RESERVED WATER RIGHTS COMPACT COMMISSION

STEVE BULLOCK, GOVERNOR

CHRIS D. TWEETEN, CHAIRMAN

STATE OF MONTANA

December 16, 2013

Senator Chas Vincent
Chairman, Water Policy Interim Committee
Legislative Environmental Policy Office
State Capitol Building
1301 E. 6th Avenue, Room 171
Helena, MT 59620-1704

Dear Chairman Vincent,

Thank you for your thoughtful letter in response to the Commission's solicitation of comments, dated June 4, 2013. I apologize that I was not able to provide this response sooner. As you are aware, the Commission has spent the intervening months preparing the report provided with this letter. Given the nature and scope of your questions, combined with the changes on the Commission's staff and the resultant need to familiarize myself with the finer details and history of this Compact, I felt that it would be preferable to provide this response along with the report, as the questions you raise are also addressed there.

In addition to the report, I have included documents from the Commission's files relating to the questions you raised in your letter. This documentation takes the form of legal memoranda, technical work, and communications prepared over the course of the CSKT negotiations by the Commission's legal and technical staff. In reviewing this information, please bear in mind that the Commission's focus is not the preparation of legal arguments and defenses in anticipation of litigation, but rather the formulation of practical solutions to real problems of water availability, usage, and allocation.

The Commission's legal staff has thoroughly researched the strength of the legal claims that serve as the basis for settlement. However, we do not have the types of documentation you requested for all of the questions. If you desire further information than is provided in this letter, you are more than welcome to review the Commission's files independently at any time. I have, however, included the legal and technical documentation that I believe is most relevant to the questions you raised.

For clarity and ease of reference, I have included your questions followed by my response. For each question, I have referenced the report sections that address the issue, and where applicable, the Commission records that I have provided with this request.

1. The inclusion of off-reservation water rights for the CSKT for instream flows with a time immemorial priority date based on the Hellgate Treaty of 1855 is unique among Montana's compacts, and engendered a great deal of interest by the public. Please explain the legal basis for the position that this is a reasonable compromise. Also, please explain the counter argument and its basis. As you know, some have questioned why it would be better to recognize a water right, rather than a right to fish. Please explain both sides of the argument.

   See Stevens Treaty Memo dated 12.28.01, Stevens Treaty Case Notes 2001, CSKT Off-Res Presentation dated 2.29.12, State's Off-Reservation Proposal dated 1.30.12, and email from Jay Weiner to Joe Kolman dated 5.3.12.

   See also Report Question 11, Map 2, and Appendix B

The reason that the proposed CSKT Compact is the only settlement negotiated by the Commission that includes off-reservation instream flows with a time immemorial priority date is that the CSKT are the only tribes in the State who possess treaty-based claims to such rights. The Treaty of Hellgate was one of fourteen treaties negotiated by Isaac Stephens, the first Governor of Washington Territory. Article III of the 1855 Treaty of Hellgate, through which the Tribes ceded approximately 20 million acres of aboriginal territory to the United States, provides in pertinent part that the Tribes reserved "the exclusive right of taking fish in all the streams running through or bordering said reservation . . . as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory." The Tribes' position in negotiations was that based on existing state and federal legal precedent, this language gives rise to an off-reservation instream flow right with a "time immemorial" priority date in all locations where the Tribes traditionally relied on such fisheries for subsistence.

The State conducted its own analysis of these legal arguments (2001 Stevens Treaty Memo), and concluded that while no court has yet been presented with, or decided the question of, whether this language gives rise to an enforceable instream flow right off-reservation, existing legal precedent does provide a strong basis for this argument. If presented with this question, there is significant probability that a court would find that the Tribes do posses such off-reservation rights to some degree.

One of the basic tenets of legal interpretation for Indian treaties is that such agreements do not represent grants of rights to the Tribes, but rather are grants from the tribes, along with a reservation of all rights not granted.[1] The United States Supreme Court has interpreted this particular treaty language in the context of ocean fisheries, rather than instream flows, for the coastal tribes of Washington. In that context, the Court has held that the right to fish "at usual and accustomed places" translates into something more than the same right of access enjoyed by other citizens of the territory; in fact it assured tribal access to those "usual and accustomed"

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[1] *U.S. v. Winans*, 198 U.S. 371, 381 (1987); State ex. rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 219 Mont. 76, 90, 712 P.2d 754, 763 (1985).

places regardless of private or public ownership: "the Indians were given a right in the land . . . that was intended to be continuing against the United States and its grantees as well as the state and its grantees."[2] This rule applies even outside of the aboriginal territory ceded by the tribe.[3]

The Supreme Court later rejected the argument, made by the State of Washington, that this language reserved no rights to the tribes beyond a right to cross over private lands to access customary fishing grounds.[4] In doing so, it upheld a Washington District Court ruling that the treaty language reserved to the tribes a right to harvest a proportionate share of each run of fish passing through the tribes' traditional fishing grounds. While the Court acknowledged that the "in common" language could be interpreted as providing no rights beyond those enjoyed by non-tribal members, it rejected this interpretation as being inconsistent with the way the tribal signatories would have interpreted it at the time.[5]

Building on this foundation, the Ninth Circuit Court of Appeals held that similar language in the Klamath Treaty of 1864 dealing with on-reservation fishing rights not only secured to the Tribes an instream flow right with a "time immemorial" priority date sufficient to sustain those fisheries, but that those rights survived the termination of the Klamath Indian Reservation.[6] The Montana Supreme Court has recognized the existence of these so called "aboriginal" rights and their time immemorial priority dates in *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*:

> If the use for which the water was reserved is a use that did not exist prior to creation of the Indian reservation, the priority date is the date the reservation was created. A different rule applies to tribal uses that existed before creation of the reservation. Where the existence of a preexisting tribal use is confirmed by treaty, the courts characterize the priority date as "time immemorial."[7]

The Montana Supreme Court has also held that these rights, in the case of the CSKT, are likely to be "pervasive."[8] In recognition of these legal claims, the DNRC has, since the mid 1990's, placed a disclaimer on all water rights permits issued west of the Continental Divide regarding the possible existence of senior tribal instream flow rights.

In the absence of a negotiated settlement, the Tribes have declined to reveal specifics about the claims they intend to file. They have, however, indicated that their off-Reservation filings will be extensive, and will stretch well east of the Continental Divide in locations where they can demonstrate aboriginal use.[9]

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[2] *Winans*, 198 U.S. at 381.
[3] *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919).
[4] *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).
[5] *Id* at 677-78.
[6] *U.S. v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983).
[7] *Greely*, 219 Mont. 79, 92, 712 P.2d 754, 764 (1985).
[8] *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner*, 278 Mont. 50, 59, 923 P.2d 1073, 1079 (Mont. 1996).

[9] See Report p. 7, Map 2; see also Deposition of Deward E. Walker, Ph.D., October 12, 2010, WC-2010-01.

Based on these considerations, it is the Commission's position that settlement of the claims in a way that effectively mitigates adverse impacts to state water users is far preferable to the time, expense, economic impact, and risk that would accompany their litigation. The Compact would recognize only eight off-reservation rights to be held solely by the Tribes with a Time-immemorial priority date. Every one of these claims is quantified and/or conditioned in a way that protects existing uses. The Compact would recognize rights on fourteen additional reaches that the Tribes would co-own with Montana Department of Fish, Wildlife and Parks (DFWP). Six other reaches would see the tribes added as co-owners of instream flow rights with DFWP. All of these shared rights, with the exception of the former Milltown Dam hydropower right, currently exist as enforceable instream flows. None of the attributes would be changed by tribal co-ownership, meaning that none of these co-owned rights would have a time immemorial priority date, or would reduce the water supply available for future appropriations in these basins. Approaching this issue solely in the interests of attaining an out-of-court settlement of the Tribes' claims the off-reservation provisions of the Compact avoid a significant litigation risk and have minimal impact on state water users.

The counter-arguments to recognition of these claims, as they have been presented to the Commission, are two-fold. First, there is an argument that absent legal authority affirmatively recognizing such claims, the Compact should not recognize them. The purpose of a negotiated settlement of any kind is to avoid the risks associated with legal uncertainty. From the State's perspective, this proposed settlement mitigates the risk that if a court were to recognize such claims, they would have a significant and adverse impact on existing state based uses throughout a large portion of the State.

If the goal is rather to establish with legal certainty whether Article III of the Hellgate Treaty gives rise to enforceable off-Reservation instream flow claims with a time-immemorial priority date, the Compact would not accomplish it. Negotiated settlements do not create substantive legal precedent that may be relied on by others similarly situated. The only way to determine this question with legal certainty is to litigate it, an option which is outside the intent or scope of the Commission's statutory mandate and which carries significant risk to state water users.

The second argument against recognition of off-reservation instream flows in the proposed Compact is that treaty-based "aboriginal" claims are fundamentally different from federal reserved water rights, and that the Commission possesses authority only to negotiate the latter. This claim is patently false, as evidenced by both the Commission's enabling legislation and the conclusive determination of the Montana Supreme Court. The Intent of the legislature in establishing the Compact Commission was to contribute to resolution of "the unified proceedings" of all water rights within the State and that the Commission should make the resolution of these agreements "its highest priority."[10] To argue that one class of tribal water claims but not another is negotiable defies this legislative purpose. Moreover, the Montana Supreme Court has determined that the Montana Water Use Act and the statutory provisions providing for negotiation of tribal water rights is sufficient on its face to resolve both consumptive uses with a priority date of the date of reservation, and non-consumptive aboriginal uses "to preserve tribal hunting and fishing rights."[11] The Commission has authority to negotiate both categories of tribal water rights. The inference of a water right, rather than a right merely to fish,

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[10] Mont. Code Ann. § 85-2-701, MCA.

[11] *Greely*, 219 Mont. at 91-93, 219 P.2d at 763-764.

is dictated by existing legal authority.[12]

2. Regarding number 1, in preparing to negotiate and conduct these negotiations, the Compact Commission must have developed memoranda analyzing the legal arguments regarding the existence and characteristics of the CSKT's extant rights under Article III of the Treaty. Please provide all such memoranda.

   See Stevens Treaty Memo dated 12.28.01, Proposal Memo dated 6.20.2003, CSKT June 2001 Proposal Notes, and research document on Water Cases involving the CSKT.

3. When the 1855 Treaty of Hellgate was signed, Montana did not exist. Since then, Congress has taken many actions that affect Treaty provisions, directly and indirectly, including allowing Montana to join the United States. What affect do these congressional actions have on the CSKT rights under the Treaty of Hellgate off-reservation? What affect do they have on-reservation? Please provide any memoranda you have analyzing this question.

   See Report Appendix B, P. 24 and Report Appendix C, question 8.

The Act admitting Montana to the union specifically excepted Indian and other federal lands: "That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Montana Enabling Act 1889, § 4.

Thus the act of admission had no effect on the status of the reservation or the central terms of the Hellgate Treaty. In interpreting Indian rights under the Stevens Treaties, specifically with reference to the Article III language discussed above, the Supreme Court has recognized no terms of the Enabling Act[13] that erode those treaty provisions.

Acts subsequent to Statehood have undoubtedly diminished the amount of Indian trust land within the exterior boundaries of the Flathead Indian Reservation, but it has been conclusively determined that these acts did not terminate or otherwise diminish the reservation itself.[14] These acts and associated legal rulings are comprehensively addressed in the Report sections referenced above.

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[12] *U.S. v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983); *Jt. Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. U.S.*, 832 F.2d 1127 (9th Cir. 1987).

[13] The decisions referenced above were decided in the context of Washington tribal rights. Washington and Montana were admitted under the same Enabling Act.

[14] *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied, City of Polson, Montana v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana*, 459 U.S. 977 (1982).

4. What relevance to the issue of assessing the CSKT's remaining legal rights under the Treaty, on and off reservation, do the litigations they brought against the United States for its violations of the Treaty have? Please provide any memoranda you have analyzing this question.

The CSKT tribes have brought claims against the United States before both the Indian Claims Commission (ICC) and the U.S. Court of Claims. The Commission ordered in 1967 that compensation be paid to the Tribes for their cession of land to the Federal Government under the Treaty of Hellgate. The amount of the compensation awarded by the ICC to the Tribes was approximately $4 million. In 1971, the Federal Court of Claims awarded the Tribes approximately $6 million plus interest for the taking of lands within the Reservation through the Flathead Allotment Act in breach of the Treaty of Hellgate.[15]

In both cases, the Tribes were compensated for land: in the first instance for land ceded by the Treaty of Hellgate for which they had not been compensated by the United States in accord with the terms of the treaty; and in the second for a fifth amendment taking of reservation land and violation of the Hellgate Treaty by the Allotment Act. Neither suit resulted in compensation for anything other than the underlying land value, or affected any of the rights retained (not ceded) under the Treaty of Hellgate.

By contrast, the Yakima Tribes of Washington State were compensated by the United States specifically for diminished treaty-based hunting and fishing rights and were consequently precluded from making a claim for undiminished water rights for fisheries purposes in the state adjudication.[16] Similarly, the Klamath Tribes, which ceded all rights to hunt and fish off-reservation in the treaty of 1864, and were compensated accordingly, were entitled to the retention only of on-Reservation treaty-based claims. It should be noted, however, that both the Yakima and the Klamath retained fisheries-based water rights claims to the extent that no compensation was made for those particular rights.[17] The CSKT retained off-Reservation hunting and fishing rights and were not compensated for the taking of those rights in either of the rulings described above. The legal consequence is that these rights are presumably still possessed by the Tribes.

5. Many members of the public asked what the effect would be on Montanans, on and off reservation, of the fact, under the proposed compact, that the CSKT would own in stream flow water rights. Would tribal sovereign power extend to nonmembers and their actions relating to and affecting water subject to the CSKT water rights proposed in the compact? In what way? Even assuming absolutely no impact on other water users arising from the volumes of water dedicated to the CSKT under the proposed compact, would not their ownership of these water rights result in some impact? Please explain, both for on and off reservation. Please provide any memoranda you have analyzing this question.

See State's Off-Reservation Proposal dated 1.30.12.

See Report Table 2, p. 8, and Report Appendix A.

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[15] *Confederated Salish and Kootenai Tribes of Flathead Reservation, Mont. v. U. S.*, 437 F.2d 458 (Ct. Cl. 1971).
[16] *State, Dept. of Ecology v. Yakima Reservation Irr. Dist.*, 850 P.2d 1306, 1323 (Wash. 1993)
[17] *Id.*; *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 768 (1985).

Nothing about the proposed instream flow rights would expand Tribal sovereignty. It should be noted that the Tribes have already been determined to have regulatory jurisdiction over riparian rights of non-Indians owning land on the southern half of Flathead Lake.[18] Moreover, the Tribes currently hold and exercise interim instream flow rights on the Reservation which have been judicially determined to have a time-immemorial priority date and which must be satisfied prior to Flathead Indian Irrigation Project (FIIP) delivery rights.[19]

The additional rights proposed under the Compact would not expand Tribal sovereignty on or off-Reservation. The rights quantified by the compact are use rights, meaning they are subject to the same restrictions and regulations as to period of use, priority date, purpose, and quantification as other state-based water rights. On the Reservation, these rights would be subject to the regulation of the joint State-Tribal Water Management Board and to the statutory terms of the Unitary Management Ordinance, which parallel those of the Montana Water Use Act. Off-Reservation, the rights would be subject to regulation by the DNRC. Nothing about the quantification or allocation of these rights would allow for expanded Tribal regulation of land use or water quality, or would convey a right of way over or across private land.

Whether and to what extent tribal ownership of these instream flow rights (or of any of the consumptive use rights quantified by the Compact, for that matter) would affect state-based water rights would depend on the particular attributes of the rights. It has been the Commission's goal throughout negotiations to minimize the possibility of impact to state water users. For example, the eight off-Reservation rights quantified under the Compact with a time immemorial priority date have been conditioned in order to minimize or eliminate the possibility of impact to state water users. Specifically, the instream flow rights on the Kootenai River and its tributaries in your own district have been located and conditioned so that state water users would be virtually unaffected. Likewise, no new off-Reservation instream flow rights were recognized for the Tribes in the Bitterroot valley, despite the fact that their claims in that region are particularly strong. For the specifics of these protections, see the report sections referenced above.

You question whether "their ownership of these water rights" would result in "some impact" on State-based water users. The recognition of newly quantified water rights always has the potential to impact state users—the reason the DNRC permitting process is burdensome on the applicant is because it seeks to protect existing rights. In a situation where there are very senior, judicially recognized rights that have not previously been quantified, the potential for adverse impact grows exponentially. The point of the Compact (and the reason the Commission was established in 1979) is to minimize those impacts to the greatest extent possible, and to a far greater extent than would be possible if the rights were decreed in an adversarial setting. Tribal ownership (as opposed to hypothetical non-tribal ownership of the same senior rights) would have no separate or additional impact on state water users because for purposes of regulatory authority and enforcement they would be no different from non-tribal

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[18] *Namen*, 665 F.2d 951; See also *Middlemist v. Sec. of U.S. Dept. of Int.*, 824 F. Supp. 940 (D. Mont. 1993) *aff'd sub nom. Middlemist v. Babbitt*, 19 F.3d 1318 (9th Cir. 1994).

[19] *Jt. Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. U.S.*, 832 F.2d 1127 (9th Cir. 1987).

rights.[20] It is the early priority date and large scope of these rights that represent the greatest risk to existing uses, and it is this risk that the Compact seeks to mitigate.

6. Many water users, in particular irrigators, both on and off reservation questioned whether in fact the proposed compact would result in a reduction of water available for their uses. As you know, these questions have been expressed by Montanans from the Flathead Valley, the Bitterroot, the Blackfoot, the Clark Fork and on-reservation. Yet they have received many public assurances, by representatives of the Compact Commission, the United States, and the CSKT that no reduction in irrigation water would occur. Taking each area separately, please explain whether in fact this is correct and, if so, what information the public can consult to be assured of this. Please provide any memoranda you have analyzing this.

   See State's Off-Reservation Proposal dated 1.30.12, Other Instream Flows Technical Document, Milltown Technical Memo, Clark Fork and Swan Instream Flow Hydrographs, and Water Right Query for the rights above the former Milltown Dam site.

   See also Report Table 2 and Appendix A.

Please bear in mind the following consideration with regard to response provided below. The Commission used a "worst case scenario" approach to analyze the likelihood of adverse effects to existing users under the proposed Compact rights, basing the analysis on an assumption that the Tribes would exercise the proposed Compact rights to the maximum extent possible. There is no certainty that Tribes would take this approach. Most water users in the State do not exercise their water rights to the maximum enforceable potential – i.e. they do not make call against each and every junior that they conceivably could in every situation where their water right priorities, enforceable flow rates, and physical water availability would allow. To do so would be time consuming, expensive, and offensive to the adjacent water users. Full enforcement of the Tribal water rights is the hypothetical (although unlikely) scenario that the Commission weighed against the costs of litigation that will ensue absent a settlement.

The proposed Compact would limit the impacts of the quantified rights to some surface water irrigation rights and groundwater irrigation in excess of 100 gallons per minute. All existing rights for domestic, commercial, municipal, industrial, lawn and garden, groundwater irrigation less than 100 gallons per minute in flow rate, stock, and all other non-irrigation purposes would be completely insulated from any potential impacts from the Tribes' water rights as recognized in the Compact. To say that the proposed Compact would result in no reductions of water available for irrigation, however, is an overstatement that requires clarification on a basin by basin level. For purposes of this discussion, the recognition of co-ownership of existing water rights owned by Montana Fish, Wildlife, and Parks are not considered as a new limitation or

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[20] Certain fundamental tenets of federal and tribal reserved water rights remain, namely that they cannot be abandoned through non-use, they do not have to be applied to a beneficial use under state law, and they may be quantified for both present and future purposes. *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 712 P.2d 754, 764, 768 (Mont. 1985)

potential reduction to irrigation water supplies; under the Compact these water rights would retain their priority dates, flow rates, and other governing elements and therefore represent the status quo with regards to water availability and enforcement.

The Upper Clark Fork and Blackfoot Basins –These basins are within the area influenced by the former Milltown Dam hydropower right. This is the right that has the greatest potential to influence irrigators off-the Reservation. Irrigators upstream of Bonner and Turah with priority dates junior to 1904 would be potentially subject to call by this right, which would be split into two separate rights—one on the Clark Fork and one on the Blackfoot—under the proposed Compact.

If left out of the proposed compact, the former Milltown Dam water right will almost certainly be changed to a non-consumptive instream fisheries water right through the standard DNRC change application process. This was one of the conditions attached to the State's acquisition of the right under the consent decree for the former Milltown dam site as part of its damages suit against the Atlantic Richfield Company and Northwestern Energy in 2005. It is impossible to predict the final outcome of this change process, but a few things are certain: 1) the water right has excellent historic use records, showing that up to 2,000 cfs has been historically put to use for hydropower generation; 2) there is potential that the water right's beneficial use value would be determined to be up to the full historic use value of 2,000 cfs; 3) because of Montana's selective call, the owner of the right could enforce the right up either tributary (the Blackfoot or the Clark Fork) in its entirety, meaning that the enforcement would not need to be based on proportional flow contributions; 4) there would be no protections for non-irrigation water rights; 5) the water right change would not include structure or funding for any drought response planning effort; and 6) on completion the change authorization, the water right would not be subject to a deferral period for its implementation.

By contrast, the Compact proposes to use this water right in a way that would resolve the Tribes' off-reservation claims for the Blackfoot and Upper Clark Fork and simultaneously change the water right in a way that is more flexible and protective of the junior water users that it could impact. Under the proposed Compact, the Milltown Dam right would be bifurcated between the Blackfoot and Clark Fork drainages in a manner that reflects proportional flow contributions of the two drainages, thereby eliminating the chances of a disproportionate call up either of the two tributaries. In addition, the water right would become a daily enforceable flow rate that is based on a consideration of water availability and historic flows as measured at USGS gauges at Bonner and Turah. The minimum enforceable flows would be 700 cfs and 500 cfs respectively, which, additively equate to 1,200 cfs—a substantial reduction from the water right's historic protectable value of 2,000 cfs.

Additional protections include the following: 1) the water right could not be used to call junior water users unless four of five consecutive days fall below the enforceable daily flow rates – this means that there is opportunity for drought response scheduling to limit the impact of water uses in efforts to maintain adequate flows and avoid call; 2) the water right would not be implemented for 10 years following the compact's effective date (after both state and federal ratification) to allow for drought response planning and stakeholder engagement; 3) the water right would be conditioned so that it could not be used to call non-irrigation water rights or groundwater irrigation water rights that use less than 100 gallons per minute—this is a significant protection as compared to what would result in the standard DNRC change

authorization process; 4) the proposed compact would bring funding and state incentives to help facilitate drought response planning in a manner similar to other existing and successful drought planning efforts in the basin; and 5) the proposed Compact would provide certainty to the fate of the former Milltown Dam water right in a way that relieves existing water users from the burden of having to individually object or litigate specific items of the change authorization if it were to move through the standard DNRC channels.

The Compact would not, however, eliminate the possibility that some existing junior surface water irrigation rights and groundwater irrigation rights exceeding 100 gallons per minute would be subject to call. In order to better quantify the number of rights that could be affected, the table titled Water Right Query for the rights above the former Milltown Dam site provides summary statistics, also including the number of water rights that would be totally protected from call under the Compact as compared to a time immemorial priority date or a non-purpose specific enforceability of the former Milltown Dam water right. On the Blackfoot, 222 of the 409 water rights junior to December 11, 1904 are already subject to the existing Montana FWP Murphy Right, which is an existing instream flow for fish set at 700 cfs; the implementation of the changed Milltown right would not substantively affect those rights, but the remaining 187 junior water users could be affected by the earlier priority date of the Milltown right.

In both basins, it is unknown how many of the remaining junior water users currently receive full-service irrigation as there are many pre-1904 water rights already actively enforced in the basins. For most of the Upper Clark Fork tributaries, it is rare that water rights junior to 1904 receive full-service as they are already curtailed during low water periods by existing state-based senior rights. This scenario is not, however, true for post-1904 water rights sourced from the mainstems. Mainstems typically carry more supply and therefore juniors sourcing water from mainstems are more likely to receive full-service irrigation and therefore more likely to be affected by this right.

Bitterroot Basin: The Compact would not recognize any new water rights in the Bitterroot basin; there would be no reductions in water for irrigation.

Swan Basin: The Compact would recognize a daily enforceable instream flow water right that approximates the 20th percentile historic flow statistic for that site. The water right would have a priority date of time immemorial and would be senior to all surface water irrigation rights and groundwater irrigation rights greater than 100 gallons per minute. Call would be limited to the mainstem of the Swan. Accordingly, based on documented flow data, all susceptible irrigation water rights would potentially be called less than 2 out of every 10 years. There are approximately 68 irrigation water rights that serve approximately 670 acres that could be called by the proposed Swan River instream flow water right. Because natural precipitation is such a reliable source of irrigation water supply in this basin and makes up such a large percentage of the irrigation water requirement, calls are infrequent in this basin. It is reasonable to expect that on all but the most severe of drought years irrigators will enjoy full- or close-to-full-service irrigation.

Lower Clark Fork River: The Compact would recognize one 5,000 cfs water right as measured below the Cabinet Gorge Dam. The water right would have a priority date of time immemorial and could be used to call mainstem surface water irrigation rights and groundwater irrigation rights greater than 100 gallons per minute. Call would be limited to the mainstem of the Clark Fork. The 5,000 cfs water right would track the FERC Federal Energy Regulatory Commission (FERC) minimum flow requirement of the Cabinet Gorge Dam, so that if that minimum flow were reduced, the enforceable level of the water right will be equally reduced. The frequency of flows dropping below the 5,000 cfs value on the Clark Fork is less than the 5th percentile of historic flows, meaning that only during the driest periods on record would this water right be enforceable and during that period, it would only be enforceable for brief periods of the year.

Kootenai River Basin: The Compact provides that so long as Libby Dam is in place and in compliance with Federal Columbia River Power System Biological Opinions, the right could not be exercised. Therefore, there are no possible reductions in irrigation water supply in this basin. In the highly unlikely event that Libby Dam was ever removed, the right could only be used to call mainstem surface water irrigation rights and groundwater irrigation rights greater than 100gpm. No tributary rights could be called. There are only 24 rights that would be susceptible to call in this hypothetical situation.

Flathead River Mainstem above the Flathead Indian Reservation: All water rights recognized by the proposed Compact that could be enforced upstream of the Reservation have enforceable flow rates that collectively are well below the lowest of minimum recorded flow levels and therefore there should be no reduction in irrigation water supply.

Within the External Boundaries of the Flathead Indian Reservation: There would be three main water right types recognized by the Compact that would have the potential to reduce irrigation water supply for existing water users: the irrigation water rights for the Flathead Indian Irrigation Project (FIIP), the associated "FIIP" instream fisheries water rights, and the "other" instream flow water rights for fish (see technical documents provided). These water rights, like all the proposed water rights, could only be used to call junior surface water irrigation water rights and junior groundwater irrigation water rights greater than 100 gallons per minute. All non-irrigation water rights would be completely insulated from call, a scenario that would not be possible in the absence of a settlement.

The difference between the "FIIP" and the "other" instream rights is that the FIIP instream flows lie within areas that have hydrology that is largely influenced by the FIIP water use for irrigation, while the other instream flows are outside of those areas. Additionally, the FIIP instream flows are more firmly quantified by the Water Use Agreement, while the "other" instream flows are quantified but will not be assigned an enforceable flow level until they go through a public process that is required for purposes of setting an enforceable schedule. That public process is mandated by the Unitary Management Ordinance and requires that these rights be set at flows that accommodate all existing uses (see technical documentation).

This leaves the FIIP instream flow water rights. These water rights were designed and based on the Water Use Agreement, which is an agreement between the Flathead Joint Board of Control (FJBC), the Tribes, and the Federal Government. The State of Montana was not a party to this agreement and is therefore less able than the parties to the Agreement to offer a detailed analysis of how those water rights will affect existing irrigation water supplies, which includes two main groups of irrigators, FIIP water users and state-based water users (non-FIIP) within the Project Influence Area.

7. Many on-reservation residents questioned the legality of the proposed Unitary Management Board and the Law of Administration/Ordinance, Appendix 4. If I understand the objection it is that Montana's constitution requires the state to administer water rights within the state and this proposal unconstitutionally shares that duty with the CSKT. Similarly, the UMB is un-elected and the Law of Administration differs from legal provisions for administering water elsewhere in Montana. Please address these and the related questions regarding both the Board and the Law of Administration.

   See Water Right Administration Comparison.

   See Report questions 23-31, Report Appendix A, and Report Appendix C, questions 18-34.

Article IX Section 3(3) of the Montana Constitution provides: "The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records." Nowhere does the Constitution require that water rights administration be restricted to any particular sovereign or administrative entity. The Unitary Management Ordinance and Water Management Board represent a rational way to administer water rights on a reservation where regulatory authority has been disputed, and violate neither Article II Section 4, nor Article IX Section 3, of the Montana Constitution.[21] If the Legislature ratifies the Compact, and with it the Unitary Management Ordinance, it will have provided "for the administration, control, and regulation of water rights" in a part of the State that currently has no water rights permitting, enforcement, or regulation. Article IX Section 3(3) further provides that the Legislature "shall establish a system of centralized records, in addition to the present system of local records." The Unitary Management Ordinance requires that the "local records" kept by the Water Management Board must be consistent with the DNRC's centralized records system, and must be provided to the DNRC in furtherance of this constitutional provision.

The fact that the Ordinance would be administered by an un-elected regulatory body is no different from administration of water rights in the rest of the state by the DNRC. Moreover, the concept of a joint State-Tribal board with regulatory authority is not unique. The Flathead Reservation Fish and Wildlife Board is composed of seven representatives, three appointed by the Tribes, three by the Governor, and the seventh by the United States Fish and Wildlife Service. The Board is responsible for developing cooperative management plans, which includes the drafting of licensing and regulatory provisions.

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[21] *State v. Shook*, 313 Mont. 347, 352-353, 67 P.3d 863, 866-867, 2002 MT 347 ¶ 15-17.

The Ordinance is modeled heavily on the Montana Water Use Act. Although it differs in some respects from the Act, those differences generally fall into two categories. The first provides for registration of existing but un-recorded uses of water on the Reservation. These provisions would allow the large number of domestic wells that have been drilled during the regulatory vacuum that has existed on the Reservation since 1996 to be legally recognized and protected. Existing water users who have a permit or statement of claim from the State would not have to register their uses. The other significant deviations from the Water Use Act are those that were made in consultation with DNRC staff and were based on their advice and experience implementing the Act. The Ordinance includes multiple protections for all water users who would be subject to it. These are detailed in the Report sections referenced above.

8. The threat of significant losses in litigation over these water rights figured very prominently in the testimony of advocates for the compact, including Compact Commission personnel, in many public meetings and hearings over the past year. Please provide any memoranda you have analyzing the likelihood of this, whether as to on or off reservation issues. Similarly, the cost of litigation figured prominently in advocates' statements. Please provide any memoranda you have analyzing the likely costs, in all respects.

   See Cost of litigation memo, dated 2.24.2004, CSKT adjudication cost estimates dated 1.10.2013, Fiscal Note for LC0292.

   See also Report Map 2, p. 7, questions 8, 11, and 12, and Report Appendix B.

The United States filed litigation in the 1970's in federal court in Montana to fulfill its trust obligation to protect tribal reserved water rights. It was this action that prompted the Legislature through SB 76 in 1979 to create the Compact Commission. The federal litigation is stayed as a result of that legislative action and pending a negotiated resolution of these claims. This stay will expire on July 1 of 2015. In the absence of a negotiated settlement, the United States has an affirmative duty to zealously advocate Tribal water rights claims. The Commission has frequently been accused of using the threat of litigation to coerce public acceptance of the Compact. As the attorney currently representing the State in a negotiation with the Tribe, it is my duty to inform both my client (the Commission) and the public of what the alternatives and risks are to a negotiated settlement. Litigation of the Tribes' claims is a viable legal alternative, but one that carries significant risk. It is impossible to predict the scope and extent of the rights that a court would decree to the Tribes (especially since we don't yet know the full extent of the claims the Tribes intend to file).

It is possible, however, from the legal analysis that has already be conducted by the Commission, from existing legal precedent,[22] and from the experiences of litigation over Tribal Reserved Rights in other states[23] to say with a fair degree of certainty that litigation with the Tribes over their judicially recognized reserved and treaty-based water rights would be time

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[22] *See e.g., State ex. rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 712 P.2d 754 (1985); *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner*, 923 P.2d 1073 (Mont. 1996); *Confederated Salish and Kootenai Tribes v. Clinch*, 992 P.2d 244 (Mont. 1999); *The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093 (Mont. 2002).

[23] For example, disputes in the Klamath basin (upper-basin irrigators reached a tentative agreement to a shared-shortage plan with the Tribes on Dec. 2), Washington State (the *Acquavella* adjudication began in 1977 and continues to the present), and Wyoming (also more than 30 years of litigation.)

consuming, expensive, and potentially harmful to both existing users of water in the State and the ability to develop water in Montana to meet the future needs of growing communities. How harmful the judicial resolution of these claims would be to non-Tribal water users is entirely dependent on the unknown outcome of that litigation. It is certain, however, that if a Court were to decree only the existing on-Reservation uses[24] and a handful of uses off-Reservation in the areas where the Tribes have the strongest evidence of aboriginal use (the Bitterroot and the Kootenai, for example), there would be no protections or limitations on call such as those the Compact would impose and the adverse effects on existing uses in those areas would be severe. This is not a threat; it is an objective statement of a possible outcome in the absence of a negotiated settlement, and one that must be considered by a deliberative body considering whether to ratify an agreement of this magnitude. For further discussion of potential non-settlement options, see the Report sections reference above.

9. The feared effects of the proposed compact, especially through Appendix 3 concerning the irrigation project water, raised almost as many concerns by citizens as off-reservation in stream flows. Notably, both tribal member irrigators and nonmember irrigators were publicly in opposition. Yet they have been assured the compact, through the project Water Use Agreement, would not reduce the amount of water historically made available to them for irrigation. Please help me understand the factual basis of that assurance. As noted in opening, the only responsible way for Legislators to vote for this proposal is for them to understand it. Assurances alone do not fulfill our responsibility, and we cannot waive away concerns merely because these irrigators live on the Reservation. They, both tribal members and nonmembers, are Montanans too, and we represent them just the same. Consequently, your assistance in helping me to understand the impact on them as well as other Montanans would be very much appreciated. Please provide any memoranda you have analyzing the facts of this situation.

   See Flathead Instream Flows Executive Summary, Water Use Agreement Presentation dated 8.20.12, and Metric Presentation dated 9.4.12.

   See Report questions 18-22, Report Appendix A, and Report Appendix C questions 44-49.

The Water Use Agreement was negotiated by the Tribes, the Flathead Joint Board of Control, and the United States. It is predicated on the recognition that the Tribes currently have judicially recognized time-immemorial instream flow rights in streams that supply Flathead Indian Irrigation Project (FIIP), and attempts to reconcile those rights with irrigation project delivery rights in a way the shares shortages between both uses and protects the junior project rights from call by the Tribes.

One of the difficulties the parties faced in reaching the Agreement is the fact that accurate records of actual historic use on the Project are lacking. For this reason, the focus of the

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[24] Including those time-immemorial instream flow rights already recognized by

Jt. Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. U.S., 832 F.2d 1127 (9th Cir. 1987)

Agreement, as the Commission understands it, is to ensure sufficient future deliveries to meet both project irrigation and instream flow needs.

The agreement includes adaptive management language to allow the project operator flexibility in allocating water within the project, and to allow the delivery amounts stipulated in the Agreement to be revisited once reliable data has been obtained from accurate measurement of project use. The Commission's understanding is that the parties to the Agreement felt the delivery provisions would provide adequate water to supply the future needs of project irrigators, taking into account the project rehabilitation, maintenance, and upgrades that would have to be accomplished before the Agreement terms could become effective.

These irrigation infrastructure upgrades would allow for greater efficiency within the project, thus improving the capacity to simultaneously manage for both instream flows and irrigation deliveries. The source of these improvements would be the State's contribution to settlement and an allocation by the Tribes of part of the federal contribution to settlement that is anticipated to accompany federal ratification of the Compact.

The Water Use Agreement as it is written today is a substantive improvement over the likely outcome of litigation. In the absence of a settlement, the project will face several significant issues, regardless of the outcome of litigation: 1) there will likely be litigation between the Tribes and United States on the one hand and the irrigation districts on the other to establish ownership of the FIIP rights; 2) substantive technical deficiencies associated with the FJBC's statement of claim filing for the FIIP water right will need to be addressed before the Water Court could issue a decree in its (or the irrigation districts') favor; 3) there will be no source of funding for the tens of millions of dollars in FIIP infrastructure repairs and maintenance and improvements that are needed; 4) Project irrigators would need to fund the fair-market electric costs to run the Flathead Pump Station (the Water Use Agreement provides for a low-cost block of power in perpetuity); 5) there is likely to be additional litigation against the Tribes to protect the FIIP water rights against additional on-Reservation Tribal instream flows the Tribes will file claims for; 6) the FIIP water rights will have to be defended against competing state-based water users during adjudication; and 7) the Project will be tasked with implementing the mandatory Endangered Species Act (ESA) and instream flow improvements deemed necessary by the Bureau of Indian Affairs (BIA) in the absence of a settlement, which will most likely include many infrastructure improvements to enhance water measurement and reduce fish entrapment in the diversion works.

The actions of the Jocko Valley and Mission Irrigation Districts in communicating their intent to withdraw from the FJBC continue to create uncertainty as to whether there will be a viable irrigator agreement to include with the Compact. The FJBC's dissolution on December 12 means that this issue will need to be revisited by all parties, because the Compact must include a mechanism for protecting FIIP irrigators from the Tribes' senior instream flow rights. For a more detailed overview of the Water Use Agreement and responses to commonly asked questions, see Report sections referenced above.

10. Finally, allow me to emphasize that I am well aware of the superiority of a compact as a means of settling these difficult issues. I and many other legislators prefer that method of resolution by a far cry. But as I have stated here, to vote responsibly in support of a compact we need facts and full, candid answers to questions, as well as objective analyses of the case law driving much of the terms in the negotiation.

I appreciate your commitment to fully understanding the Compact and associated documents before making a decision as to whether you can support, and ultimately vote for, the proposed settlement in the Legislature. The Commission firmly believes the Compact represents a just and equitable settlement of the Tribes' legal claims to water that protects existing uses to the greatest extent possible. While the decision is ultimately up to the Legislature, it is the Commission's responsibility to ensure that the Legislature and citizens have a comprehensive understanding of the proposed agreement before a decision is made. It is my hope that this letter, the report, and other enclosed documents will assist you in this process. I also appreciate the need for objective analysis of the legal underpinnings for this proposed settlement. I encourage you to use whatever legislative staff resources are available to request an independent review. If there is any way I can be of further assistance to this inquiry, please do not hesitate to contact me directly.

Sincerely,

Melissa Hornbein
Staff Attorney
Montana Reserved Water Rights Compact Commission

C: Chris Tweeten
John Tubbs