From Lies to Truth: Why the CSKT Water Rights Compact Is Good For Montana

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Prepared by: Hertha L. Lund

662 S. Ferguson Ave., Unit 2
Bozeman, MT 59718
Lund@Lund-Law.com
406-586-6254
Lund-law.com

This document was paid for by Montana Water Stewards, a private, non-partisan organization comprised of farmers and ranchers on the Flathead Indian Reservation, and their supporters.

Montana Water Stewards' goal is to present factual information about the CSKT Compact and the likely impacts to people living on and off the reservation if the state fails to approve this negotiated agreement.

For more information about Montana Water Stewards, please visit MontanaWaterStewards.com.

I. Introduction

The Confederated Salish and Kootenai Tribes have been negotiating with the state of Montana and the United States for more than 20 years to reach a settlement, known as a *compact*, to quantify the Tribes' reserved water rights. Reserved water rights are recognized by the courts, and have a priority date of either the date the reservation was created (in this case, 1855) or "time immemorial." Either way, tribal reserved rights are senior to almost every other water rights holder.

Truth #1: Tribal reserved water rights have a priority date of either 1855, the date the CSKT reservation was created, or "time immemorial."

While tribal reserved rights are real, they are of an unknown quantity. They were created either to "fulfill the purpose of the reservation," or to allow the Tribes to continue hunting and fishing in their traditional hunting and fishing grounds – both on and off the Flathead Reservation. Until either a court decides how much water each right includes, or the Tribes and the state and federal governments enter into a binding agreement about how much water the Tribes will get, a cloud of uncertainty hangs over all water users on and off the Flathead Reservation.

The CSKT Compact is the 18th compact resolving reserved water rights in Montana. All of the other reserved-water-rights compacts have been successfully negotiated by the Reserved Water Rights Compact Commission and adopted by the Montana Legislature. Two of those compacts await approval by the Montana Water Court. This is the last compact to be negotiated, and the only one involving off-reservation Stevens Treaty rights.

Truth #2: The CSKT Compact does not give the Tribes new rights, nor take away anyone's existing rights.

The 2013 Montana Legislature refused to ratify the CSKT Compact after a fairly rough legislative battle with racial undertones. Some of those who oppose the CSKT Compact do not want the tribe to have any rights, evidencing a fundamental misunderstanding of tribal reserved water rights. Others claim that the Compact "takes" existing water rights, which it does not, or that the joint administration of water rights on the reservation violates non-Indians' constitutional rights – ignoring longstanding tribal-state administration of hunting and fishing on the Flathead Reservation.

When the CSKT Tribes ceded their rights to a large area of land to the United States in the 1855 Hellgate Treaty, which created the Flathead Reservation, they kept the right to enough water to fulfill the purpose of the reservation. The purpose of the Compact is to quantify those reserved water rights and thereby provide certainty not only to the Tribes, but to non-Indian irrigators and water users on and off the Reservation.

After the 2013 Montana Legislature rejected the Compact, opponents immediately began campaigning against its passage in the next legislative session, in 2015. The Tribes continue to support the Compact, but if it does not pass, the Tribes will file in the Montana Water Court for their reserved water rights both within the reservation boundaries as well as within a large area of Montana.

Truth #3: The CSKT Compact quantifies existing – but unquantified -- tribal water rights so that all water users will know how much water they really have.

The Tribes' reserved water rights claims could affect many people, not just those from the northwest corner of Montana. Those who oppose the Compact have glossed over the likely consequences of their actions: subjecting hundreds and perhaps thousands of water rights holders to a long, expensive legal battle in Montana state and federal courts, with the potential to end up in the U.S. Supreme Court – and no guarantee of a better outcome than can be obtained through the Compact.

While tribal water rights can be adjudicated in state court, federal courts can review those decisions, and will be very protective of the Tribes' interests. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 570 (1983). Moreover, a state court that appears to abridge Indian water rights will receive "particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." *Id.* at 571 (Stevens, J. dissenting). In other words, the United States will allow the Montana Water Court to adjudicate tribal reserved water rights – and specify how much water the tribes have a right to use – but its decision will be subject to federal scrutiny to ensure the state does not take away tribal water rights.

Truth #4: State adjudication of tribal water rights will be subject to heightened scrutiny by the federal courts.

This is why resolving tribal water rights through a negotiated compact is in the best interest of everyone who depends on their irrigation water rights. A compact will avoid costly ongoing litigation for many water rights holders, and provide certainty for the future.

II. Exactly What the CSKT Compact Does

The CSKT Compact quantifies the Tribes' water rights in several ways. It:

1. Quantifies on-reservation consumptive rights for current and future uses.

2. Quantifies on-reservation non-consumptive rights for hydropower and "aboriginal" fisheries uses.

3. Quantifies limited off-reservation instream flow aboriginal fisheries rights:

    a. Eight rights will be held by the Tribes with a "time immemorial" priority date, quantified at levels that accommodate existing uses;

    b. The Tribes will co-own (with MT Fish, Wildlife & Parks) current instream flow rights on 14 streams, rivers, and lakes, which would retain their current priority dates (1928-1971).

    c. The Tribes will co-own (with MT Fish, Wildlife & Parks) the former Milltown Dam hydropower right, which retains its 1904 priority date.

5. Provides 90,000 acre-feet from Hungry Horse Reservoir that is currently not available for use within the state of Montana.

6. Provides for leasing of tribal water rights for new development.

7. Specifically allows state control of 11,000 acre-feet from Hungry Horse Reservoir for new off-reservation domestic, commercial, municipal and industrial uses at fixed rate.

Truth #5: The CSKT Compact provides 100% protection for stock water, municipal water, domestic, commercial and other non-irrigation uses on and off the reservation.

8. Provides that all water quantified to the Tribes cannot be transferred out of the state.

9. Protects most existing uses. Specifically:

    a. It provides complete protection from call for ALL non-irrigation uses on and off the Flathead Reservation.

    b. It quantifies Tribal water rights to protect existing irrigation uses to the greatest extent possible.

    c. It will require on-reservation instream flows to be set at an enforceable level after the Compact is ratified at levels that MUST accommodate existing on-reservation irrigation uses.

10. Gives the state a role in permitting and water development on the reservation through a Unitary Management Ordinance:

Truth #6: The CSKT Compact quantifies all tribal water rights *except* on-reservation instream flow rights. Those **must** be set at levels that accommodate existing irrigation uses on the reservation.

a. Provides a means to obtain a new permit or change in use (this hasn't been legally available since 1996).

b. Provides for legal recognition of more than 900 existing domestic uses currently in legal limbo after Montana Supreme Court decisions that acknowledge tribal reserved water rights.

c. Provides for domestic, stockwater, and development exceptions from permitting going forward.

d. Provides a regulatory mechanism similar to the Montana water rights system, administered jointly by a state-tribal board.

Truth #7: On-reservation water rights will be administered jointly by the state and the Tribes, just as on-reservation hunting and fishing are. Persons unhappy with board decisions will be able to seek judicial review.

e. Provides judicial review in a court of competent jurisdiction for anyone unhappy with a board decision.

f. Ensures the Montana Water Court retains jurisdiction to adjudicate all existing pre-1973 claims.

11. The Flathead Indian Irrigation Project Water Use Agreement would have balanced the needs of project irrigators with tribal instream flows, which have already been recognized as senior to irrigation project rights by the Ninth Circuit Court of Appeals.

a. This agreement is dead, as the Flathead Joint Board of Control no longer exists.

b. The state has invited the Tribes to reopen negotiations for the limited purpose of resolving Flathead Irrigation Project water right issues and protect irrigation deliveries.

III. The Bottom Line

A. How will the CSKT Compact affect you?

First, and most important, the Compact will not affect **any** existing rights for domestic, commercial, municipal, industrial, lawn and garden, or stockwater. Additionally, there will be no impact to surface water irrigation or groundwater rights producing less than 100 gallons per minute.

Second, some irrigation rights may be impacted under drought conditions. However, these impacts vary basin by basin and are unlikely under normal conditions.

> **Truth #8**: The Compact will not affect **any** existing rights for domestic, commercial, municipal, industrial, lawn and garden, or stockwater.

Upper Clark Fork and Blackfoot Basins – There may be some impact to irrigation rights in these off-reservation basins. An irrigator upstream of Bonner and Turah with a priority date junior to 1904 would be potentially subject to a call by the Tribes. However, those irrigators are already subject to a senior Milltown Dam water right that is owned by the State and would be co-owned by the Tribes.

Bitterroot Basin – The Compact will have no impact on irrigation water rights here because it does not recognize any new water rights in this basin. The Tribes will become co-owners (with MT Fish, Wildlife & Parks) of existing rights for recreation, instream flows, and storage. Without the Compact, however, the Tribes would likely file for water rights in this basin, which could have an impact all types of water rights.

Swan Basin – Irrigation rights greater than 100 gallons per minute on the main stem of the Swan River may be affected under severe drought conditions. Based on the data, the DNRC predicts that a call on these water rights would happen less than 2 out of every 10 years, which could impact about 68 irrigation rights that serve approximately 670 acres. However, without the Compact, the Tribes will likely file for larger water rights that could have a much larger impact in this basin.

Lower Clark Fork River – The Compact recognizes a 5,000 cfs water right measured below the Cabinet Gorge Dam. The enforceable amount of this right will track FERC's minimum flow requirements for the dam. If the FERC level is reduced, the Tribal right will be likewise reduced. The practical effect of this is that there will be no increased probability of call due to the Tribal water right. Even in times of low flow, the Tribal right will be satisfied by Avista's use of stored water to maintain the FERC level.

Additionally, any call will be limited to the main stem of the Clark Fork River. DNRC predicts a call would occur only during the driest periods, which have historically occurred less than five percent of the time and only during brief periods of the year.

Truth #9: If you use water for something other than irrigation, your water right is 100% protected under the CSKT Compact.

Kootenai River – Under the Compact, as long as Libby Dam is in place and complies with federal regulations, the right quantified under the Compact cannot be enforced, which means there will be no impact on irrigation water rights in this basin. If the Libby Dam is ever removed, then 24 irrigation water rights that produce more than 100 gallons per minute may be called by the Tribes.

Flathead River above the Flathead Indian Reservation – There will be no impact on irrigation rights here.

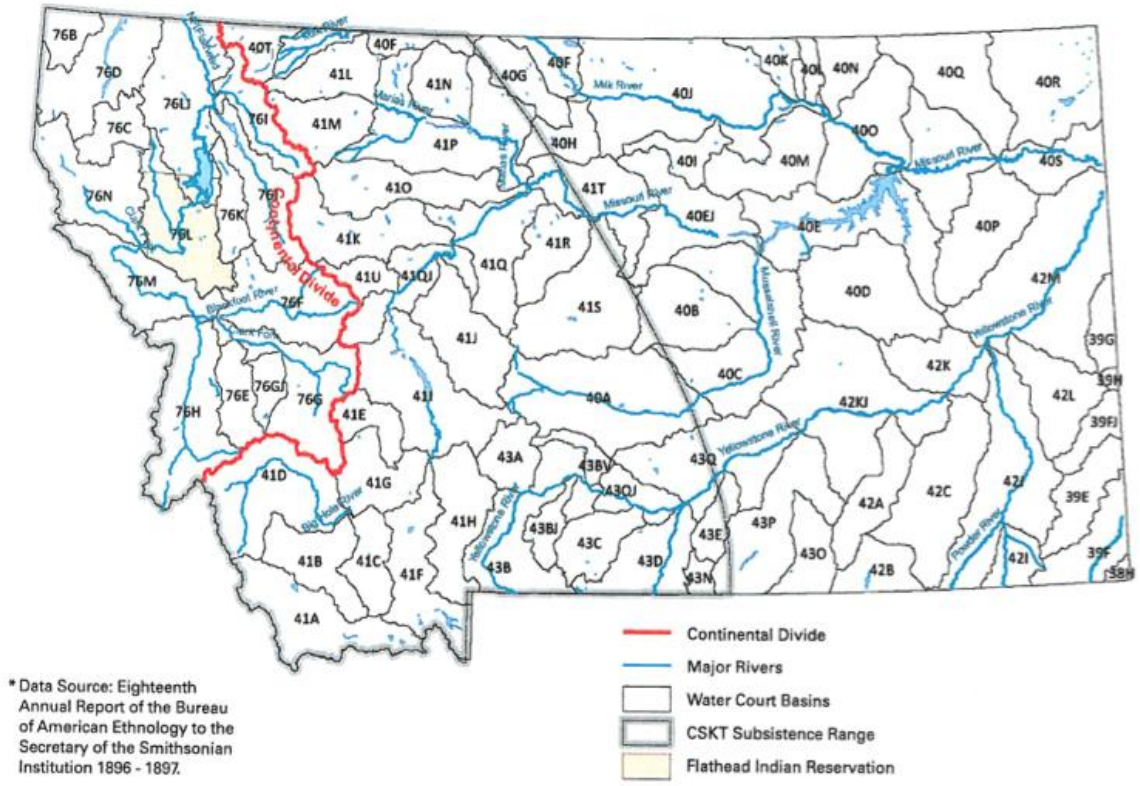
Truth #10: The CSKT Compact will have minimal impact on irrigation rights, although rights for more than 100 gpm may be called during drought conditions.

In summary, stock water, municipal, domestic, commercial and other non-irrigation uses are 100% protected on and off the reservation. There will be minimal impact on irrigation rights other than those for more than 100 gallons per minute, which may be called in drought conditions.

B. How will the lack of a Compact affect you?

If a Compact is not approved by the Legislature, many off-reservation landowners -- from the Flathead Indian Reservation to Billings in the east, and to Idaho in the west and south -- may have to file objections to the Tribes' claims in the Montana Water Court. Because the Tribes have a Stevens Treaty, they may assert a right to instream flows for fish wherever tribal members fished in the past. If proved in Water Court, this instream flow right would have a priority date of time immemorial.

MAP 2: Confederated Salish Kootenai Tribes Subsistence Range



If the Tribes file their water rights claims in the Water Court rather than agreeing through the Compact to relinquish the vast majority of their claims in exchange for the certainty of a smaller number of claims, the time and cost needed to complete adjudication will increase dramatically.

Truth #11: It may take up to 20 years for the CSKT reserved water rights to be fully adjudicated in the Montana Water Court if the Compact is not adopted.

Some water rights holders have already participated in the adjudication process and received preliminary decrees; however, these water rights holders and all others potentially affected by a Tribal claim would have to respond to new Water Court filings by the Tribes in order to protect their water rights.

The Department of Natural Resources and the Water Court would need additional funding and time to address the numerous possible filings by the Tribes for instream flow rights, as well as objections from state water users to these claims. Optimistically, it may take the Water Court an additional 5-10 years to complete the ongoing adjudication process. Given

DNRC and Water Court funding constraints and the likely contentious nature of the proceedings before the Water Court, it is entirely feasible that adjudication could take at least 10-20 additional years. The Compact will eliminate the uncertainty as well as the additional expense.

IV. Water Rights Compacts in Montana

A. Montana's Decision to Compact

In 1979, the Montana Legislature amended the Water Use Act to allow Montana to adjudicate all claims of reserved Indian water rights and all claims of federal reserved water rights. 43 U.S.C. § 666 (the "McCarran Amendment"); M.C.A. § 85-2-703. The Legislature created the Montana Reserved Water Rights Compact Commission for the purpose of negotiating compacts for the equitable division and apportionment of waters between:

Truth #12: The 1979 Montana Legislature created the Reserved Water Rights Compact Commission for the sole purpose of negotiating compacts for federal and tribal reserved water rights.

- Montana and the several Indian Tribes claiming reserved water rights within the state, M.C.A. § 85-2-702; and
- Montana and the federal government for claims of non-Indian reserved waters within the state, M.C.A. § 85-2-703.

A federal reserved water right is a right to water that was created when Congress or the president removed land from the public domain, such as for a national park or an Indian reservation. *See Winters v. U.S.*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. U.S.*, 426 U.S. 128 (1976); *U.S. v. Adair,* 723 F.2d 1394, 1408-1411 (9th Cir. 1983). Tribal reserved or "aboriginal" rights are rights retained by tribes to hunt and fish in aboriginal territories notwithstanding their surrender of land in a treaty. In *Winters*, the U.S. Supreme Court held that it made little sense to create a reservation for tribal people to adopt an agrarian lifestyle without implicitly guaranteeing the water necessary to farm and ranch on the reservation lands.

Truth #13: A federal reserved water right is created when Congress or the president remove land from the public domain, such as for a national park or an Indian reservation.

Under the Montana Water Use Act, tribal reserved rights must be resolved through

Montana's statewide adjudication process. The Montana Supreme Court has ruled that the Act is adequate to adjudicate federal and Indian reserved water rights. *State ex rel. Greely v. Confed. Salish & Kootenai Tribes*, 219 Mont. 76, 95 (1985). However, the Court also stated, "Should the Water Court abridge Indian reserved water rights by improperly applying the Act and the federal law that protects those rights, that failure can be appealed to this Court as well as to the United States Supreme Court for 'a particularized and exacting scrutiny.'" *Id.* at 95-96 (*quoting San Carlos Apache*, 463 U.S. at 571). In other words, the Water Court can adjudicate tribal reserved rights, but its decisions will be subject to scrutiny by both the Montana and U.S. Supreme Courts.

The modern era of Indian self-determination is largely considered to have begun with the passage of the Indian Civil Rights Act in 1968. 82 Stat. 77, 25 U.S.C.A. § 1301, *et seq.*; William C. Canby, Jr., *American Indian Law in a Nutshell* 30 (West 2009). Nearly 80 years after the *Winters* decision, Congress members from the western United States recognized that the Indian water right, if used to its full potential, could severely impact non-Indian water use. Daniel McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era* 31 (U. Ariz. Press 2002). These congressmen realized that in order to protect their constituents' significant water interests, they would have to deal with the Indian water rights. As a result, the era of negotiating Indian water rights began in earnest. *Id.* Western congressmen realized that the tribes of the western United States have priority to the bulk of the West's water. Although the tribes have had this right since 1908 under *Winters*, what made Western congressmen stand up and take notice in the late 1970s and early 1980s was that, in the new era of Indian self-determination, tribes were becoming politically and economically sophisticated enough to make use of and enforce their rights.

Truth #14: U.S. Congressmen from western states realized 30 years ago that negotiation of Indian reserved water rights would lead to better outcomes for everyone than adjudication.

Around this same time, in the 1970s, the state of Montana began the process of adjudicating all water rights within its borders. Four years after the passage of the Montana Water Use Act, the state realized that the pace of adjudication was much slower than anticipated. Merianne Stansbury, *Negotiating Winters: A Comparative Case Study of the Montana Reserved Water Rights Compact Commission*, 27 Pub. Land & Resources L. Rev 131, 132 (2006). Substantial revisions were made to the Act in 1979, including the creation of the Reserved Water Rights Compact Commission to facilitate the quantification of reserved water rights – both Indian and federal – in Montana. *Id.*

Fear and misinformation have swirled around Reserved Water Rights Compact Commission negotiations since the beginning. *Id.* at 133. Indian interests worried about the state's jurisdiction to quantify and qualify a reserved water right. *Id.* Agricultural and non-Indian irrigation interests worried about a "federal water grab" and the nullification of their state-based water rights. *Id.* The 1979 Montana Legislature tried to address these concerns, but the concerns have persisted throughout the Reserved Water Rights Compact Commission's negotiations – especially when the negotiations have involved Indian reserved water rights.

Truth #15: Adjudicating reserved water rights can take decades and cost millions, as shown by cases in Washington and Oregon.

Additionally, Montana's compacting model is unique. While other Western states have used negotiated settlement techniques to resolve federal and Indian reserved water rights, only Montana has done so proactively, through a special body created for the sole purpose of negotiating them. Several Western states have engaged in adjudication rather than negotiation. The process has been long, expensive, and contentious. The most common -- and most troubling -- example is the Big Horn River adjudication, which began in the early 1980s and continued for many decades. Stansbury, 27 Pub. Land & Resources L. Rev. at 135. One common quip about the Big Horn River adjudication is that the only people who have benefitted are the attorneys.

Other long-running and contentious adjudication processes include the Acquavella adjudication involving the Yakima Tribe in Washington State, and the Klamath adjudication in Oregon. The Acquavella adjudication has been an ongoing litigation battle for more than 36 years, and is still not complete. *See Wash. Dept. of Ecology v. Acquavella*, No. 86211-17 (Wash. Mar. 7, 2013); Jeff Kray, *Acquavella – Washington's 36-Year-Old Water Rights Adjudication Nears an End* (Apr. 16, 2013), http://www.martenlaw.com/newsletter/20130416-acquavella-adjudication-near-end. Similarly, the Klamath Adjudication has been litigated for decades and has cost the parties millions of dollars. Montana has been working to avoid that kind of outcome, and has been largely successful.

B. Montana's Compacts To Date

Since its inception, the Reserved Water Rights Compact Commission has negotiated -- and the Legislature has approved -- 17 compacts with six tribes and five federal agencies in Montana. Montana has completed tribal compacts with:

- Assiniboine & Sioux Tribes of the Fort Peck Reservation;

- Northern Cheyenne Tribe;
- Crow Tribe;
- Gros Ventre & Assiniboine of the Fort Belknap Reservation;
- the Chippewa Cree of the Rocky Boy's Reservation, and
- the Blackfeet Tribe.

See http://www.dnrc.mt.gov/rwrcc.

A tribal compact must be approved both by all three governments: state, federal, and tribal. The Reserved Water Rights Compact Commission is working on federal legislation for the Blackfeet compact of 2009, and the Fort Belknap compact of 2001. Congress approved the 1999 Crow Compact in 2010, and tribal members approved it in March 2011.

Truth #16: Tribal compacts must be approved by all three governments: state, federal, and tribal.

Federal compacts have been completed with:

- National Park Service,
- U.S. Fish & Wildlife Service,
- Bureau of Land Management,
- U.S. Department of Agriculture, and
- U.S. Forest Service.

The 2013 Montana Legislature approved compacts with the U.S. Bureau of Land Management for the Upper Missouri River Breaks National Monument (SB 88), and the U.S. Fish & Wildlife Service for the Charles M. Russell National Wildlife Refuge (SB 278). *Id.*

C. The Tribal Compacting Process and the Composition of Montana's Tribal Compacts

The Reserved Water Rights Compact Commission is a bipartisan commission composed of nine members, appointed to four-year, renewable terms. Four members are appointed by the governor, two are appointed by the president of the Montana Senate, two are appointed by the speaker of the House, and one is appointed by the Attorney General. MCA § 2-15-212(2)(a)-(d). The Reserved Water Rights Compact Commission also has technical support staff to assist with legal, historical, and hydrological research. Tribal water rights claims are suspended from adjudication during the negotiation process. MCA § 85-2-702(1).

Truth #17: The Reserved Water Rights Commission is a bipartisan commission created by the Montana Legislature and composed of nine members.

Once a compact is negotiated, it must be ratified by the Montana State Legislature, the tribal governing authority, and the United States. MCA § 85-2-702(2). Approved compacts are incorporated into preliminary decrees issued for the basins affected by the compact. MCA § 85-2-702(3). Unless an objection to the compact is sustained under § 85-2-233, MCA, the compact is included in the final decree for each affected basin, without alteration. *Id.*

If a compact was not completed and approved by the Montana Legislature and a tribe by July 1, 2013, the tribe has 24 months to file its water rights claims with the DNRC and begin participating in statewide adjudication. MCA § 85-2-702(3). The Confederated Salish & Kootenai Tribes have said publicly that they will not defer their claims even if the Legislature extends this deadline. Therefore, the 2015 legislative session represents the final opportunity for the state to ratify the CSKT Compact and avail itself of the protections contained in this negotiated settlement.

Truth # 18: The 2015 legislative session represents the final opportunity for the state to ratify the CSKT Compact. After that, the Tribes will file in the Montana Water Court, and pursue adjudication.

Each tribal compact addresses the unique water needs of the tribes involved and the resources available in the basins affected by the tribal reserved water right. However, all tribal water compacts contain similar components:

1. The compacts are a complete and final determination of the Indian reserved water right in order to provide certainty to the state, the tribes, the federal government, and all water users, including non-Indian and off-reservation water rights claimants.

2. The Indian reserved water right priority date is the date when the reservation for the particular tribe was created; however, this date can be subordinated to other uses if agreed to in the negotiations.

3. The compacts provide clear guidance on how water rights will be administered among the state, tribes, and federal government.

4. The compacts provide clear guidance on how the reserved water right will be regulated after the compact is implemented and the reserved right is quantified.

5. The compacts allow tribes to acquire alternative sources of water in order to

avoid more significant impacts to existing water users.

6. The compacts typically include significant funding to implement the reserved water right.

Truth #19: Negotiated compacts are far more flexible than adjudicated water rights.

An adjudicated reserved water right is not nearly as flexible as this. Adjudication merely allocates a particular amount of water for Indian reserved uses. Moreover, adjudication is open only to parties who have actual water rights interests, i.e., the tribe and any valid state-based water rights holder in an affected basin. No other parties are allowed to participate in the adjudication process.

Here are several things adjudication cannot do:

- Adjudication cannot provide for subordination of the tribal priority date.
- Adjudication cannot provide for administrative or regulatory oversight.
- Adjudication cannot provide for alternative sources of water to fulfill a reserved right.
- Adjudication cannot provide for federal or state funding.

It is useful to remember that western lawmakers 30 years ago realized the limitations of the adjudicatory process and the potentially vast extent of the Indian reserved water right, and decided to pursue negotiated settlements of reserved water rights. Only a negotiated compact allows the flexibility to craft water solutions that work for everyone.

D. The Current Status of the CSKT Compact

The CSKT Compact was approved by the Reserved Water Rights Compact Commission but failed to win approval of the 2013 Legislature (HB 629). Senate Bill 265 was passed by the 2013 Legislature, extending the deadline to file adjudicated claims for reserved water rights and requiring a study of the CSKT Compact, but Governor Bullock vetoed this bill. In his veto letter, Governor Bullock directed the Reserved Water Rights Compact Commission to prepare a report addressing the questions raised during the 2013 Legislative session about the CSKT Compact. The veto letter can be found here: http://leg.mt.gov/bills/2013/AmdHtmS/SB0265GovVeto.pdf.

Truth #20: Every document related to the CSKT Compact is online.

The Reserved Water Rights Compact Commission completed its report on the CSKT Compact, as directed by the governor, in December 2013. The full report can be found here: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/WaterCompactReportLR.pdf.

The Reserved Water Rights Compact Commission encouraged public involvement in the study and took public comment on what should be included in the report. The public comment received can be found here: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/2013/cskt_comments_070913.pdf and here: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/cskt comments20130904.pdf.

The Water Policy Interim Committee held a meeting on the CSKT Compact and the Reserved Water Rights Compact Commission's report on January 6, 2014. The meeting minutes can be viewed here: http://leg.mt.gov/css/Committees/interim/2013-2014/Water-Policy/default.asp. WPIC met May 12-13, 2014 in Helena to discuss the CSKT Compact. http://leg.mt.gov/css/Committees/interim/2013-2014/Water-Policy/Meetings/May-2014/may-2014.asp.

Complete up-to-date information on the CSKT compact can be found at http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/Default.asp.

V. Overview of Tribal Water Rights

A. The Binding Effect of Indian Treaties

1) Article II, Section 2, Clause 2 of the U.S. Constitution grants the President of the United States the power to enter into treaties with foreign nations with the consent of at least two-thirds of the U.S. Senate.

2) Treaties are legally binding, enforceable agreements that have no "expiration date" unless specifically provided for in the treaty or the treaty is later amended or abrogated. The U.S. Supreme Court has referred to treaties as "essentially a contract between two sovereign nations." *Washington v. Wash. State Comm'l Pass. Fishing Vessel Assoc.*, 443 U.S. 658, 675 (1979).

Truth #21: Indian treaties are the law of the land. They do not expire. Every allotment of land on the Flathead Reservation was made subject to the binding effect of the 1855 Hellgate Treaty.

3) The "Treaty Era" of United States federal Indian policy concluded in 1871 with the passage of 25 U.S.C.A. § 71, which provides, in

pertinent part, that:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

Thus, all treaties between Indian tribes and the United States made and ratified before March 3, 1871, are valid, enforceable legal documents.

4) Land patents issued by the United States to the states or to non-Indians are not exempt from treaty obligations. They are subject to the terms of an Indian treaty just as they are to other laws of the land. *U.S. v. Winans*, 25 S.Ct. 662, 664 (1905).

5) The Hellgate Treaty with the CSKT was negotiated July 16, 1855 and ratified on March 8, 1859. No subsequent action has abrogated the treaty. *Confed. Salish & Kootenai v. Namen*, 665 F.2d 951 (9th Cir. 1982).

B. Origin of the "Aboriginal" Water Right

1) The Stevens Treaties

Isaac Stevens was the governor of the Washington Territory in the mid-1850s. He negotiated several treaties with various tribes in the Pacific Northwest. At least ten of the treaties contained similar language regarding retention of tribal rights to traditional foods and harvest practices.

Examples of some Stevens Treaties with language regarding tribal rights include:

Truth #22: Some Stevens Treaties contain unique language conferring rights to hunt and fish off of the reservation as well as on it.

i. Treaty of Medicine Creek, Dec. 26, 1854 (10 Stat. 1132, 1133)
ii. Treaty of Point Elliott, Jan. 22, 1855 (12 Stat. 927, 928)
iii. Treaty of Point No Point, Jan. 26, 1855 (12 Stat. 933, 934)
iv. Treaty of Neah Bay, Jan. 31, 1855 (12 Stat. 939, 940)

v. Treaty with the Walla-Wallas, June 9, 1855 (12 Stat. 945, 946)
vi. Treaty with the Yakimas, June 9, 1855 (12 Stat. 951, 953)
vii. Treaty with the Nez Perce, June 11, 1855 (12 Stat 957, 958)
viii. Treaty with the Tribes of Middle Oregon, June 25, 1855 (12 Stat. 963, 964)
ix. Treaty of Olympia, July 1, 1855 (12 Stat. 971, 972)
x. Treaty of Hellgate, July 16, 1855 (12 Stat. 975, 976)

The CSKT are the only tribes in Montana with a Stevens Treaty that has language granting the Tribes off-reservation aboriginal rights.

2) <u>The Hellgate Treaty of 1855</u>

Article III, Paragraph 2 of the Hellgate Treaty, which created the Flathead Indian Reservation, contains the boilerplate Stevens treaty language giving rise to off-reservation aboriginal water right claims:

Truth #23: The Hellgate Treaty is the only Stevens treaty in Montana with language granting the Tribes off-reservation aboriginal rights, which means the CSKT Compact is the only Montana compact addressing off-reservation water rights claims.

> And provided…*The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory*, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. (Emphasis added).

The first court decision to interpret the Stevens Treaty aboriginal rights language was *U.S. v. Winans*, 198 U.S. 371 (1905). In *Winans*, the court interpreted the Stevens treaty language providing the Yakima Indians the right of taking fish "at all usual and accustomed places in common with the citizens of the territory." *Id.* at 379. The Supreme Court held that the Yakima Treaty was "not a grant of rights to the Indians, but a grant of right from them, - a reservation of those not granted." *Id.* at 381. The Court further held that these reserved rights "imposed a servitude upon every piece of land" and that there "was a right outside of those boundaries reserved 'in common with citizens of the territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise." *Id.* The Court went on to say that the Yakima Indians were given a right to the lands for the purposes set forth (i.e., fishing and related activities) outside the boundaries of the reservation, and that that right was a continuing right against the

United States and, later, the states and their grantees. *Id.*

Winans previewed what was to come later when the so-called "fishing wars" raged in Washington State during the late 1960s and early 1970s. Out of that turmoil came *U.S. v. Washington* (the "Boldt Decision"), 384 F. Supp. 312 (W.D. Wash. 1974), which held that Stevens Treaty tribes were entitled to 45%-50% of the annual salmon harvest from off-reservation fishing grounds. The Boldt Decision was appealed to the U.S. Supreme Court, which held that the boilerplate fishing provisions in the Stevens Treaties entitled tribes to 50% of the harvestable share of fish or the tribes' needs, whichever was less. *Washington v. Wash. State Comm'l Pass. Fishing Vessel Assoc.*, 443 U.S. 658 (1979).

In 1983, the Ninth Circuit Court recognized on-reservation instream flow water rights to support aboriginal hunting and fishing rights based upon the treaty or statute setting aside the Indian reservation (in this case, the Klamath Tribe in Washington state). *U.S. v. Adair*, 723 F.2d 1394, 1412-1415 (9th Cir. 1983). The priority date of these rights is from "time immemorial." *Id.* However, the reserved right is limited to the amount needed to preserve a moderate livelihood from hunting and fishing. *Id.* These rights survived the termination of the Klamath Indian Reservation, and have fueled the Klamath water dispute that has been ongoing ever since.

Truth #24: Some courts have held that aboriginal rights arising from Stevens treaty language have a priority date of "time immemorial."

The Boldt, *Fishing Vessel* and *Adair* decisions gave rise to additional legal questions, including whether a right to fish includes a right to preserve habitat for fish (i.e., instream flows off of the reservation).

C. Extent of the Indian Reserved and Aboriginal Water Right

1) The Indian Reserved Water Right and On-Reservation Rights

In 1908, the U.S. Supreme Court handed down the foundational decision in Indian water law – *Winters v. U.S.*, 207 U.S. 564 (1908). In *Winters*, the Court ruled that Indian water rights were reserved to the Indians by the creation of their reservations. *Id.*

Truth #25: The priority date for on-reservation reserved water rights is the date the reservation was created.

In subsequent cases, the "Winters Doctrine" was created, further defining the extent and scope of the original *Winters* right. In *Arizona v. California*, the Supreme Court held that the priority of the reserved right coincided with the creation of the reservation. *Arizona v. California*, 373 U.S. 546 (1963). The *Arizona* decision also quantified the reserved right as

enough water to irrigate all the *practically irrigable* acreage on the reservation.[1] *Id.* *Winters* and *Arizona* also established that the Indians' priority did not depend upon diversion or beneficial use, both of which are usually required by the prior appropriation doctrine that dominates western water law.

Later, in *Cappaert*, the Supreme Court held that the reserved-water-rights doctrine protects the federal government's right to divert enough water to protect the purpose of the reservation – in that case, Devil's Hole. *Cappaert v. U.S.*, 426 U.S. 128 (1976). Finally, when a reservation is established with express or implied purposes that extend beyond agriculture, enough water is reserved to sustain the express or implied use. *U.S. v. Adair,* 723 F.2d 1394, 1408-1411 (9th Cir. 1983).

In general, the Winters Doctrine has been applied to on-reservation water rights. However, as touched upon earlier, the principles underlying the Winters Doctrine could -- and may be -- applied to aboriginal, off-reservation water rights as this body of law develops.

The Montana Supreme Court discussed "aboriginal" treaty rights in *State ex rel. Greely v. Confed. Salish and Kootenai Tribes*. 219 Mont. 76 (1985). The Court found that the Water Use Act is "sufficiently broad to allow adjudication of water reserved to protect tribal hunting and fishing rights, including protection from the depletion of streams below a protected level." *Id.* at 91. Further, the Court found that Indian reserved water rights can have different priority dates – and thus are not limited to a single purpose:

> The date of priority of an Indian reserved water right depends upon the nature and purpose of the right. In many instances, the federal government's plan to convert nomadic Indians in to farmers involved a new use of water. 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."

Id. at 92 (citations omitted). In other words, water rights reserved for traditional subsistence activities – hunting and fishing – will have a priority date senior to all other water users.

[1] This has come to be known as the "PIA" standard for measuring the amount of the reserved right.

Through the Commerce Clause of the United States Constitution, the federal government was initially the only entity authorized to have any dealings with Indians and Indian nations. Art. I, sec. 8, cl. 3, U.S. Const. The government's policy changed in regards to water rights when Congress passed the McCarran Amendment in 1952. 43 U.S.C. § 666. Under McCarran, the federal government waived its sovereign immunity and allowed itself to be joined as a defendant in any suit for the general adjudication and administration of water rights in the states. *Id.*

The McCarran Amendment does not mention Indians or Indian reserved water rights. Nonetheless, it was the avenue through which states could join tribes in general state water adjudications. By allowing federal sovereign immunity to be waived, the federal government, as trustee for a tribe, could be joined in state water adjudications.[2]

The United States, as trustee for the tribes, has sometimes been inclined to make expedient negotiated agreements on behalf of tribes, rather than agreements that fully comply with the tribal water rights afforded under the Winters Doctrine. Thus, if tribes want to ensure their rights are fully protected in state water adjudications, they too must waive their sovereign immunity and either litigate or negotiate directly with the state.

2) <u>The Aboriginal Water Right and Off-Reservation Rights</u>

After the Boldt Decision and the *Fishing Vessel* cases, questions remained regarding the scope of aboriginal fishing rights, including the extent of off-reservation water rights. The first case to address fish habitat protection was *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 626 F.2d 95 (9th Cir. 1980).[3] In *Kittitas*, the court held that when the Tribe's treaty right included the right to fish at usual and accustomed places, this included a right to demand water from a Bureau of Reclamation water project to protect instream flows for the fish, regardless of any potential conflict with state-based water rights. *Id.*

Truth #26: The Ninth Circuit federal court held in 1980 that a treaty right to fish "at usual and accustomed places" includes a right to demand water from a Bureau of Reclamation project.

When the Yakima Tribe participated in Washington state's general adjudication of water rights in the Yakima Basin, the adjudication court held that the Tribe's implied water

[2] *Colorado River Water Conservation District v. U.S.,* 424 U.S. 800, 811-812 (1976). In *Colorado River,* the court found that even if a tribe did not want to litigate or negotiate with the state, it had no choice once the federal government, acting as trustee for the tribe, entered into state water adjudication proceedings. *See also Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545, 564-565 (1983).
[3] *See also* Rachael Osborn, *Native American Winters Doctrine and Stevens Treaty Water Rights*, 20 Water Law 224, 230 (2010).

Truth #27: The Washington Supreme Court held that a tribe's reserved water rights have to be sufficient to preserve its fishing rights, i.e., provide it with instream flow rights.

rights had to be sufficient to preserve its fishing rights. *State Dept. of Ecology v. Yakima Reservation Irr. Dist.*, 850 P.2d 1306, 1309 (Wash. 1993). The adjudication court further held that the priority date for this instream flow right was "time immemorial." *Id.* at 1310. The court limited the right somewhat, finding that specific congressional and Indian Claims Commission actions pertaining to the Yakima Reservation had diminished the scope and extent of -- but not eliminated -- the Tribe's rights. *Id.* at 1320-1323. The court held that the flow right was limited to current minimal flow needs and that it retained the "time immemorial" priority date; however, any additional instream flow rights would be junior to existing irrigation rights. *Id.* at 1318, 1331-1332.

The Nez Perce Tribe in Idaho, another Stevens Treaty Tribe, did not fare as well in Idaho's Snake River Basin Adjudication. The adjudication court refused to recognize an off-reservation instream flow right for fish habitat protection under the Nez Perce Tribe's treaty. *In re Snake River Basin Adjudication*, Consolidated Subcase No. 03-10022 (Idaho 5th Dist. Ct., Twin Falls Co., Nov. 10, 1999). The court, ignoring much of the prior case law regarding aboriginal water rights and Indian treaty interpretation, was unwilling to imply a water right for fish habitat. *See* Katheryn Bilodeau, *The Elusive Implied Water Right for Fish*, 48 Idaho L. Rev. 515, 539-543 (2012). While that decision was on appeal to the Idaho Supreme Court, the Nez Perce Tribe entered into negotiations with the state of Idaho and the United States, reaching a settlement that secured the Tribe off-reservation instream flow rights. *See* Osborn at 231. The Nez Perce Tribe's off-reservation instream flow rights are owned by the state and subordinated to all pre-2004 state water rights. *Id.*

Truth #28: An Idaho district court refused to recognize an off-reservation instream flow right under the Nez Perce treaty in 1999. While the case was being appealed, the tribe reached a settlement with the state and federal governments that secured off-reservation instream flow rights.

The Idaho decision has been heavily criticized as inconsistent with existing Supreme Court precedent regarding the nature of the rights conferred by the Stevens Treaties' language. *See, e.g.,* Bilodeau at 541-543, Osborn at 232. The issue has been litigated more extensively in Washington state and, arguably, the body of law developed there is more instructive and will be more persuasive to a Montana court asked to determine whether an off-reservation aboriginal water right exists. Even with a favorable ruling in

Idaho state court, at the end of the day the state of Idaho set aside extensive off-reservation instream flow rights as part of its settlement with the Tribes. This, in its own way, continues to set precedent for recognizing such rights in other state negotiated water rights agreements.

D. History of the Flathead Irrigation Project

Federal Indian policy from approximately 1850 to 1887 focused heavily on moving Indian peoples to reservations. William C. Canby, Jr., *American Indian Law in a Nutshell* 19 (West 2009). Throughout the period from 1887 to 1934, federal Indian policy increasingly focused on assimilating Indian peoples to more agrarian and less nomadic lifestyles. *Id*. at 20-24. In addition, during the assimilation period, the General Allotment Act (or "Dawes Act") of 1887 was passed. 24 Stat. 388. The Dawes Act provided for the allotment of defined parcels of reservation land to be divided among Indians living on reservation lands. *Id*. Lands not allotted to individual Indians were considered "surplus" and were opened to non-Indian settlement. *Id*. The purpose of the Dawes Act was to promote a shift in Indian lifestyle from nomadic hunter/gatherers to non-nomadic farmers and ranchers. *Id*. At the time, two competing federal needs were attempting to be met: 1) the need to end Indian conflict and assimilate Indian peoples to non-Indian culture and practice, and 2) the need to open formerly Indian-occupied territory to non-Indian settlement.

In 1904, Congress passed a law allowing for the allotment of the Flathead Indian Reservation, with remaining lands opened to non-Indian settlement. Section 14 of the Act provided that half of the proceeds from the sale of any lands susceptible to sale under the terms of the Act were to be expended:

> …from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation,…in *the construction of irrigation ditches*…or other necessary articles to aid the Indians in farming and stock raising…

33 Stat. 302, Sec. 14 (emphasis added).

In 1908, Congress passed the Flathead Allotment Act. May 29, 1908, 35 Stat. 444, 448. The Allotment Act opened the Flathead Indian Reservation to further settlement by non-Indians and specifically extended the benefits of Flathead irrigation project works onto those lands. *Id.; see also* Garrit Voggesser, Bureau of Reclamation,*The Flathead Project: The Indian Projects* 9 (2001), http://www.usbr.gov/history/ProjectHistories /INDIAN%20PROJECTS% 20FLATHEAD%20PROJECT.pdf. Under the 1904 Act, the entire Flathead irrigation project was to be funded from the sale of Indian reservation lands. *Id*.

Construction of the Flathead irrigation project came at a politically contentious time between the Bureau of Reclamation and the Bureau of Indian Affairs. Originally, Indian water projects were under the purview of the Bureau of Indian Affairs. However, in 1907, the Secretary of the Interior assigned construction of Indian and non-Indian irrigation projects to the Bureau of Reclamation, and directed the Bureau of Reclamation to coordinate with the Bureau of Indian Affairs on Indian projects. Daniel McCool, *Command of the Waters* 162 (U. of Cal. Press 1987).

Initially, the arrangement seemed advantageous to both agencies. However, after the *Winters* decision in 1908, the Bureau of Reclamation became increasingly hostile toward the recognition of Indian reserved water rights. *Id.* at 163. By 1915, there was open hostility between the two agencies, with the Bureau of Indian Affairs commissioner publicly calling out the Bureau of Reclamation for what the Bureau of Indian Affairs saw as excessive transfers of Indian lands to non-Indians and the high cost of Indian water projects being taxed to the Indians, although the projects were aimed at primarily benefitting non-Indians. *Id.* at 164. The Bureau of Reclamation regarded reserved water rights with skepticism and viewed its work as primarily for the benefit of non-Indians. *Id. at* 163; Voggesser, at 10. By the early 1920s, relations between the two agencies had degraded to such an extent that both agencies were investigated by special commissions. McCool, at 165.

Truth #29: Construction of the Flathead Irrigation Project began in 1908, but was not complete until 1963. The Bureau of indian Affairs controlled construction from 1924-1963.

Though relations between the Bureau of Reclamation and the Bureau of Indian Affairs remained contentious, the Flathead irrigation project continued to be constructed. From 1908 to 1924, the Bureau of Reclamation helped with construction. *Id.* at 23. However, rough terrain, funding difficulties, lack of consistent labor force, and other factors made the Flathead irrigation project a challenge to construct. It was not completed until 1963. *Id.* at 10. From 1924 until its completion in 1963, the Bureau of Indian Affairs controlled construction on the project.

Over the course of the intervening years, federal Indian policy and management of the Flathead Reservation led to more and more Indian lands being consolidated into non-Indian ownership. By the time the Flathead project was completed in 1963, non-Indians owned more than 95% of the 127,000 irrigated acres in the project. Voggesser at 33.

Given the project's contentious and long-drawn out history, it is little wonder that confusion persists today as to whether the Flathead irrigation project is an "Indian

project," a "Non-Indian project," a "BIA project" or a "BOR project." As originally conceived, it was an "Indian project." However, changes in federal Indian policy, the process of allotment, inter-governmental agency disputes, the transfer of vast tracts of reservation lands into non-Indian ownership, and funding issues have muddled these distinctions. At the end of the day, the Flathead Indian Irrigation Project is a U.S. government project, built to service lands owned by Indians and non-Indians alike on the Flathead Indian Reservation. The project now includes 15 reservoirs and dams, and more than 10,000 diversion and control structures, covering a drainage basin of about 8,000 square miles. Voggesser at 3-4.

As with most government water projects built to benefit individual irrigators – whether built by the Bureau of Reclamation, the Bureau of Indian Affairs, or the Corps of Engineers -- the Flathead Indian Irrigation Project is still owned by the U.S. government. The last federal agency with authority for construction, supervision and administration of the Flathead Indian Irrigation Project is the Bureau of Indian Affairs.

Non-Indian irrigators are represented by three irrigation districts, the Flathead Irrigation District, the Mission Irrigation District, and the Jocko Valley Irrigation District. These districts signed repayment contracts with the United States in 1928, 1931, and 1934 respectively, and were collectively represented by the Flathead Joint Board of Control, which was chartered under state law and represented only owners of fee lands. *Id.* Individual Indians and the Tribes that irrigate lands held in trust by the United States were statutorily excluded from representation by the Flathead Joint Board of Control. *Id.*

VI. Property Rights and the CSKT Compact

Some opponents of the CSKT Compact have argued that the Compact take non-Indian irrigators' water rights in violation of the Montana and United States Constitutions. *See, e.g.,* "A Citizen's Guide to the Flathead Water Compact," and "A Critical Review of the CSKT Compact," Western Montana Water Rights, http://westernmtwaterrights.wordpress.com. In order to be valid, a takings claim must be based on a compensable property interest. *See Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 55-56 (1986); *Preasault v. United States*, 27 Fed. Cl. 69, 84 (1992). In other words, you cannot have something taken that you never owned in the first place.

A. Is There a Compensable Property Interest Taken by the Compact?

Those who allege a taking argue that the Flathead Indian Reservation was opened by Congress for settlement in 1904 and that "valid land and water rights claims established

by non-Indians prior to 1934 were deemed unaffected by the Indian Reorganization Act." *Questions and Answers Re: CSKT Compact*, Concerned Citizens of Western Montana at Tab 2 pgs. 1-2. Basically, they argue that non-Indians who settled within the boundaries of the Flathead Indian Reservation benefitted from laws associated with homesteading public lands.

But the reservation allotments were never public lands. Even though Congress passed the Flathead Allotment Act, the law made it clear that the unallotted tribal lands that were opened for non-Indian entry went directly from tribal title to non-Indian entry under the fiduciary management of the United States, which means the lands were never "public lands" or in the "public domain." Section 16 of the Flathead Allottment Act; *see also* Decisions of the Department of Interior in Cases Relating to the Public Lands, Vol. 48, Feb. 1-Apr. 30, 1922, pp. 476, 470; *U.S. v. McIntire*, 101 F.2d 650, 656 (9th Cir. 1939).

Truth #30: For the Compact to "take" property rights, a person must first show a compensable property interest.

The 1908 Flathead Allotment Act provided a detailed mechanism for non-Indian landowners on the Flathead Indian Reservation to attain water rights under the Flathead Indian Irrigation Project. 35 Stat. 444, 448, amended Section 9 of the FAA. These amendments required that the non-Indian irrigators pay for the costs of the irrigation projects. *Id.* Even though Congress requested payment many times, most of the irrigation project has been subsidized and not paid for by the irrigators.

In 1939, the Ninth Circuit held that the water, on, under, and flowing through the Flathead Indian Irrigation Project was reserved by the United States for the Tribes, and therefore "no title to the waters could be acquired by anyone except as specified by Congress." *United States v. McIntire and Flathead Irrigation District*, 101 F.2d 650, 654 (9th Cir. 1939). Further, in the Acts of 1908, 1912, and 1926, Congress specified how a non-Indian could acquire a water right under the Flathead Irrigation Process: follow an application process and make the required payments. If a non-Indian had followed this process, the person could have received a final certificate of water rights.

Truth #31: Non-Indian irrigators on the Flathead Reservation who use Flathead Irrigation Project water do not have a compensable property interest in the water they use.

To date, there is no record of anybody applying to acquire a final certificate, which means that all of the non-Indian irrigators on the Flathead Indian Reservation currently have a very tenuous right to delivery of their irrigation water. Therefore, based on

federal law, no non-Indian irrigator using water from the Flathead Irrigation Project has a compensable property right.

Furthermore, the only way to claim a water right under Montana law is to have filed for that water right in by the initial filing deadline of January 1, 1982, later extended to April 30, 1982, or by the late claim filing deadline of July 1, 1996.[4]

Based on federal law and Montana law, non-Indian irrigators using Flathead Irrigation Project water do not own a compensable property interest that can be taken by the Compact. Non-Indian irrigators who use other sources of water have state-based water rights if they filed valid claims in a timely manner, subject to final determination by the Montana Water Court.

B. The Joint Board of Control of Flathead, Mission and Jocko Already Lost the Legal Argument that Their Water Rights Were Taken.

More than 20 years ago, the Flathead Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts sued the United States alleging, among other things, that they were entitled to operate and manage the Flathead Indian Irrigation Project, and that the federal government's failure to turn the project over to them effected a taking of their property. *Flathead Joint Bd. of Control of Flathead, Mission and Jocko Valley Irrigation District*, 30 Fed. Cl. 287 (1993). Their takings claim was premised on contracts they signed with the United States. The court found that "none of these contracts established an express or implied duty to transfer the management and operation of the project to the plaintiffs." *Id.* at 293. As a result, the court held that the irrigation districts did not have a compensable property interest, and dismissed their takings claim. *Id.*

While this case was presented on the basis of contracts between the irrigation districts and the federal government, and involved the entire irrigation project rather than only water rights, it reveals some of the flaws in the arguments of the Compact's opponents. It is arguable that if the irrigation districts had additional grounds for alleging a taking, they were obligated to bring them up in the 1993 lawsuit, and their failure to do so means they may have forever forfeited such claims.

[4] Late claims are subordinate to federal and tribal compacted rights, all timely filed claims, and certain newly permitted rights. § 85-2-221, MCA.

VII. Benefits of the CSKT Compact

A. The Compact Provides Certainty.

Currently, irrigators and others water users on and near the Flathead Reservation have no certainty regarding their water use and property rights. To have certainty, the Tribes' reserved water rights must be quantified, which is the purpose of the Compact. Without quantification of the Tribes' water rights, which have the earliest priority date, all other nearby water users' water rights are questionable.

"Questionable" means that a neighboring water rights holder does not know for sure where and how much water the Tribes may be allocated during the adjudication process. There is no doubt based on the treaties as interpreted by state and federal courts that the Tribes have valid reserved water rights. The only remaining question is how much water the Tribes have. Therefore, until the issues of quantity and extent are resolved, neighboring water rights holders have uncertainty related to their water rights, which are junior to any water rights the Tribes ultimately secure.

Truth #32: The CSKT Compact provides numerous concrete benefits to Montanans on and off the Flathead Reservation.

Further, the irrigators on the reservation currently have only tenuous rights to receive a certain amount of project water for irrigation, as their rights are subject to the Tribes' judicially recognized senior instream flow rights. Once the Compact is finalized in a way that resolves water rights for the Flathead irrigation project, then -- for the first time -- irrigators on the reservation will have an enforceable right to receive water that is not junior to the Tribes' instream flows. This will provide them certainty that they have never before had relating to their project irrigation water.

B. The Compact Avoids Greater Budget Allocation to DNRC and the Montana Water Court.

If the Compact is not finalized, the determination of how much water belongs to the Tribes will be made in the Water Court, as part of a larger adjudication process. Due to the breadth of the geographical area from the Canadian border on the north, the Idaho border on the west, and the Yellowstone River on the east, as well as the number of water rights cases that will have to be reopened along with the new adjudication cases, the Montana Water Court and the Montana Department of Natural Resources and Conservation will need additional funding for 10-20 more years.

C. The Compact Means Off-Reservation Water Rights Holders Will Not Have to Defend Their Water Rights Against the Tribes in Water Court.

If the Compact is not adopted, many water rights holders in the western half of Montana may have to defend their water rights against the Tribes in the Montana Water Court. The Tribes will likely file for 1855 or "time immemorial" priority date water rights that predate all other water rights issued for the water sources historically used by tribal members for fishing. Therefore, many current adjudication cases would have to be reopened, and many individual water rights holders would have to participate to protect their water rights against the Tribes' claims. Participation in adjudication cases can be costly and time consuming.

D. The Compact Avoids Costly Litigation.

If the Compact is not finalized, there will likely be litigation in the Montana Water Court that could end up in the Montana Supreme Court. Because federal courts have jurisdiction over Indian rights cases, there could also be federal litigation in addition to the state adjudication process. Any of these cases could go all the way to the United States Supreme Court. This type of litigation may not directly involve all water rights holders, but it will result in ongoing uncertainty over all water rights affected by the Tribes' reserved water rights. A Compact will avoid costly litigation expenses and provide certainty to everyone.

E. The Compact Ends the Current Water Rights Battles and Allows the Community to Heal.

Based on the number of new articles, op-eds, and statements made in public, hard feelings and acrimonious splits in the local community have arisen from the Compact. People have made racial and otherwise unpleasant statements related to the Compact and the process associated with Compact approval. A negotiated settlement and a final Compact is the best way to move forward. Years of expensive litigation will continue to cause hard feelings and splits in the community.

F. The Compact Provides 90,000 Acre-Feet for Additional Development in the Valley.

If the Compact is approved, the Flathead Valley and other areas surrounding the reservation will be some of the few places in Montana with new water available for growing communities and individuals to put to beneficial use. The Compact would make available up to 90,000 acre-feet of water for mitigation of existing and future

water uses in the Flathead and Clark Fork basins. At least 11,000 AF of that water would be available for off-reservation uses. This is the only place in Montana that would have that much new water available for economic development.

G. The Compact Protects Fish.

By quantifying tribal instream flow water rights on the Reservation, the Compact balances the needs of fish and agriculture and assures the continued health of fisheries on the Reservation, as well as continued compliance with federal environmental regulations such as the Endangered Species Act. Off-reservation instream flow rights quantified under the Compact will protect existing consumptive water rights, but nonetheless reaffirm a commitment to healthy fisheries that benefits the Montana economy as well as individual Montanans.

H. The Compact Quantifies Off-Reservation Rights.

To date, Montana courts have not been asked to address the existence and extent of off-reservation instream flow water rights necessary to sustain traditional tribal fishing habitat. There is no question, though, that the United States Supreme Court, other federal courts, and courts in other states have generally interpreted these kinds of questions in favor of tribes. Moreover, the Montana Supreme Court has stated that "statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor." *Greely*, 219 Mont. at 91 (*quoting Hollowbreast*, 425 U.S. 649, 655 n.7). If this issue is litigated instead of negotiated, there will likely be years of litigation in state and federal courts to finally determine the extent of the Tribes' rights. This poses a significant risk to other water rights holders, as the likelihood is that the Tribes will secure significant senior water rights.

Truth #33: Through the Compact, the Tribe will relinquish its rights to make a call upon existing irrigation water rights both on and off the reservation.

The Compact will solve this question without years of expensive litigation, in a way that protects existing state water rights to a far greater extent than is likely through litigation. Quantifying the Tribe's rights will provide certainty for many landowners and the businesses that rely on their water rights.

As discussed earlier, the amount of off-reservation water rights that the Tribe will agree to in the Compact is potentially much less than the amount it could be awarded by the courts. Quantifying the off-reservation Tribal rights

through the Compact will result in significantly less litigation expenses and significantly greater certainty for landowners and businesses.

I. The Compact Protects All Current Non-Irrigation Water Users On and Off the Reservation.

If the Compact is finalized, it will protect current irrigation water uses, both on and off the reservation. In other words, the Tribe will limit its rights to make a call on existing irrigation rights on the reservation, and give up its rights to make a call on irrigation rights off of the reservation.

On the other hand, if the Compact is not finalized, the Tribes will reserve their right to call numerous irrigation claims on and off the reservation. Basically, irrigation rights from as far north as Canada, as far west and south as Idaho, and as far east as the Yellowstone River could potentially be called by the Tribes.

J. The Compact Provides Government Funding to Increase the Efficiency of the Flathead Irrigation Project.

Upon finalization of the Compact, the state and federal governments will provide up to $55 million dollars to assist the tribal economy and provide repairs and upgrades to the Flathead irrigation project. In addition, federal approval of the Compact by Congress will come with a federal appropriation of money. The amount of that appropriation is unknown, but likely to be significant. Congress approved the Crow Compact in 2012, and included a $461 million appropriation, much of which is targeted for Tribal and irrigation project infrastructure upgrades. This money will not be available without a Compact.

VIII. Lies, Untruths and Misinformation.

A. The CSKT Compact Will Not Violate the Montana Constitution.

Some individuals argue that the Compact and associated agreements will violate the Montana Constitution. *See A Citizen's Guide to the Flathead Water Compact*, Western Montana Water Rights group. The group states that the Compact "forever banishes the state from administering water rights within the reservation boundaries, and as such, it is a violation of the Montana Constitution." *Id.* Further, they argue that the Compact "also violates the equal protection clauses of the Montana and U.S. Constitutions by removing a class of citizens from the protection of the state of Montana." *Id.*

These claims are not true. The Compact is not granting water rights, as suggested by the

group. Instead, the Compact is quantifying water rights that the Tribes already have, which they acquired under the Hellgate Treaty.

Additionally, the Compact does not banish the state from administering water rights on the reservation. It would establish a water rights system on the reservation that the Tribes and the state will jointly administer. This system would dovetail with the state's water rights system off the reservation, providing both certainty and consistency for water rights holders.

Regarding the group's equal protection argument: Apparently, they are arguing that non-Indians on the reservation will not have the protection of the Montana and United States Constitutions because of the Compact. This is simply not true. Every Montanan is protected by state and federal law, regardless of the Compact. In addition, the Unitary Management Ordinance created as part of the Compact will institute a rigorously controlled system of water rights administration that will ensure equal treatment of all reservation water users, as well as judicial review to those who believe the Board has treated them unfairly or erroneously.

In other words, the rule of law will underlie the water rights system created by the Compact, thereby offering full and equal protection to everyone.

B. The CSKT Tribes Have a Federal Reserved Water Right Off the Reservation.

Another statement that some have made is that the Tribes do not have a federally reserved water right off the reservation. The group argues that "a federal water right only applies to the land that was reserved, not to off-reservation lands." *A Critical Review of the CSKT Compact*, by Western Montana Water Rights. Maybe those in the group believe this; however, the courts disagree. Earlier in this paper, the origin of aboriginal water rights was thoroughly discussed.

The Montana Supreme Court has found that pursuant to the Montana Water Use Act and the McCarran Amendment, the Montana Water Court has the jurisdiction to apply federal law to determine the priority date and to adjudicate both on-reservation and off-reservation, "aboriginal" rights. *Greely*, 219 Mont. at 95. The Court stated, "We conclude that the Montana Water Use Act on its face is adequate to adjudicate Indian reserved water rights." *Id*.

C. The CSKT Compact Will Not Take Private Property Rights.

In numerous publications the group of individuals who oppose the Compact, have stated that the Compact would take private property rights. *A Citizen's Guide to the Flathead*

Water Compact, by the Western Montana Water Rights group; *A Critical Review of the CSKT Compact*, by Western Montana Water Rights. The group alleges that irrigators will have to "FOREVER RELINQUISH their project water rights to the tribe in exchange," for less water. *A Citizen's Guide to the Flathead Water Compact*, by the Western Montana Water Rights group.

Again, this statement is simply not true. As explained earlier, irrigators do not currently have a clear, legally established contract or property right to the Flathead Irrigation Project water. More importantly, the irrigators are not required relinquish anything to the Tribe. The proposed Flathead Indian Irrigation Project water use agreement, in which the former Flathead Joint Board of Control agreed to relinquish the claims it had filed to project water on behalf of irrigators, no longer exists. Neither the state nor the Tribes can compel individual irrigators to relinquish existing water rights claims they hold individually, or any claims held collectively by the irrigation districts.

Truth #34: Nothing in the Compact or any related agreement allows the state or the Tribes to compel individual irrigators to relinquish their individual water rights claims, or irrigation districts to relinquish any claims they hold collectively.

Lastly, the irrigators are not going to receive a "significantly diminished allotment of water," as the group alleges. At this time, nobody knows for sure how much water irrigators have been using because the irrigation system lacks measuring devices. The Compact and associated agreements will allocate water for irrigation of crops based on existing uses.

D. The CSKT Compact Will Not Give the Tribes "Control" Over Water and Water Rights Administration on the Reservation.

The Unitary Administration and Management Ordinance proposed under the Compact has been criticized for delegating state jurisdiction over non-members to the Tribes and United States. This is untrue. The proposed ordinance would establish a *joint* state-Tribal board to fulfill the role of the DNRC on the reservation. This is not a usurpation of state authority, partially because the state has not had authority to administer water rights on the Reservation since 1996. *Ciotti I*, 923 P.2d 1073 (Mont. 1996). As a result, it has not been legally possible to obtain a new permit since that time.

The proposed ordinance would resolve many of the problems created by this regulatory impasse. The highly interspersed nature of tribal and fee land on the reservation would make dual management by separate state and tribal entities challenging, duplicative, and expensive. The ordinance is modeled on the Montana Water Use Act and is designed to ensure that management on and off the reservation dovetail. The Unitary

Management Ordinance applies almost entirely to new uses of water going forward, and would not remove existing water rights from the jurisdiction of the Water Court for adjudication purposes. The ordinance sates that tribal and non-tribal water users must be treated equally, and that any water user unhappy with a decision of the Water Management Board may seek resolution in the court of his choosing, assuming that court possesses jurisdiction.

The Unitary Management Ordinance represents a different approach from that taken in other Compacts for two reasons. First, the highly integrated nature of tribal and fee land on the Flathead Reservation makes a dual management scheme impracticable. Second, the large amount of water made available for new uses from the Flathead and Hungry Horse Reservoir ensures that there will be no basin closure.

In contrast, the majority of other tribal compacts involve a basin closure such that the only new uses of water are from the tribal water right, meaning that the tribes have total jurisdiction over all new uses, even by non-tribal members. The Initary Management Ordinance would use existing state and tribal technical staff to provide support to the board, and represents a reasonable means to resolve a number of water related issues while preserving a role for the state in water rights administration on the reservation. *State v. Shook*, 67 P.3d 863 (Mont. 2002).

E. The CSKT Compact Does Not Need a MEPA Analysis.

Some have also argued that the Compact needs a review pursuant to the Montana Environmental Policy Act ("MEPA"). If every piece of legislation that potentially affected the environment had to go through MEPA review, then almost all legislation would have to be go through a months-long MEPA study prior to passage, and the Legislature could not act until all bills were scrutinized pursuant to MEPA. Under these individuals' theory, for example, if the Legislature considered legislation concerning gravel pits, power lines, oil and gas drilling, or any other policy that may impact the environment, then this legislation would also have to go through MEPA review as well.

Obviously, applying MEPA in this way would mean that the Legislature could not pass legislation. However, MEPA is meant to only apply to actions by state agencies, not to legislative acts. *Northern Plains Res. Council v. Mont. Bd. of Land Commrs.*, 366 Mont. 399, 288 P.3d 169 (2012). Based on MEPA and common sense, there is no reason to apply MEPA to the Compact or any other act by the Legislature.

F. The CSKT Compact Does Not Require a Private Property Assessment.

Additionally, some have argued that the Compact should be reviewed pursuant to The Private Property Assessment Act. Again, this law was passed by the Legislature in 1995 to require state agencies to evaluate agency action prior to taking any action that may damage or take private property. It does not apply to legislative actions, such as ratifying the Compact. Section 2-10-102, MCA.

G. The CSKT Compact Would Not Negatively Impact Current Domestic Wells On or Off the Reservation.

The Montana Supreme Court's *Ciotti* line of cases beginning in 1996 deprived the Department of Natural Resources and Conservation of jurisdiction to issue new permits or changes of use for water rights on the Flathead Indian Reservation. This decision applied to so called "exempt" domestic wells that are excepted from permitting requirements under § 85-2-306, MCA. Nonetheless, these wells continued to be drilled. Currently the DNRC holds but is unable to process more than 900 certificates for such "exempt" wells, leaving these water users without a valid right. In addition, well-driller logs indicate that approximately twice as many additional wells have been drilled for which no certificate was filed with the Department.

Under the Compact, all of these wells would be considered valid existing uses. Without the Compact, this legal limbo is likely to continue until the Tribes' reserved rights are finally adjudicated, a process that could take decades. In the meantime, the property owners holding these rights will suffer from the cloud that is created by the uncertainty surrounding their water rights.

Going forward under the Compact, the Unitary Management Ordinance would provide a similar exception to permitting as that contained in the Montana Water Use Act, allowing a streamlined process for the types of small domestic and stock uses that are necessary for new development in the region. Both on and off the reservation, all valid existing domestic uses would be entirely protected from call by the senior Tribal water rights. This protection will not be available without the Compact.

H. The CSKT Compact Will Not Set Negative Precedent.

Another issue some have raised that the Compact will open the door for other Tribes that have already entered into Compacts to bring suit against the state for off-reservation water rights. This too is not true.

First, the Confederated Salish Kootenai are the only tribes in Montana that have a Stevens treaty, which contains language providing for fishing rights off the reservation. Thus, no other tribe in Montana has a legal basis to claim off-reservation water rights.

Second, every other Tribe has already reached compacts that specifically provide that the compact is a final and binding settlement of all tribal claims. In entering into the compacts, the tribes relinquished all water rights claims not specifically enumerated in the compacts. Based on this language, other tribes may not now assert additional water rights claims. This demonstrates the kind of certainty that a compact can provide.

CONCLUSION

The CSKT Compact will save millions of dollars in litigations expenses for current water rights owners who live the area bordered by the Yellowstone River, Idaho, Dillon, and Canada. It will save Montana taxpayers millions of dollars needed to fund decades of adjudication if the Compact fails.

The Compact will provide certainty to irrigators on and off the reservation, while protecting all current irrigation uses below 100 gallons per minute. It will also protect all current non-irrigation uses on and off the Flathead Reservation.

The CSKT Compact is a common-sense solution to the difficult problem of tribal reserved water rights. It offers a more certain path into the future for water users and taxpayers throughout Montana.

We live and work on the Flathead Reservation. Our livelihoods depend on the ratification of the final CSKT Compact.

Please contact us for more information. We'd love to talk with you.

Montana Water Stewards