rights, and contingencies. These disclaimers and reservations of rights are similar to those contained in other Montana compacts that are described in other Commission reports and will not be repeated here. The Compact does have some unique disclaimers.

The Compact specifically sets out disclaimers relating to the Board. The Compact states that nothing in the Compact empowers the Board to assess a fee for the use of water or confers

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<sup>263</sup> Memorandum, to Susan Cottingham; Jay Weiner; Sonja Hoeglund; CSKT Negotiating Team, from Joan Specking, CSKT Minute Summary from April 30, 2008 Negotiating Session, Pablo, Montana, dated May 14, 2008. Section 1-2-108, Ordinance.

<sup>264</sup> Memorandum, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, from, Joan Specking, Draft CSKT Minute Summary from February 8, 2008 Negotiating Session, Pablo, Montana, dated February 08, 2008.

<sup>265</sup> Section 85-20-1902, MCA.

<sup>266</sup> The Ordinance was both itself passed by the Montana Legislature under MCA 85-20-1902 and included as appendix 4 with the Compact. See the DNRC’s CSKT Compact page for links to the Compact, Ordinance, and all appendices: <http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/confederated-salish-and-kootenai-tribes-compact>

jurisdiction to the Board for any water right whose place of use is located outside of the Reservation.

The Compact reserves the rights of the Tribes to take all steps they deem necessary to protect any interests in Water Rights Arising out of State Law that the Tribes may acquire associated with the FERC license for the former Kerr Dam. Further, the Compact states the Parties expressly reserve all rights not granted, recognized, or relinquished in the Compact, including the right to the continued exercise by members or the Tribes of Tribal off-Reservation rights to hunt, fish, trap, and gather food and other materials as reserved in the Hellgate Treaty.

## **ARTICLE VI – CONTRIBUTIONS TO SETTLEMENT**

### **1. State Contribution to Settlement**

The total State contribution to settlement is \$55 million. The Compact provides that the Tribes may withdraw from the Compact if the State has not authorized appropriations for the State contribution to settlement within five years of federal ratification, which would be December 29, 2025. The Compact includes a proposed funding structure, which may be modified by the Parties as described in the Compact, as follows:

- \$4 million for water measurement activities;
- \$4 million for improving on-farm efficiency;
- \$4 million for mitigating the loss of stockwater deliveries from the Flathead Indian Irrigation Project;
- \$30 million to provide a fund that makes annual payments to offset pumping costs and related projects; and
- \$13 million to provide for aquatic and terrestrial habitat enhancement.

## **ARTICLE VII – FINALITY**

### **A. Ratification and Effectiveness of Compact**

Following the first ratification by any Party, the terms of the Compact may not be modified without the consent of the Parties. The Compact provides that if certain actions are not taken or certain timelines are not met, the State or the Tribes can withdraw from the Compact.

### **B. Incorporation into Decrees**

Consistent with the language in other compacts and as described in previous staff reports, once the Compact is ratified by the State, the United States and the Tribes, the Parties agree to file a motion within 180 days for approval of the Compact through entry of a proposed decree (Appendix 38 to the Compact) with the Montana Water Court and to defend the Compact through the Water Court process. The Water Court decree is limited to the contents of Appendix 38 and may extend to other sections of the Compact only to the extent that they relate to the determination of water rights and their administration.

### **C. Disposition of State and Federal Suits**

When the Water Court decree becomes final, the United States, the Tribes, and the State will file a joint motion to dismiss the claims delineated in this section.

#### **D. Settlement of Water Rights Claims**

This section underscores that the water rights and other benefits confirmed to the Tribes in the Compact are in full and final satisfaction of and replace and substitute all water claims by the Tribes, Tribal members, and Allottees and the United States on behalf of the Tribes, Tribal members, and Allottees existing on the Effective Date.

#### **E. Settlement of Tribal Claims Against the United States**

The Compact is in full settlement of water right claims by the Tribes and the United States on behalf of the Tribes within Montana. The water rights and other benefits in the Compact are in satisfaction of all claims to water by the Tribes, Tribal members, and Allottees and the United States on behalf of the Tribes, Tribal members, and Allottees.

In consideration of the rights confirmed to the Tribes, Tribal members, and Allottees in this Compact and of performance by the State and the United States of all actions required by the Compact, the Tribes and the United States — as trustee for the Tribes, Tribal members, and Allottees waive, release, and relinquish any and all claims to water within the Reservation.

The Compact covers all federal Indian reserved water rights for the Confederated Salish and Kootenai Tribes and its members within the Flathead Reservation. Any claim to water by the Tribes, its members, or Allottees within the Reservation shall be satisfied out of the Tribal Water Right, except for any Water Rights Arising Under State Law held by the Tribes, its members, or Allottees as of the which shall be satisfied pursuant to their own terms.

#### **F. Binding Effect**

After the Effective Date of the Compact and entry of a final decree, the Compact is binding on Persons or entities claiming rights to water arising under the authorities of the State, the Tribes, or the United States, without the authorized consent to the respective governments as set forth in the Compact.

### **ARTICLE VIII – LEGISLATION/DEFENSE OF COMPACT**

The Parties agree to seek enactment of necessary legislation to ratify and implement the Compact without modification and to defend the Compact from challenges. As part of that agreement, the Parties elaborate under Article VIII.B. specific provisions in federal legislation they will support.

## **IV. APPENDICES**

To access all the appendices, please visit the DNRC's CSKT Compact webpage at the following URL: <http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/confederated-salish-and-kootenai-tribes-compact>

## **Appendix 1 (Hydrologic Basin Maps)**

A collection of 14 maps (one of them of the entire state) depicting DNRC adjudication basin boundaries and highlighting the 12 basins of western Montana that contain the Tribal Water Right quantified in the Compact.

## **Appendix 2 (FIIP Influence Area Map)**

This “FIIP Influence Area” is defined in the Compact as “the lands influenced by the operations of the FIIP.” It was important for negotiators to clearly delineate the lands served and influenced by the FIIP right, the largest right in volume included under the umbrella of the Tribal Water Right, to quantify River Diversion Allowances.

## **Appendix 3.1 (MEFs, TIFs, Minimum Reservoir Pool Elevations)**

This appendix specifies Minimum Enforceable Instream Flows (“MEFs”) and Target Instream Flows (“TIFs”) for certain streams that interface with the FIIP and for Minimum Reservoir Pool Elevations, all parts of the Tribal Water Right. MEFs are based on dry water year conditions. TIFs are based on normal and wet water year conditions and are reported for normal and wet years. MEFs and TIFs become enforceable following the completion of Operational Improvements according to the schedule in Compact Appendix 3.4. Incremental implementation of Operational Improvements will result in additional FIIP Instream Flow.

## **Appendix 3.2 (River Diversion Allowances)**

This appendix specifies the water allocations for River Diversion Allowances (“RDAs”), as they are defined in Article II – Definitions of the Compact, for RDA administrative areas related to the FIIP. See page 8 of this appendix for an accompanying map depicting the RDA areas.

## **Appendix 3.3 (Historic Farm Deliveries)**

This appendix reports Historic Farm Deliveries, as they are defined in Article II – Definitions of the Compact, for RDA administrative areas encompassing irrigated lands that are assessed and served by the FIIP. Page 2 is an accompanying map.

## **Appendix 3.4 (Implementation Schedule)**

This appendix specifies implementation schedules for Operational Improvement actions that modernize FIIP water management procedures and improve the CITT’s ability to plan for and manage natural and regulated stream flows, reservoir storage, and allocation between instream and irrigation uses of water.

## **Appendix 3.5 (Adaptive Management and CITT)**

This appendix specifies the structure and duties of the CITT and the tools necessary to carry out the provisions of the Compact relating to Adaptive Management, Instream Flows, reservoir pool elevations, and irrigation water management on natural watercourses influenced by, and infrastructure associated with, the FIIP.

## **Appendix 3.6 (Rehabilitation and Betterment)**

This appendix identifies Rehabilitation and Betterment projects for the FIIP. The projects are listed in relative order of priority and may be modified by the CITT. These are projects that are intended to be supported from Federal appropriations and cannot be guaranteed until appropriations are specifically made available. The CITT will plan for and prioritize Rehabilitation and Betterment projects as identified in Appendix 3.5.

#### **Appendix 3.7 (Determination of Wet, Normal and Dry Years)**

RDAs, MEFs, and TIFs are based on hydrological conditions of wet, normal, and dry as determined from modeled Natural Flow for certain areas. This appendix lays out the process for determining wet, dry, and normal conditions for areas through the selection of indicator gages.

#### **Appendix 4 (Proposed Law of Administration/Ordinance)**

This is the full text of the “Ordinance” or “Unitary Administration and Management Ordinance” which was concurrently approved with the Compact as its own law under § 85-20-1902, MCA. This law governs water rights administration on the Flathead Indian Reservation as of the Effective Date (September 17, 2021) of the Compact.

#### **Appendix 5 (FIIP Abstracts in 76L and 76LJ and Maps)**

This appendix sets forth three separate water right abstracts for the Little Bitterroot, Jocko, and Mission portions of the FIIP. These abstracts are substantive parts of the Compact and depict, in a form consistent with the DNRC water rights database, the FIIP right described in Article III.1.a of the Compact. Maps and dam diagrams are also part of this appendix.

#### **Appendix 6 (Map of Non-FIIP Historic Irrigated Acres Lands Eligible for Registration)**

These are acres that have been identified as historically irrigated but which are not part of the FIIP. They are irrigated acres that are eligible to be registered as Existing Uses of the Tribal Water Right described in Article III.C.1.b.i of the Compact (MCA 85-20-1901). The registration process is more completely described in sections 2-1-101 through 2-1-105 of the Ordinance.

#### **Appendix 7 (Bureau of Reclamation Modeling Report)**

This is a report developed by the United States Bureau of Reclamation (Reclamation) to analyze the efficacy of using 90,000 acre-feet per year of storage water out of Hungry Horse Reservoir, a Reclamation project, to augment water supplies in the Flathead Basin. Reclamation developed a model to compare three scenarios: a base scenario; a scenario that includes new tribal diversions under the Compact (“Natural Q”); and a scenario that includes both the new diversions under the Compact and the use of 90,000 acre-feet per year of storage water from Hungry Horse Reservoir (“Natural Q plus 90K”) to be used to offset the new tribal diversions.

#### **Appendix 8 (State Biological Constraints Evaluation)**

This is a MFWP report analyzing the potential biological impacts associated with the proposed withdrawal of 90,000 acre-feet per year from Hungry Horse Reservoir. The report also includes operational constraint recommendations intended to minimize the potential for an impact on the fishery of the reservoir.

#### **Appendix 9 (Flathead System Compact Water Abstract and Map)**

This is an abstract for the Flathead System Compact water right described in Article III.C.1.c. of the Compact. This is the right to the use of water from the South Fork Flathead River, Flathead River, or Flathead Lake up to a total annual diverted volume of 229,383 acre-feet per year and a depletion volume of 128,158 acre-feet per year. The abstract is a substantive element of the Compact. A map is also included as part of this appendix.

#### **Appendix 10 (Natural Node Instream Flow Abstracts and Maps)**

These are water right abstracts for Instream Flow on streams within the Flathead Reservation. They are for streams that do not interact with the FIIP. Maps depicting the nodes are a part of this appendix.

#### **Appendix 11 (FIIP Instream Flow Nodes Abstracts and Maps)**

These are water right abstracts for Instream Flow on streams on the Flathead Reservation. They are for streams that interact with the FIIP. Maps depicting the nodes are a part of this appendix.

#### **Appendix 12 (Other Instream Flow Abstracts and Maps)**

These are water right abstracts for Instream Flow to streams which shall only become enforceable on the date that an enforceable flow schedule for that right has been established pursuant to the Ordinance, section 2-1-115.

#### **Appendix 13 (Interim Instream Flows and Interim Reservoir Pool Elevations)**

Until the FIIP Instream Flow rights depicted in Appendix 11 are enforceable, the water right abstracts for Instream Flow depicted in this appendix are active.

#### **Appendix 14 (Interim Instream Flow Protocols)**

This appendix identifies the enforcement procedures in effect as of December 31, 2014, for the Interim Instream Flows identified in appendix 13. Ensuring compliance with the interim Instream Flows is the responsibility of the Project Operator of the FIIP.

#### **Appendix 15 (FIIP Reservoir Minimum Pool Abstracts and Maps)**

This appendix contains abstracts and maps of the FIIP reservoirs that have minimum pool rights. Similar to an Instream Flow right, this is the recognition of a non-consumptive right to preserve water at minimum levels to support their biological resources.

#### **Appendix 16 (Wetlands Abstracts and Maps)**

This appendix contains abstracts and maps for wetland water rights on the Reservation, separated into individual abstracts according to drainage basin. Similar to an Instream Flow right, this is the recognition of a non-consumptive right to preserve water at natural levels within wetlands on the Reservation to support their biological resources.

#### **Appendix 17 (High Mountain Lakes Abstracts and Maps)**

This appendix contains abstracts and maps for High Mountain Lakes water rights on the Reservation, separated into individual abstracts according to drainage basin. Similar to an



Instream Flow right, this is the recognition of a non-consumptive right to preserve water at natural levels within mountain lakes on the Reservation to support their biological resources.

**Appendix 18 (Flathead Lake Abstract and Map)**

This appendix contains an abstract and map for the Flathead Lake level water right recognized by the Compact. Similar to an Instream Flow right, this is the recognition of a non-consumptive right to preserve water in a source to support the source's biological resources. In this case, the right is to preserve a shoreline elevation of 2,883 ft.

**Appendix 19 (Boulder Creek Hydroelectric Project Abstract and Map)**

This appendix contains an abstract for Power Generation related to the Boulder Creek Hydroelectric Project, a tribally owned hydropower project on a tributary to Flathead Lake.

**Appendix 20 (Hellroaring Hydroelectric Project Abstract and Map)**

This appendix contains two abstracts for Power Generation related to the Hellroaring Creek Hydroelectric Project, a tribally owned hydropower project on a tributary to Flathead Lake.

**Appendix 21 (MFWP Wetlands Abstracts and Maps)**

This appendix contains the abstracts and maps for state law-based Wetland rights appurtenant to lands owned by MFWP within the Flathead Reservation and co-owned by the Tribes and MFWP under the Compact.

**Appendix 22 (MFWP Claim Number 76L 153988-00 Co-Owned by Tribes)**

This appendix contains the abstract and map for state law-based water right 76L 153988 00 for Fish and Wildlife purposes on a small lake that is co-owned by the Tribes and MFWP under the Compact.

**Appendix 23 (USFWS Wetland Abstracts and Maps)**

This appendix contains the abstracts and maps for state law-based Wetland rights appurtenant to lands owned by the USFWS within the Flathead Reservation and co-owned by the Tribes and USFWS under the Compact.

**Appendix 24 (USFWS Claims Co-Owned by Tribes)**

This appendix contains the abstracts for state law-based rights for pothole lakes appurtenant to lands owned by the USFWS within the Flathead Reservation and co-owned by the Tribes and USFWS under the Compact.

**Appendix 25 (Kootenai Mainstem Instream Flow Right Abstract)**

This appendix contains the water right abstract for the off-Reservation Instream Flow right quantified for the Kootenai River in DNRC basin 76D under the Tribal Water Right.

**Appendix 26 (Swan Mainstem Instream Flow Right Abstract)**

This appendix contains the water right abstract for the off-Reservation Instream Flow right quantified for the Swan River in DNRC basin 76K under the Tribal Water Right.

### **Appendix 27 (Lower Clark Fork Mainstem Instream Flow Right Abstract)**

This appendix contains the water right abstract for the off-Reservation Instream Flow right quantified for the Lower Clark Fork River in DNRC basin 76N under the Tribal Water Right.

### **Appendix 28 (MFWP Claims to be Decreed as Part of the Compact)**

This appendix contains a listing of off-Reservation state law-based claims appurtenant to MFWP lands for Instream Flow co-owned by the Tribes and MFWP under the Compact and that will be decreed as part of the Compact since they had already been through the Preliminary Decree process in Montana's general stream adjudication at the time of state ratification of the Compact. Please note that as part of finalization of the Federal bill ratifying the Compact, co-ownership to 14 of these water rights in the upper Flathead basin have been waived by the Tribes. The Tribes and MFWP will meet on a biennial basis to confer on the exercise of the rights identified in these appendices with a goal of establishing a joint plan for their exercise.

### **Appendix 29 (MFWP Claims Not to be Decreed as Part of the Compact)**

This appendix contains a listing of off-Reservation state law-based claims appurtenant to MFWP lands for Instream Flow co-owned by the Tribes and MFWP under the Compact that will not be decreed as part of the Compact since they had not been through the Preliminary Decree process in Montana's general stream adjudication at the time of state ratification of the Compact. Please note that as part of finalization of the Federal bill ratifying the Compact, co-ownership to 22 of these water rights in the upper Flathead basin have been waived by the Tribes. The Tribes and MFWP will meet on a biennial basis to confer on the exercise of the rights identified in these appendices with a goal of establishing a joint plan for their exercise.

### **Appendix 30 (Former Milltown Dam Instream Flow Abstracts)**

#### Active/Current Versions of Milltown Instream Flow Abstracts

This appendix contains the two abstracts (76M 94404 01 and 76M 94404 02) created by the Compact from the former Milltown Dam hydropower right on the Clark Fork River just below the confluence between the Blackfoot River and the Clark Fork. The Compact changed the former hydropower right to two Instream Flow rights, one for the Blackfoot River and one for the Clark Fork River, that have flow rate levels following a hydrograph throughout the season. These rights have the priority date of the former Milltown Dam right: December 11, 1904.

### **Appendix 31 (Former Milltown Dam Instream Flow Enforceable Level Technical Document)**

This appendix contains additional information on the management of these water rights along with tables depicting the flow rates.

### **Appendix 32 (2004 DNRC-MFWP Painted Rocks Contract) and Appendix 33 (1958 Painted Rocks Contract Including Amendment) and Appendix 34 (1994 MFWP-Reclamation Lake Como Contract)**

These appendices are the MFWP contracts for water from two storage facilities in the Bitterroot Basin, Painted Rocks (which is owned by DNRC) and Lake Como (which is owned by Reclamation). As part of the Compact, MFWP committed to managing those contracts in a "prudent, biologically based and environmentally sound manner" to support the Tribes' interests

in Instream Flow and aquatic habitat conditions in the Basin. The Tribes also became co-owners of these MFWP contract rights, and the Tribes and MFWP will meet and confer on a biennial basis regarding the management of these contract rights.

**Appendix 35 (Placid Creek Instream Flow Right Abstract and Map)**

This appendix contains the water right abstract for the off-Reservation Instream Flow right quantified for the North Fork Placid Creek in DNRC basin 76F under the Tribal Water Right. The protected reach is below the North Fork Placid Creek FIIP Diversion which transports water from just outside the Reservation in basin 76F westward to supplement the Jocko basin (76L) on the Reservation.

**Appendix 36 (Kootenai River Tributary Instream Flow Abstracts)**

This appendix contains four water right abstracts for off-Reservation Instream Flow quantified for tributaries of the Kootenai River in DNRC basin 76D under the Tribal Water Right. These four water rights are for Big Creek, Boulder Creek, Steep Creek, and Sutton Creek.

**Appendix 37 (Flathead Reservation Unitary Water Management Board Forms)**

These are draft forms for some of the applications under the authority of the Board upon the Effective Date (9/17/2021) of the Compact.

**Appendix 38 (Flathead Proposed Preliminary Decree)**

This appendix shows the proposed Preliminary Decree for Compact approval. It is essentially a re-formatting of the Compact text itself to be consistent with Montana Water Court decrees.