FLATHEAD NATION

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June 13, 2001

Mr. Chris Tweeten, Chairman
Montana Reserved Water Rights Compact Commission
1625 Eleventh Ave.
P. O. Box 201601
Helena, MT 59620-1601

Dear Chairman Tweeten:

It is a pleasure to present the Compact Commission with the Tribes' June 2001 water rights negotiation proposal entitled "A Proposal For Negotiation Of Reserved and Aboriginal Water Rights In Montana." We recognize that the proposal presents a different approach than the Commission has traditionally followed with other Tribes. There are several reasons for this. We do not intend to cast doubt on the complex logic, law and politics behind prior settlements. We note however, that each Reservation has its own unique Treaty and laws, history, logic and politics.

We think the proposal for negotiating a single unitary, jointly-developed system of Reservation-wide water administration simplifies water rights for all persons. The duplication and ultimate uncertainty inherent in all prior Compacts that provide for dual State and Tribal systems with questionable intergovernmental dispute resolution mechanisms raises potential for protracted litigation *after* the Compacts are implemented. Additionally, those systems are based on land ownership, which is constantly changing. Finally, such systems fail entirely to treat water as the unitary hydrologic resource that it is. Simply put, we believe genuine finality is more probable with our approach.

We look forward to moving forward with negotiation under the Proposal. I think a logical first step would be for the Flathead Team of the Commission, and any other Commission members, to review our proposal and then discuss with us a process for moving both the negotiations and public involvement forward. I note that under the terms of Section 4 of the

State/Tribal/Federal Memorandum of Understanding we need to coordinate on any press releases and other communications with the press. I suggest that we address that issue as soon as possible and come to a mutually agreeable announcement and for public hearings on the Proposal. I also note that under Section 6 of the MOU, the Tribes and the United States are responsible for communicating with the members of the Tribes. To that end please be aware that under the Tribes' Constitution, we are required to hold quarterly meetings on issues of general interest to the membership. Discussion of the Tribal Proposal is one of the agenda items on the July Quarterly Meeting.

We look forward to working with the Commission. We suggest a late July 2001 meeting to discuss the procedural issues we raise here and to the extent possible, to hear the preliminary views the Commission holds on the Proposal.

Sincerely,
CONFEDERATED SALISH & KOOTENAI TRIBES

D. Fred Matt

D. Fred Matt, Tribal Chairman &
Head of the Tribal Water Rights Negotiation Team

OUTLINE OF PROPOSAL FOR INTERIM WATER ADMINISTRATION ON THE FLATHEAD INDIAN RESERVATION

1. The State and the Tribes would enter into a memorandum of understanding that defines a system of interim administration of water on the Reservation, to be jointly operated, pending final resolution of the Tribes' aboriginal and reserved water rights.

2. The Tribes and the State would develop a joint application form for new water use on the Flathead Indian Reservation.

3. The Tribes and State would create a decision-making body or review board, to be composed of State and Tribal personnel with technical expertise in water use and administration.

4. The review board would review all Tribal and nonTribal applications for new water use on the Reservation. Review of new use applications would be based on yet-to-be-determined criteria and process derived from State and Tribal law and practice. All applications would be publicly noticed and an opportunity to object would be available. Due process would be provided to the applicant and persons with standing to object.

5. Interim water administration would be limited to ground water sources and would not include new surface water uses.

6. Allowable new uses would be limited to single-family domestic wells and to municipal and community well development. The review criteria would reflect a simplified review process with lesser degree of scrutiny for single-family wells than for municipal and community wells.

7. Wells that would have been subject to state law prior to the Montana Supreme Court decision in Ciotti but that were completed without compliance and wells drilled after Ciotti but prior to the execution of the interim memorandum of understanding, would be allowed if they satisfy the criteria for the classes of licensed wells.

8. Upon completion of the review under paragraph 4, above, and upon approval of the application, a joint Tribal/State license would be issued to the successful applicant containing appropriate terms and conditions relating to ground water use under the license.

9. A record system would be developed to preserve all information pertaining to applications under this interim administration on the Reservation to preserve a license recipient's relative status.

10. Yet to be resolved; inclusion or exclusion of changes to existing uses.

July 17, 2002

A PROPOSAL

FOR

NEGOTIATION

OF

RESERVED AND ABORIGINAL WATER RIGHTS

IN

MONTANA

JUNE 2001

Respectfully submitted to:

The Montana Reserved Water
Rights Compact Commission
And
The Flathead Federal Team

By:

The Confederated Salish and
Kootenai Tribes of the
Flathead Reservation

I.

INTRODUCTION

The origins of the Tribes reach back to the beginnings of human time. Elders of the Salish, Pend d'Oreille and Kootenai People all tell of Coyote and other animal-people who prepared the world for the human beings who were yet to come. The profound length of ancestral inhabitance of the region, which includes Montana, is suggested by numerous Tribal legends which closely parallel geological descriptions of the end of the last ice age: the draining of glacial Lake Missoula, the retreat of the glaciers and the establishment of a temperate climatic regime.

The Salish, Pend d'Oreille and Kootenai practiced a cyclical way of life based on the harvest of the seasonal abundance of a great variety of fish, animals and plants. This way of life was suffused with a spiritual tradition in which people respected and sought help from elements of the natural environment. In many aspects of their mode of subsistence, they sought to conserve resources for future generations. This Tribal way of life continues to this day.

To the Tribes the beauty and sacredness of water are of the highest value. The intrinsic cultural and spiritual value of water is pervasive with our people. Water has long been considered a medicinal substance, which is one reason it is considered sacred. We believe, however, that water is to be shared among animals, plants and humankind for the mutual benefit of all. To take more than is needed risks the loss of environmental balance, which is necessary for all to survive and prosper.

It is in this spirit of mutual respect and benefit that we propose the following framework for a negotiated water rights settlement. We hope to be guided by the wisdom of our Tribal

elders, including these words of the Flathead Culture Committee:

> Our stories teach us that we must always work for a time when there will be no evil, no racial prejudice, no pollution, when once again everything will be clean, and beautiful for the eye to behold - a time when spiritual, physical, mental, and social values are interconnected to form a complete circle.

A good trail can provide safe passage for all travelers.

II.

THE PROPOSAL

In lieu of previous approaches to Indian reserved water rights negotiations between Tribes and the State of Montana, we respectfully propose the following alternative approach. We propose that the focus of negotiations be the development of a Reservation-wide Tribal water administration ordinance which guarantees due process and equal protection under a prior appropriation system to all people who use water on the Flathead Indian Reservation. Fundamental to this approach is our assertion that all water on the Reservation is Tribal. The following is a description of the framework which we propose and a justification of the basis of our approach.

III.

THE FRAMEWORK

Water is a unitary resource. The hydrologic cycle is a unitary system. Unitary management and administration of all water on and under the Flathead Indian Reservation by one government is a logical and pragmatic use of limited resources. We propose the development of a Reservation-wide Tribal water administration ordinance. We further propose to deliver the ordinance through this negotiation process such that it will guarantee compatibility with water

records maintained by the State elsewhere in Montana. The negotiation process will guarantee the development of an ordinance that affords due process to all people claiming or asserting a protectable interest in water on the Flathead Indian Reservation. It will foster the development of a system that adheres to the seniority system of the prior appropriations doctrine while at the same time protecting the unique federal attributes of Indian reserved and aboriginal rights. Non-Indian claimants to Reservation waters shall be afforded protections equal to those available off the Reservation. For this to work the Montana Reserved Water Rights Compact Commission and the Tribes will need to agree to the following points.

1. **All water on and under the Flathead Indian Reservation is owned by the United States in trust for the Confederated Salish and Kootenai Tribes.**

A) This is significant for four reasons. First, in prior Indian water rights settlements in Montana, the parties agreed to a dual governmental ownership scheme that resulted in parallel and redundant administrative functions for State and Tribal governments, predicated on ever-changing land ownership patterns. This complexity is further compounded when one owner holds both fee and trust title lands and therefore may have to have both Tribal and State permits. Second, in the event of conflict between the two different systems, a tortuous administrative process with potential ongoing administrative and judicial conflict may result. Third, this new approach will guarantee consistent Reservation-wide administration. Fourth, water users will have direct and timely access to the single local government serving them.

B) Tribal ownership of all waters is supported in Federal and State law. A Tribal claim to ownership of all waters on and under the Flathead Indian Reservation is based on the Treaty of Hellgate and a long history of Federal and State case law, statute and treatise. The reader is

referred to the Appendix to this Proposal for an annotated listing of significant authorities which support this assertion.

C) The State claim to ownership of all waters within the State arises out of Article IX section 3 of the Montana Constitution, which is subject to the above-cited State and Federal law to the contrary and to the provisions of 2-1-304 (1) Montana Codes Annotated, entitled "Jurisdiction on Indian lands", which expressly disclaims the State's power to alienate or encumber any water rights belonging to any Indian or Tribe that is held in trust by the United States.

2. **The negotiation process will focus on the development of a comprehensive Reservation-wide Tribal water administration ordinance, which will apply the seniority system and protect the unique federal attributes of Indian reserved and aboriginal rights.**

A) The Commission and the Tribes, with help from the Federal Team, will focus the majority of the negotiation process on the development of a comprehensive ordinance that addresses all users of all waters on and under the Reservation. The main elements of the ordinance should include the following considerations;

1) Incorporation of verified non-Indian water claims, permits and certificates
2) administrative and judicial due process
3) a record keeping system compatible with the existing Montana DNRC system
4) application of the seniority system
5) treatment of surface and ground water as a unitary resource
6) all water use on the Reservation subject to the Tribal water administration

ordinance

7) protection of unique aspects of Tribal water uses

8) composition of the decision-making body or board

9) new water uses, changes of use, marketing, *de minimis* uses

10) coordination with off-Reservation water administration agencies and entities

B) A comprehensive Tribal Water Administration Ordinance is supportable in Federal, State and Tribal law. The federal government has regularly included Tribal water use codes as a component of federal legislation confirming Indian water rights settlements. The State may settle Indian water rights matters in essentially any manner that is acceptable to the Montana Legislature.

The Tribes regularly exercise Reservation-wide jurisdiction and authority over Indians and non-Indians on the Flathead Reservation in a manner that has been fair to all and proven to satisfy due process concerns. This has been so for decades. Examples include operation of the Reservation-wide electric power distribution system called Mission Valley Power through several boards comprised of Indians and non-Indians; the Shoreline Protection Office's protection of the aquatic environment through the Shoreline Protection Board, made up of Indians and non-Indians; management of fish and wildlife through the Reservation Fish and Wildlife Advisory Board, comprised of representatives of the Tribes, the State and the U.S. Fish and Wildlife Service. The Tribal Water Quality Program of the Tribal Natural Resources Department is the sole administrator of surface water quality standards within the Reservation.

3. **The Negotiations will also include other issues pertaining to the Tribes' reserved and aboriginal water rights.**

A) The Tribes possess off-Reservation reserved and aboriginal consumptive and non-consumptive water rights that derive from their time immemorial use and habitation of a vast aboriginal territory in Montana and elsewhere. To finally resolve all Tribal water rights within the jurisdiction of the Commission, the quantity of water necessary to protect the Tribes' off-Reservation rights in Montana must be determined.

B) Under the Department of Interior "Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims", a final settlement of the Tribes' claims will be structured to promote economic efficiency and Tribal self-government and will contain appropriate cost-sharing by the State and Federal governments.

IV.

SUPPORTING CONSIDERATIONS

1. **Reservation-wide water administration will become part of the Tribal unitary resource management system.**

The Confederated Salish and Kootenai Tribes operate multiple resource programs throughout the Flathead Indian Reservation. The administration of multiple natural resource programs demonstrates the authority and ability of the Tribes to operate an integrated resource management system. Tribal government practices Reservation-wide resource management with direct input from and participation by non-Indian residents. Existing programs include the Salish and Kootenai Culture Committees, the Tribal Culture Preservation Office, Mission Valley Power and several natural resource programs, including Water Quality, Air Quality, Shoreline Protection, Aquatic Lands Conservation, Hunting and Fishing, Recreation, Fish Management and Water Resource Management.

2. **A greater number of state-based water users will be protected under the Tribal proposal than under the approach typically used by the State of Montana.**

The typical approach of the State of Montana when negotiating Indian reserved water rights is to protect existing non-Indian rights first, and then address the remainder as Indian reserved rights. As used in past negotiations, "existing right" or "existing water right" means a right to the use of water that would be protected under state law as it existed prior to July 1, 1973. In fact, the term includes non-Indian and Indian reserved water rights created under federal law and water rights created under state law. 85-2-102(8) MCA.

The Tribal proposal is to develop a Tribal administrative system that recognizes not only state-based existing rights, but also post-1973 state based "permits" and "certificates". In lieu of the Tribal proposal, the Tribes would take the position that Tribal rights will be quantified first. Then we would consider "existing rights." Permits and certificates would not be considered "existing rights."

3. **The Tribal proposal will provide greater benefit to all Reservation residents and the State of Montana.**

The Tribal proposal will achieve major goals of the State of Montana and the Confederated Salish and Kootenai Tribes. The proposal will save money and years of conflict. In addition to providing a more timely and cost efficient process, the proposal will protect water uses for more people, and ultimately create greater opportunity for future use development and wise resource management.

The State will benefit beyond the cost and time saved in negotiations. Once the program is instituted by the Tribes the burden of administration will fall on the Tribes. This local

administration will give Reservation residents greater access to a more knowledgeable and responsive program. The shortened duration of the negotiation process also will expedite the creation of certainty among landowners. This will facilitate a more orderly resource development for all Reservation residents.

The creation of a unitary system of administration will foster cooperation and involvement between and among Reservation residents. Tribal government practices cooperation and involvement by all Reservation residents. A split system applied to a unitary resource would not allow this kind of harmony.

V.

CONCLUSION

We are pleased to propose this Framework for Negotiation in the interest of achieving a fair settlement for all parties. We know that this is an innovative approach, and we feel that it may be the best approach given the complexity involved in working toward a Flathead compact. Clearly this approach offers advantages in terms of time and money saved to the State of Montana, the United States and the Tribes.

This is a framework. A framework implies that there are many spaces which will need to be filled. This is by design. We would not presume to go any further unilaterally. If the other parties agree, we would like to begin the negotiation to fill the spaces. If we succeed, we believe that we could have a settlement which results in appropriate stewardship and an equitable sharing of water resources between all peoples, reflecting the long tradition of the Confederated Salish and Kootenai Tribes.

APPENDIX TO TRIBAL PROPOSED FRAMEWORK FOR NEGOTIATION OF RESERVED AND ABORIGINAL WATER RIGHTS IN MONTANA

SUPPORTING AUTHORITY

This Appendix represents a nonexhaustive discussion of case law pertaining to Indian reserved and aboriginal water rights generally and as applied on the Flathead Indian Reservation. It is intended to represent a summary of central points in an abbreviated format. By its very brief nature, it is not intended to represent the Tribes' definitive analysis of the current status of the law. We acknowledge that interpretation of law is debatable. To that end we have relied upon direct quotes where a long contextual predicate is not necessary to establish the point of law. The Appendix is structured to address the three premises contained in Part III of the document entitled A Proposal For Negotiation Of Reserved And Aboriginal Water Rights In Montana, prepared by the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation.

1. **All water on and under the Flathead Indian Reservation is owned by the United States in trust for the Confederated Salish and Kootenai Tribes.**

A. The Hellgate Treaty of July 16, 1855 (12 Stat. 975).

The Montana Supreme Court properly determined that the Hellgate Treaty is both a treaty under the United States Constitution and a "contract between two independent nations, in this case, the United States of America and the Flathead Nation." State of Montana v. McClure, 127 Mont. 534, 268 P.2d 629, 631 (1954). The Tribes reserved the Flathead Indian Reservation as their homeland and the United States agreed to many duties and responsibilities in exchange for the cession by the Tribes of many of their claims to vast portions of the Western United States. In Article III, the Tribes reserved the "exclusive right of taking fish in all streams running through and bordering" the Reservation, as well as off-Reservation rights, including the right to hunt and fish. Articles II, III and V identify some of the many other purposes for which the Reservation was set aside; essentially fostering the development of a healthy, educated, industrial and agrarian Indian homeland with the ongoing assistance and protection of the Tribes' trustee, the United States.

B. Winters v. United States, 207 U.S. 564 (1908).

The Winters case is the foundation of the federal Indian reserved water rights doctrine. Under the Winters doctrine, the United States impliedly reserved all waters necessary to satisfy the purposes for which an Indian Reservation was created, even if the treaty or other organic document creating the Reservation did not expressly address water.

C. United States v. McIntire, 101 F.2d 650 (9th Cir. 1939).

In a case involving competing claims to water on the Flathead Indian Reservation, the Court applied the Winters doctrine and found that "The waters to Mud Creek were impliedly reserved by the treaty to the Indians. . . Being reserved no title to the waters could be acquired by anyone except as specified by Congress." (p. 653). The Court noted that "the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation." (p. 654).

D. United States v. Alexander, 131 F.2d 359 (9th Cir. 1942).

In another dispute over Flathead Reservation water, the Court built on the Winters and McIntire decisions and found that "The treaty impliedly reserved all waters on the reservation to the Indians." (p. 360).

E. The Big Four v. Bisson, 132 Mont. 87, 314 P.2d 563 (1957).

In a water rights dispute on the Flathead Indian Reservation the Montana Supreme Court affirmed its own rule of ownership, finding that "By the creation of the reservation, title to the waters was vested in the United States as trustee for the Indians." (p. 89)

F. State ex rel Greely v. Confederated Salish and Kootenai Tribes, 219 Mont. 76, 712 P.2d 754 (1985).

Greely makes many points specifically pertaining to the Tribes' water rights, including:

1) The United States is the trustee of the Tribes' water rights and "Indian water rights are 'owned' by the Indians." (p. 767).

2) "reserved water rights are established by reference to the purposes of the reservation rather than by actual present use" (p. 762), and these include water for "secondary purposes" (p. 767).

3) Tribal rights include past, present and future uses (p. 765).

4) Tribal rights include consumptive and nonconsumptive uses (p. 763).

5) Tribal priority dates include "time immemorial" as well as the date of the Treaty (p. 765).

6) "Federal Indian law must be applied" to the Tribes' water rights (p. 765), and "We hold that state courts are required to follow federal law with regard to those water rights." (p. 765-766).

7) Indian reserved water rights "are immune from abandonment for nonuse." (p. 768).

G. In The Matter of the Application For Beneficial Water Use Permit Nos. 66459-76-L, Ciotti, 278 Mont. 50, 923 P.2d 1073 (1996) ("Ciotti I").

The Ciotti I Court relied upon and affirmed Winters, Alexander, JBC (discussed later in this Appendix), and Greely and found that it is likely that the Tribes' reserved and aboriginal water rights are "pervasive" throughout the Reservation (p. 1079). The Montana Supreme Court

concluded that until the Tribes' water rights were finally quantified through negotiation or litigation, Montana was without authority under state law to permit water use and engage in other water-related activities on the Flathead Indian Reservation (p. 1080). The State statutes at issue apply to surface and ground water without distinction for permitting purposes.

H. Confederated Salish and Kootenai Tribes v. Clinch , 279 Mont. 448, 992 P.2d 244 (1999), ("Ciotti II").

Virtually indistinguishable from Ciotti I, the Montana Supreme Court again upheld the Winters doctrine on the Flathead Indian Reservation and again found that Montana lacked the authority to permit water use and engage in other water-related activities on the Flathead Indian Reservation.

I. Joint Board of Control v. United States and the Confederated Salish and Kootenai Tribes , 832 F.2d 1127 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988) ("JBC").

In a dispute between the Tribes' Hellgate Treaty Article III fisheries rights and junior nonIndian claims to water for irrigation, the Court determined that the Tribes' aboriginal water rights will carry a priority date of "time immemorial" and the United States, as the Tribes' trustee, has an obligation to protect those rights against junior claims (p. 1132). The Court also confirmed that "Once a court takes jurisdiction to resolve a water rights dispute, it has 'a solemn obligation to follow federal law' that governs Indian water rights." (p. 1131).

J. Colville Confederated Tribes v. Walton, 647 F.2d 42, (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981).

In a dispute over water use on the Colville Reservation, the Court followed Winters and McIntire and concluded that "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users." (p. 52). From this premise, the Court determined that the water use of a nonIndian owner of former Indian allotments was subject to the following rules:

1) the water use right on allotted lands remains a part of the larger Tribal Winters reserved right and carries a priority date of the date of the reservation (p. 50-51).

2) a proratable share of the Tribal Winters right was conveyed to the original allottee and the allottee may convey that right with the land (p. 50).

3) "state regulation of water in [the Reservation creek at issue] was preempted by the creation of the Colville Reservation." (p. 52).

4) the tribe has the right to regulate water use on allotted lands, regardless of the status of the present owner, and the United States may play some role also (p. 52).

5) reserved rights for fish are a protectable Tribal right, and include both surface and ground water sources (p. 48).

K. Montana v. Environmental Protection Agency and the Confederated Salish and Kootenai

Tribes, 137 F.3d 1135 (9th Cir. 1998), cert. denied, 525 U.S. 921 (1998).

In a dispute between Montana and the Tribes over Tribal jurisdiction over certain water quality issues on the Flathead Indian Reservation, the Court affirmed the district court holding that Montana had no regulatory authority on the Reservation (p. 1142). The Court quoted the Walton language cited in the above annotation ("water is a unitary resource.") as authority for its holding that the Tribal government, not Montana, was the proper government to establish surface water quality standards for all waters of the Reservation, regardless of the status of the land owner.

L. United States v. Cappaert, 508 F.2d 313 (9th Cir. 1974).

"Although the Supreme Court cases involved only surface water rights, the reservation of water rights doctrine is not so limited." (p. 317).

" In our view, the United States may reserve not only surface water, but also underground water." (p. 317).

M. United States v. Cappaert, 426 U.S. 128 (1976).

The Supreme Court affirmed the Circuit Court Cappaert decision and relied upon Winters to confirm that the United States may reserve and protect water to satisfy the purposes of a federal reservation, whether the source is "surface or groundwater." (p. 143).

N. Tweedy v. Texas Company, 286 F.Supp. 383 (D. Mont. 1968).

In a dispute over the use of groundwater on a tract of nonIndian land on the Blackfeet Indian Reservation, the Montana Federal District Court relied upon Winters and McIntire to conclude that Indian reserved rights apply to waters "found on the surface of the land or under it." (p. 385). This is so because "When the Blackfeet Indian Reservation was created, the waters of the reservation were reserved for the benefit of the reservation lands." (p. 385).

O. In Re the General Adjudication of All Rights to Use Water In The Gila River System and Source, 989 P.2d 739 (Az. S.Ct. 1999), cert. denied, 530 U.S. 1250 (2000).

The Arizona Supreme Court decision addressing Indian reserved water rights relied upon Winters and Cappaert to strongly condemn the "artifice" of treating surface and ground water as separate resources, noting that "Conforming their law to hydrologic reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface waters and undertaken unitary management of water supplies." (p. 744). The Court went on to "hold that the trial court correctly determined that the federal reserved rights doctrine applies not only to surface water but to groundwater." (p. 748).

2. The negotiation process will focus on the development of a comprehensive

Reservation-wide Tribal water administration ordinance that will apply the seniority system and protect the unique federal attributes of Indian reserved and aboriginal rights.

From ownership springs administration. Therefore, to a large extent, the case law cited above also supports this portion of the Framework For Negotiation. Accordingly, on the issue of Tribal administration of Reservation waters the Tribes refer the reader to the Treaty and to the case law addressed in annotations above.

3. **The negotiations will also include other issues pertaining to the Tribes' reserved and aboriginal water rights.**

A. The Tribes possess off-Reservation reserved and aboriginal consumptive and nonconsumptive water rights. Under Article III of the Hellgate Treaty the Tribes reserved the continuing right to hunt and fish and conduct grazing and gathering practices off of the Flathead Indian Reservation. Under the reserved rights doctrine, these aboriginal and Treaty-reserved rights would be a hollow promise if the United States failed as trustee to protect adequate water supplies to satisfy these purposes. See for example:

1) State of Montana v. Stasso, 172 Mont. 242, 563 P.2d 562 (1977), (the off-Reservation right to hunt under the Hellgate Treaty is a protectable, continuing right).

2) United States v. Washington, 506 F.Supp. 187 (W.D. Wash. 1980), vacated in part, aff'd in part, 759 F.2d 1353 (9th Cir. 1985), (an off-Reservation treaty right to take fish necessarily implies a right to protect the environment upon which that Treaty right depends).

3) Minnesota v. Mille Lacs Band of Chippewa Indians , 526 U.S. 172 (1998), (off-Reservation treaty rights survive statehood and are a protectable property interest).

4) Joint Board of Control v. United States and the Tribes, (cited above), (the U.S. has an affirmative duty to protect the aboriginal fishing rights of the Tribes and the water upon which such rights depend).

5) Montana v. ARCO, No 83-317-HLN-PGH (D. Mont.), (Hellgate Treaty Article III off-Reservation hunting, fishing and gathering rights qualify Tribes as proper party to seek judicial protection of the Clark Fork River environment from industrial pollution).

B. The Criteria and Procedures for the Participation of the Federal Government in the Negotiations for the Settlement of Indian Water Rights Claims, Fed. Reg. Volume 55, No. 48 at 9223, provides for settlements to include "cost-sharing by all parties benefitting from the settlement." The State of Montana and the United States are parties to the proposed settlement and will be called upon, as in prior settlements, to contribute financially and otherwise to any settlement that finally resolves the aboriginal and reserved rights of the Tribes.