MEMORANDUM

To: Senator Debby Barrett, President of the Senate
Representative Austin Knudsen, Speaker of the House

From: Richard A. Simms, Attorney for Montana Land and Water Alliance

Re: Threat of 10,000 Off-Reservation Instream Flow Claims

Date: March 18, 2015

In *United States v. Winans*, 198 U.S. 371 (1905), the United States Supreme Court construed Article III of the Yakima Nation Treaty, *i,e*., "the right of taking fish at all usual and accustomed places in common with citizens of the Territory," as a Treaty-imposed right of access to places opened to settlement under the Treaty where the Yakima had fished historically. *Winans* was not a water rights case. It was about a servitude in the land and had absolutely nothing to do with reserved water rights. Reserved water rights did not exist until the Court promulgated the doctrine three years later in *Winters v. United States*, 207 U.S. 564 (1908), a doctrine that posits that reserved water rights for an Indian Tribe may be generated by implication when the United States reserves land from the public domain to create the Tribe's Reservation.

The Flathead Compact, however, puts *Winans* and *Winters* together so that the Art. III Treaty-imposed servitude generates a reserved water right for instream flows. The overriding issue in regard to the threat of filing 10,000 instream flow claims east of the continental divide in Montana if the Compact is not ratified, is why a servitude of access across land entails a reserved water right for instream flows.

In the shadow of this overriding issue, there is an independent issue regarding the on-going threat to file claims for instream flows in the area east of the continental divide within the CSKT subsistence range, which covers roughly half of Montana. *See*, Map 2: Confederated Salish Kootenai Tribes Subsistence Range. Whether Art. III of the Treaty of Hellgate of July 16, 1855, 12 Stat. 975, applies to the CSKT subsistence range is decided by the geographical grasp of the Treaty.

The Geographical Grasp of the Treaty of Hellgate

The Yakima Nation Treaty of June 9, 1855, 12 Stat. 951, Art. III of which was the subject of *United States v. Winans*, is with certain minor

exceptions, almost exactly the same as the Treaty of Hellgate. Each Article in both treaties applies only to the lands ceded by the tribes to the United States or to the Reservations within the ceded areas created by the United States when the treaties were ratified and proclaimed in 1859. The Treaty of Hellgate does not apply to the CSKT subsistence range south and east of the continental divide and therefore Art. III of the Treaty does not create any right of taking fish in common with the citizens of the Territory in that range.

In Art. I of the Yakima Treaty, the Yakima agreed to "hereby cede, relinquish, and convey to the United States all their right, title, and interest, in and to *the lands and country occupied by them* (*Emphasis added*). In Art. II, the Yakima agreed that "*from the lands ceded* in Art. I, the United States would create a reservation for the exclusive use of the tribes which would be "*settled upon . . . within one year of the ratification of this treaty*." (*Emphasis added*). The same provisions are found in the Treaty of Hellgate in Articles I and II. Similarly, in the concluding paragraph of the Yakima Treaty, as in the concluding paragraph of the Treaty of Hellgate, it is provided that "[t]his treaty shall

be obligatory upon the contracting parties as soon as the same shall be ratified by the President and the Senate of the United States." The Yakima Treaty was ratified on March 8, 1859, and proclaimed on April 18, 1859. The Treaty of Hellgate was both ratified and proclaimed on March 8, 1859. In other words, both the Yakima Reservation and the Flathead Reservation were created by the United States from lands ceded by the Tribes, the lands ceded were found to be the primary areas of occupancy and settlement of the respective confederated tribes, and neither Stevens Treaty was effective until 1859.[1]

In the Treaty of Hellgate, the lands ceded by the confederated tribes are the areas numbered 87, 88, and 89, all north and west of the continental divide.[2] *See* "Indian Land Areas Judicially Established in 1978." Art. III of the Treaty of Hellgate also addresses rights-of-way on and off of the Flathead Reservation. In pertinent part, Art. III states that

[1] In the first sentence of the Court's opinion in *United States v. Winans*, Justice McKenna referred to the Yakima Treaty as a treaty "made in 1859," a fact which seems to be lost on many people today. With respect to the fact that the ceded lands were lands found to be the primary areas of occupancy and settlement of the Confederated Salish and Kootenai Tribes, see Findings of Fact on Compromise Settlement, August 1, 1966, ICC Docket No. 61; ICC Docket No. 50233, 86 Stat. 64. See also, Findings of Fact, August 3, 1959, Findings Nos. 1-19, ICC Docket No. 61.

It was also understood by both Tribal Nations and the United States that the ceded lands outside the internal Reservations would be opened to settlement under the homestead and mining laws of the United States.

[2] Justice McKenna explained this to some extent in *United States v. Winans,* and the Court explicated the matter further fifteen years later in *Seufert Brothers Company v. United States*, 249 U.S. 194 (1919). *Infra*, at 6-10. If you compare both maps, it becomes apparent that the lands ceded by the CKST lie within the area of Montana north and west of the continental divide.

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 the 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." With respect to the same provision in Art. III of the Yakima Treaty, the Supreme Court explained in *United States v. Winans,* 198 U.S. 371 (1905), that two rights were established:

> There was an exclusive right of fishing within certain boundaries. 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. They were given 'the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' The contingency of future ownership of the lands, therefore, was foreseen and provided for. In other words, the Indians were given a right in the land, the right of crossing it to the river, the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.

Id. at 381.[3] The exclusive right of the Tribes was within the Yakima Reservation. The right outside the boundaries of the Reservation, but within the ceded area, is where the Yakima and the CSKT were granted rights "in common with the citizens of the Territory." The areas south and east of the continental divide, where the CSKT ranged from time to time, are neither addressed nor identified in the Treaty of Hellgate, and no right "of taking fish at all usual and accustomed places" in the subsistence range of the CSKT is granted in Art. III of the Treaty. *See*, "Map 2: Confederated Salish Kootenai Subsistence Range." *See*, also *Antoine et ux. v. Washington*, 420 U.S. 194, 205 (1975) ("*Winans* involved a treaty that reserved to the Indians *in the area ceded to the United States* 'the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.'") (*Emphasis added*).

The United States, Not the Tribes, Reserved The Yakima and the Flathead Reservations in 1859

In deciding in *Winans* whether Art. III of the Yakima Nation

[3] The "contingency of future ownership of lands" was foreseen within the lands ceded because that is where it was known that settlement under the homestead and mining laws of the United States would take place. Art. VI of the Treaty of Hellgate and Art. 6 of the Yakima Nation Treaty, which are identical, also contemplated allotments in severalty, the subsequent sale of which would result in changes in ownership.

Treaty preserved a servitude in the land of access to all usual and accustomed fishing places, the Supreme Court recognized that the Yakima believed that they were retaining their historical right to fish, but the Court did not hold that the Yakima "reserved" their own Reservation. Quite the contrary, the Court held that the United States reserved the Yakima Reservation upon the effective date of the Treaty in 1859. Quoting *Shively v. Bowlby*, 152 U.S. 1, 41 (1894), the Court stated:

> 'By the Constitution, as is now well established, the United States, having acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition.'

United States v. Winans, 198 U.S. 371, 383 (1905). In terms of sovereign power, the Court held that the United States reserved the Yakima Reservation:

> The extinguishment of Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. *And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great*

> *rights they possessed as 'taking fish at all usual and accustomed places."*

Id. (*Emphasis added*).[4]

In a letter to Chas Vincent dated December 16, 2013, from Melissa Hornbein, it was stated that "[t]he Tribes' position in negotiations was that based on existing state and federal legal precedent, [Art. III] gives rise to an off-reservation instream flow rights with a 'time immemorial' priority *in all locations where the Tribes traditionally relied on such fisheries for subsistence*." (*Emphasis added*). While that may have been the Tribes' position in Compact negotiations, and while it may also have been the view of the Compact Commission in negotiations, it was not the Supreme Court's view in *United States v. Winans*, 198 U.S. 371 (1905), *Winters v. United States*, 207 U.S. 564 (1908), or in any other federal reserved water rights case.

In *Antoine et ux. v. Washington*, 420 U.S. 194 (1975), the appellants were two Indians convicted of hunting and possession of deer out of season in violation of Wash. Rev. Code. §§ 77.16.020 and

[4] The country within the Yakima subsistence range became part of the Territory of Washington, *i.e.*, part of the public domain of the United States, through the Treaty of June 15, 1846, with Great Britain.

77.16.030. The United States Supreme Court immediately addressed the error of the Washington Supreme Court:

> The Colville Confederated Tribes ceded to the United States [the] northern half [of the Colville Reservation] under a congressionally ratified and adopted agreement, dated May 9, 1891. Article 6 of that ratified Agreement provided expressly that 'the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.' Appellants' defense was that congressional approval of Art. 6 excluded from the cession and retained and preserved for the Confederated Tribes the exclusive, absolute, and unrestricted rights to hunt and fish that had been part of the Indians' larger rights *in the ceded portion of the reservation*, thus limiting governmental regulation of the rights to federal regulation and precluding application to them of Wash. Rev. Code §§ 77.16.020 and 77.16.030. The Supreme Court of Washington held that the Superior Court had properly rejected this defense. 82 Wash. 2d 440, 511 P.2d 1351 (1973). We noted probable jurisdiction. 417 U.S. 966 (1974). We reverse.

Id., at 196-97 (*emphasis added*).

The Washington Supreme Court had stated in its opinion that "the State of Washington was not a party to the 1891 Agreement," that "[o]nce ratified, a *treaty* becomes the supreme law of the land," and that the 1891 Agreement was "only [enforceable] against those party to it." *Id*., at 200-01. In response, the United States Supreme Court held:

> [W]e take [these statements] to mean that the Congress is not constitutionally empowered to inhibit a State's exercise of its police power by legislation ratifying a contract between the Executive Branch and an Indian tribe to which the State is not a party. *The fallacy in that proposition is that a legislated ratification of an agreement between the Executive Branch and an Indian tribe is a "Law of the United States . . . made in Pursuance' of the Constitution and, therefore, like 'all Treaties made,' is made binding upon affected States by the Supremacy Clause*.

Id., at 201 (*emphasis added*).

The Extent of the Article III Fishing Rights in <u>Winans</u>

In *Winans*, Art. III of the Yakima Nation Treaty was construed to give the Yakima fishing privileges on the north bank of the Columbia River, not because the Court distinguished between the north and south banks, but because the Winans brothers' property and fishing wheels were on the north bank. In *Seufert Brothers Company v. United States*, 249 U.S. 194 (1919), the United States sought to enjoin a commercial fishing company from interfering with the fishing rights granted to the Yakima in Art. III on the south bank of the Columbia. The Seufert Brothers Company argued that the lands ceded by the Yakima were all on the north side of the Columbia, that Art. III is "in the nature of an

exception from the general grant of the treaty," that "whatever rights [Art. III] saves must be reserved out of the thing granted," and because "all of the lands lay to the north of the river [Art. III] cannot give any rights on the south bank."

In *Seufert*, the Court explained that the Yakima Treaty:

> [W]as one of a group of eleven treaties negotiated with the Indian tribes of the northwest between December 26, 1854, and July 16, 1855, inclusive. Six of these were concluded between June 9th and July 16th, inclusive, and one of these last, dated June 25th, was with the Walla-Walla and Wasco tribes, 'residing in Middle Oregon,' and occupying a large area, bounded on the north by that part of the Columbia River in which the fishing places in controversy are located.
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> * * *
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> These treaties were negotiated in a group for the purpose of freeing a great territory from Indian claims, preparatory to opening it to settlers, and it is obvious that with the treaty with the tribes inhabiting Middle Oregon, in effect, the United States was in a position to fulfill any agreement which it might make to secure fishing rights in, or on either bank of, the Columbia River in the part of it now under consideration, -- and the treaty was with the Government, not with Indians, former occupants of relinquished lands.

Id., at 196-97.

The evidence at trial in *Seufert* established:

> [T]hat the Indians living on each side of the river, ever since the treaty was negotiated, had been accustomed to cross to the other side to fish, that the members of the tribes associated freely and intermarried, and that neither claimed exclusive control of the fishing places on either side of the river or the necessary use of the river banks, but used both in common.[5]

Id., at 197. The evidence also established that the Yakima, the Walla-Walla, and the Wasco tribes:

> [W]ere accustomed to resort habitually to the locations described in the decree for the purposes of fishing at the time the treaty was entered into, and that they continued to do so to the time of the taking of the evidence in the case, and also that Indians from both sides of the river built houses upon the south bank in which to dry and cure their fish during the fishing season.

In upholding the Art. III fishing rights of the Yakima, the Supreme Court held that "the United States, having rightfully acquired the Territories, and being the only Government which can impose laws on them," reserved the Yakima Reservation by congressional ratification and presidential proclamation in 1859. Art. III, obviously, was ratified and proclaimed along with the rest of the Yakima Nation Treaty.[6]

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[5] The Yakima to the north and the Walla-Walla and Wasco to the south. (*Footnote added*).

[6] In her letter of December 16, 2013, to Senator Chas Vincent, Melissa Hornbein cited *Seufert Brothers Co. v. United States* for the proposition that Treaty rights under Art. III "[apply] even outside of the aboriginal territory

The Recent Development of Art. III Case Law

The State of Montana's position on the strength of the legal support for including off-Reservation instream flow water rights in the Compact based on Art. III's "right of taking fish at all usual and accustomed places, in common with the citizens of the Territory," appears to have changed over the years. In recent years, a seeming bias in favor of gleaning support from the cases has emerged. Accordingly, the purpose of this section of this memorandum is to compare what has recently been said about the precedent with what the precedent actually says.

In her letter to Chas Vincent of December 16, 2013, Melissa Hornbein began her explanation of "why it would be better to recognize [Art. III off-Reservation water rights] . . ., rather than a right to fish" by stating that "[t]he State conducted its own analysis of these legal arguments (2001 Stevens Treaty Memo) and concluded that while no court has yet been presented with, or decided the question of, whether

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ceded by the tribe," as if she felt she needed to try to make the point. This construction of the case was wrong, however. In *Seufert*, the Court held that Art. III of the Yakima Treaty gave the Yakima fishing privileges on the south side of the Columbia River, for the same reason that it had been held in *Winans* that the Yakima Treaty gave the same privileges on the north bank of the Columbia River.

[Art. III] gives rise to an enforceable instream flow right off-reservation, *existing precedent does provide a strong basis for the argument*." *Ibid*., at 2 (*emphasis added*). Actually, the 2001 Stevens Treaty Memo, which was a Memorandum from Ann Yates, the Compact Commission's legal counsel, to Chris Tweeten, then Chairman of the Compact Commission, dated December 28, 2001, concluded that the Ninth Circuit would be inclined to "find instream flow rights off-reservation in the Tribes' usual and accustomed fishing grounds," but that the rights would likely be limited to "off-reservation places currently fished," as opposed to those "fished in 1855," as well as to the "moderate living" standard reiterated in *Washington et al. v Washington State Commercial Passenger Fishing Vessel Association et al.*, 443 U.S. 658 (1979) (The right to a share of harvestable fish "secures so much as, but no more than, is necessary to provide the Indians with a livelihood, that is to say, a moderate living." No water right was deemed to accompany the right of access and the limited right to harvest fish). The off-Reservation instream flow rights recognized in the Compact are neither limited by demonstrated fishery needs for minimum flows nor even the pretext of identified needs. More

importantly, the Art. III right of access was limited to just that between 1905 and 1974, when Judge Boldt addressed the impingement by greatly increased commercial fishing in Washington on the Tribes' Treaty right by adding the second component of a right to a harvestable fish. Adding a third component of an instream flow right has to be seen for what it would be. If we were talking about federal reserved water rights, the addition of the third component would give the United States the power to unjustifiably condemn the rights of irrigators or other diversion-based water rights in the guise of an implied water right. By framing the matter in terms of an Indian reserved water right, the Compact confers the power of unjustifiable condemnation on the Tribes for no reason whatsoever.

The next case cited as providing legal support for off-reservation instream flows is *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984). The principal subject of *Adair* was Art. I of the Klamath Treaty of October 14, 1864, 16 Stat. 707, which gave the Klamath the exclusive right to hunt, fish, and gather *on their Reservation*. Prior to the General Allotment Act of 1877, ch. 119, 24 Stat. 388, Klamath Reservation lands

were held communally. After allotments were made in severalty, more than a fourth of the Reservation went into individual ownership and numerous allotments were conveyed to non-Indians. In 1954, Congress passed the Klamath Termination Act of August 13, 1954, 68 Stat. 718, allowing individual tribal members to give up tribal property for cash, which most of the tribal members elected to do. The United States ended up purchasing most of the Reservation and placing the remainder of the Reservation in trust for the tribal members who elected to retain their interests. In 1958, the United States also purchased 15,000 acres of the Reservation to establish a migratory bird refuge to be operated by the United States Fish and Wildlife Service. Finally, in 1961 and 1973, the United States purchased large forested portions of the former Reservation, which became the Winema National Forest, resulting in federal ownership of approximately 70 % of the former Reservation.

In addition to the changes in land holdings between 1864 and 1973, a jurisdictional dispute arose when the United States filed a suit in federal district court in 1974 for a declaration of water rights in a portion of the Williamson River Drainage. Four months later, the State of

Oregon filed a general adjudication in state court for all of the water rights in the Klamath Basin. Thereafter, the State of Oregon intervened in the federal action and moved to dismiss under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), a case that recognized the wisdom of deferring to state court water rights adjudications under the McCarran Amendment, 443 U.S.C. §666. The motion to dismiss was denied, but the federal district court limited the questions it would address to three: "(1) whether water rights had been reserved for the use of Klamath Reservation lands in the 1864 treaty; (2) whether such rights passed to the Government and to private persons who subsequently took fee title to reservation lands; and (3) what priorities should be accorded the water rights of each of the present owners and users of former reservation lands." In limiting its jurisdiction, the federal district court avoided state water law issues and retained jurisdiction to rule "only on the application of the federal Indian law doctrine of reserved water rights." *Id*., at 1406. In this regard, the Ninth Circuit stated that "[f]ar from improperly intruding on the role of the state court, we find that in exercising federal jurisdiction in this

fashion the district court coordinated its adjudication of water rights with adjudication by the state court so as to allow each forum to consider those issues most appropriate to its expertise."[7] *Id*.

On the merits in *Adair*, the Court began by stating that *Cappaert v. United States*, 426 U.S. 128 (1976), and *United States v. New Mexico*, 438 U.S. 696 (1978), "addressed the scope and nature of *Winters* doctrine water rights on federal land *other than Indian Reservations*," but then stated that "[i]n determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Id*. at 1408. In other words, the Court first

[7] *Adair* is likely the model on which the CSKT's pending, federal district court case was fashioned. Footnote 11 in the 9th Circuit's opinion, appears at the same place this one appears. In my opinion, most everything stated by the Court in footnote 11 is demonstrably incorrect. There is no independent "federal law doctrine of Indian reserved water rights." If there were, the United States Supreme Court could not have made federal reserved water rights equally applicable to non-Indian reservations of land from the public domain, as the Court did in *Arizona v. California*, 373 U.S. 546 (1963). The original *Winters* right, which became effective with Congress' ratification of the Fort Belknap Treaty in 1888, was reserved by the United States when it withdrew the lands from the public domain to create the Fort Belknap Reservation. *Winters v. United States*, 207 U.S. 564, 577 (1908). The reserved right of access in *Winans* was also a federal right in that it was created by the sovereign power of the United States when it became a law of the United States upon ratification in 1859. *See*, *supra*, at 6-8; *United States v. Winans*, 198 U.S. 371, 383 (1905). That the right may have an aboriginal priority date is inapposite to the fact that there is only one federally reserved water rights doctrine and only one sovereign capable of imposing the aboriginal priority date on Washington Territory.

rejected the applicability of *Cappaert* and *New Mexico*, but then framed the issue as it was framed in both of those cases. Based on the guidelines established in *Cappaert* and *New Mexico*, namely whether "the scope of the implied right is circumscribed by the necessity that calls for its creation" and the proposition that a federal reserved water right "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more," the Court held that "[w]e therefore have no difficulty in upholding the district court's finding that at the time the Klamath reservation was established, the Government and the Tribe intended to reserve a quantity of water flowing through the reservation not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe's [exclusive] treaty right to hunt and fish on reservation lands." *Id*. at 1410. This holding, it should be noted, provides no support for changing the nature of an Art. III Stevens Treaty right of access by expanding it categorically to include a reserved water right that, historically, was never thought or intended to be a part of it.[8] Art. III cannot be construed to be a purpose for which

[8] In Melissa Hornbein's letter of December 16, 2013, to Chas Vincent, it is stated that *Adair* not only secured "to

the Flathead Reservation was created. Quite the opposite, it was meant to be a right of access off-reservation in the Tribes' principal area of occupancy, *i.e.*, on the lands they ceded, where they fished before agreeing to settle on the Reservation once it was established.

Turning to the issue of priority, the Court made reference to "established principles of Indian treaty interpretation," including the statement in *Winans* that "the treaty is not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted." The Court further explained that "a corollary of these principles, also recognized by the Supreme Court, is that when a tribe and the Government negotiate a treaty, the tribe retains all rights not expressly ceded to the Government in the treaty so long as the rights retained are consistent with the tribe's sovereign dependent status." In this regard, it should be noted that the only way to recognize the Tribes' intention in the context of the Treaty of Hellgate is by virtue of the fact that the United States reserved the Art. III right in *Winans* and not the

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the Tribe an instream flow right with a 'time immemorial' priority date sufficient to sustain . . . fisheries, but also that those rights survived the termination of the Klamath Indian Reservation." The right did not survive the termination of the Reservation; the Termination Act expressly provides that "[n]othing in sections 564-564w of this title shall abrogate any water rights of the tribes and its members." *Adair* at 1412.

Tribes. *Supra*, at 7-8; *United States v. Winans*, 198 U.S. 371, 393 (1905). The Tribes retain the right by intending to do so, while the United States reserves the right by virtue of its exclusive sovereign power to enact the Tribes' intention into law. *See*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) ("Indian tribes are 'completely under the sovereignty and dominion of the United States'").

The Court then turned to the line of cases and commentary upholding aboriginal or Indian title deriving from the uninterrupted use and occupation of land and water. Accordingly, the Court held: 1) that the Treaty confirms the Art. I right to support hunting and fishing; 2) that the water right has a time immemorial priority; 3) that the right is limited by the amount of water necessary to support the fishing right as it is currently being exercised, as opposed to how it was exercised in 1864; 4) and that the right is limited to the "moderate living" standard in *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979). None of these holdings supports changing the nature of an Art. III Stevens Treaty right of access off-Reservation by expanding it categorically to include a reserved water right that wasn't there when the Supreme Court

articulated its decision in *Winans* in 1905. The right was nothing but a right of access until the Boldt Decision in 1974.

Finally, alluding to the Art. I right in *Adair*, the letter to Chas Vincent of December 16, 2013 also asserts that:

> The Montana Supreme Court has recognized the existence of these so called 'aboriginal' rights and their time immemorial priority dates in *Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation* [712 P.2d 754 (1985)]:
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> > 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.'
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> The Montana Supreme Court has also held that these rights, in the case of the CSKT, are likely to be 'pervasive.' In recognition of these legal claims, the DNRC has, since the mid 1990's, placed a disclaimer on all water rights permits issued west of the Continental Divide regarding the possible existence of senior tribal instream flow rights.

Ibid., at 3. At least the DNRC knew the geographical grasp of the Treaty of Hellgate and the extent of the possible claims. *See*, *supra*, at 2-6; *Antoine v. Washington*, 420 U.S. 194, 205 (1975) ("*Winans*

involved a treaty that reserved to the Indians *in the area ceded to the United States* 'the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.") (*Emphasis added*).

In the letter to Chas Vincent of March 3, 2014, Melissa Hornbein cites two additional cases that address the "Article III 'in common' language [that] warrant mention." *Ibid*., at 1. The first was *In re Snake River Basin Adjudication*, No. 39576, Subcase No. 03-10022 (Idaho Dist. Ct., November 10, 1999. After stating that the court "determined that Article III of the Nez Perce Treaty provided neither an enforceable share of the fish harvest nor a water right to sustain the fishery," Ms. Hornbein pointed out that "[t]he Tribe appealed the SRBA court's decision, but the case settled before the Idaho Supreme Court issued a decision." *Id*. She failed to fully explain what the Nez Perce Settlement provided.

Following the Senate Judiciary Committee hearing on SB 262, Rhoda Cargill, the Chairman of the Lincoln County Natural Resources Council, who lives in Libby, asked Ms. Hornbein about two opposing state court decisions in the 9th Circuit on the subject of Art. III. Ms.

Hornbein responded by first explaining *what the State of Idaho agreed to* in the Nez Perce Settlement. First, she said that the Settlement gave "50,000 acre feet out of the Clearwater River" to the Tribe." She failed to mention that the priority the CSKT are asserting – time immemorial – was rejected in the compromise, giving the Nez Perce an 1855 priority. Second, she stated that the Settlement gave "nearly 200 off-reservation instream flows for salmon habitat protection" to the Tribe. She failed to mention that the rights were not given to the Tribe, but rather to the Idaho Water Resources Board. She also failed to mention that the rights have a priority of April 20, 2004, and are subordinated in the Settlement to all existing state-based water rights and to future domestic, commercial, industrial, and municipal water uses, as well as certain future irrigation rights. Third, she said that the Nez Perce were given "a $60,000,000 water and fisheries trust fund, failing to mention the money was not state, but rather federal money. Fourth, she said that the Settlement gave the Nez Perce an "annual release of 200,000 acre feet of stored water to maintain late-season fisheries." She failed to mention that the 200,000 acre feet were the last 200,000 acre feet of 1,200,000

acre feet that the United States had prior control over. Fifth, she stated that the Settlement gave the "management of two federal fish hatcheries to the Tribes," failing to mention that the Tribes were given varying levels of management authority, not plenary authority. And sixth, Ms. Hornbein stated that the Settlement provides for "the transfer of land to the Tribes," failing to mention that the transfer of isolated parcels of federal land was given to the BIA, not the Tribe. In sum, the State of Idaho got everything it wanted, *i.e.*, the complete protection of non-Indian rights, both existing and future, and the Tribe got little more wet water (beyond the stream flow augmentation aspects of the Settlement) than some legally meaningless off-Reservation instream flows, meaningless in the sense that they can't be enforced against anybody. All of the heavy lifting was given to the United States, and the Nez Perce Settlement stands in stark contrast to the Compact negotiated with the CSKT in most every respect.

With respect to the last case that ostensibly supports the inclusion of off-Reservation instream flow rights under Art. III of the Treaty of Hellgate, Ms. Hornbein states that "[a]t the federal level, the Ninth

Circuit Court of Appeals determined that the identical language in Article III of the Yakima Nation's Treaty with the United States "created a property interest that required a federal district court to order the release of water sufficient to sustain a fishery," referring to *Kittitas Reclamation Dist. v. Sunnyside Irr. Dist.*, 763 F.2d 1032 (9th Cir. 1985). Letter of March 3, 2014, at 1. The statement is unequivocally incorrect.

The issue in *Kittitas* was "whether the district court had authority to order the water released." *Id*. at 1033. The Yakima's interest was predicated on Art. III of the Treaty. The irrigators' interests derived from two Reclamation Projects built between 1909 and 1933 "and a 1945 consent decree, which specified the amounts of water to be delivered to the appellant irrigation districts during the irrigation season." *Id*. at 1033. The district court's decision to order releases of water to preserve nests of salmon eggs threatened by low, post-irrigation season flows was based on the court's retention of jurisdiction under the 1945 consent decree.

In holding that "[t]he district court did not exceed the scope of its retained jurisdiction under the consent decree," the 9th Circuit affirmed

the district's courts orders and stated that "[w]e need not decide the scope of fishing rights reserved to the Yakima Nation under [Art. III of] the 1855 Treaty." *Id*. at 1034 and 1035.

Conclusion

The work product provided by counsel for the Compact Commission appears to have changed over years from impartial advice to what might be described as advocacy. Instead of neutrality and disinterest in addressing the risks of trial, the legal advisors now appear to be championing a desired conclusion.

Two things are clear, however. Notwithstanding that Tribal interests have been trying at every opportunity to expand the Art. III "in common" treaty right, the United States Supreme Court has recognized that the right is restricted to the ceded, non-Reservation area under a given treaty, making the likelihood of success on any off-Reservation instream flow claims east of the continental divide in Montana highly unlikely.[9]

[9] It should be noted that much of the Compact's Lower Clark Fork off-Reservation instream flow is outside of the ceded area in the Treaty of Hellgate.

Second, between 1905 and 1974, the Art. III "in common" treaty right was nothing more than a right of access over ceded lands to usual and accustomed places where tribal members had historically fished, coupled with the right to build structures for curing the fish. In light of the continuing growth of the commercial fishing industry in Washington, and the fact that commerce was rapidly impinging on the Tribes' treaty right, the nature of the right was broadened by Judge Boldt in 1974 to include a right to a share of the harvestable salmon. The decision may well have been a form of legislation, but the United States Supreme Court eventually upheld the Boldt Decision in 1979. The Court did not, however, make the quantum leap requisite to changing the conceptual nature of the Art. III right of access to include either a federal or Indian reserved water right to protect the fishery. Indeed, an examination of *Winans* demonstrates that the right was limited to a right of access. In sum, the CSKT see this "case" as their ticket to finally accomplish the transformation of the federal reserved water rights doctrine into an unquestionably expansive Indian reserved water rights doctrine, something the Tribes have been trying to do for quite some

time. The 9th Circuit Court of Appeals hasn't done so, the United States Supreme Court has not allowed it to happen, and there is absolutely no reason why the Court should do so now. The Supreme Court's view of the federal reserved water rights doctrine has caused the Court to be much more inclined to limit federal reserved water rights, given the Court's recognition that the doctrine itself has the potential to take property without compensation. *See*, Brief for the State of New Mexico, Point I, pp. 10-18, *United States v. New Mexico*, 438 U.S. 696 (1978) (the recognition of federal reserved water rights can often result in "a gallon-for-gallon" reduction in water rights perfected by appropriation under regimes of state water law). *See*, also, Jennele Morris O'Hair, "The Federal Reserved Rights Doctrine and Practicably Irrigable Acreage: Past, Present, and Future," BYU Journal of Public Law, Vol. 10, 263, 289-291, (discussing Justice O'Connor's majority opinion in *Wyoming v. United States* in 1989, and noting that in "Justice O'Connor's view, PIA should not be awarded for additional irrigation that either is not necessary to meet 'the realistic needs' of Indians living on their reservation or that would produce only a marginal economic

return for the tribe. These limitations, coupled with the 'reasonable likelihood' test, would have radically narrowed the federal reserved rights doctrine."). *Ibid*. at 291.

Cc: Representative Nancy Ballance
Senator Jennifer Fielder
Senator Kristen Hansen
Senator Jedediah Hinkle
Representative Krayton Kerns (former)
Representative Debra Lamm
Representative Teresa Manzella
Representative Matthew Monforton
Representative Art Wittich
Representative Keith Regier
Senator Janna Taylor

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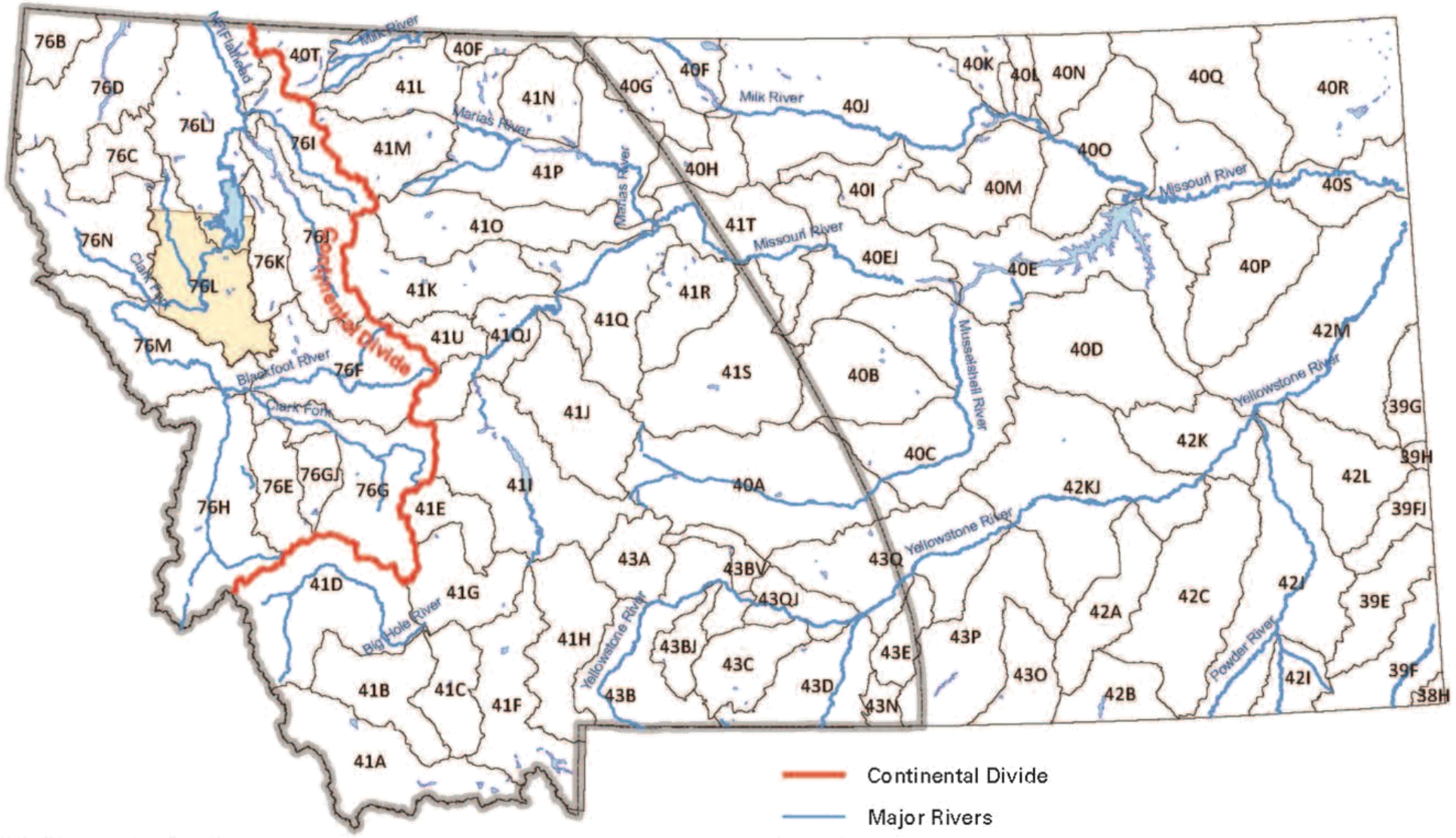
Bruce Fredrickson, Rocky Mountain Law Partners

Jon Metropoulos, Metropoulos Law Firm, PLLC

MLWA Board Members

MAP 2: Confederated Salish Kootenai Tribes Subsistence Range



Continental Divide

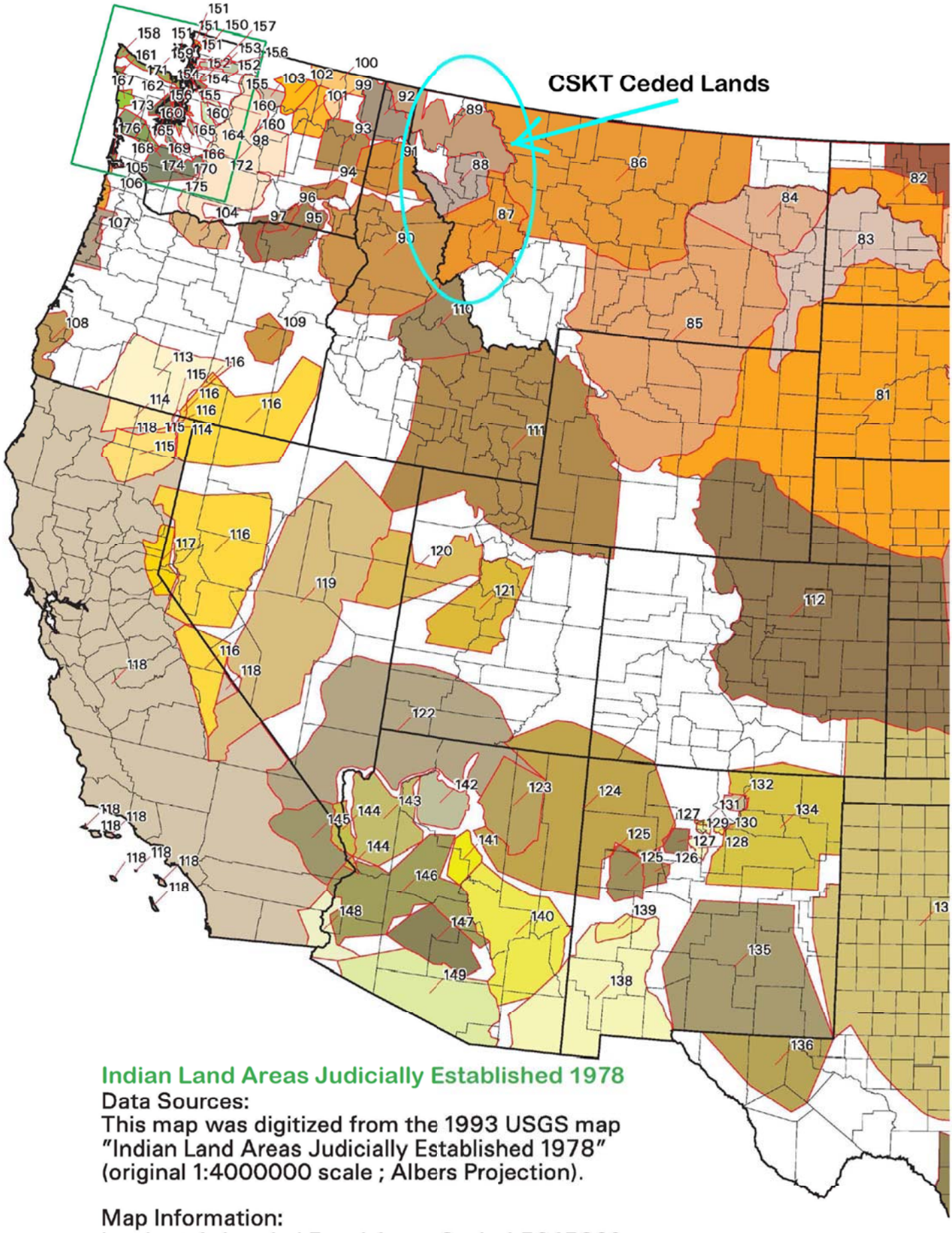
Major Rivers

Water Court Basins

CSKT Subsistence Range

Flathead Indian Reservation

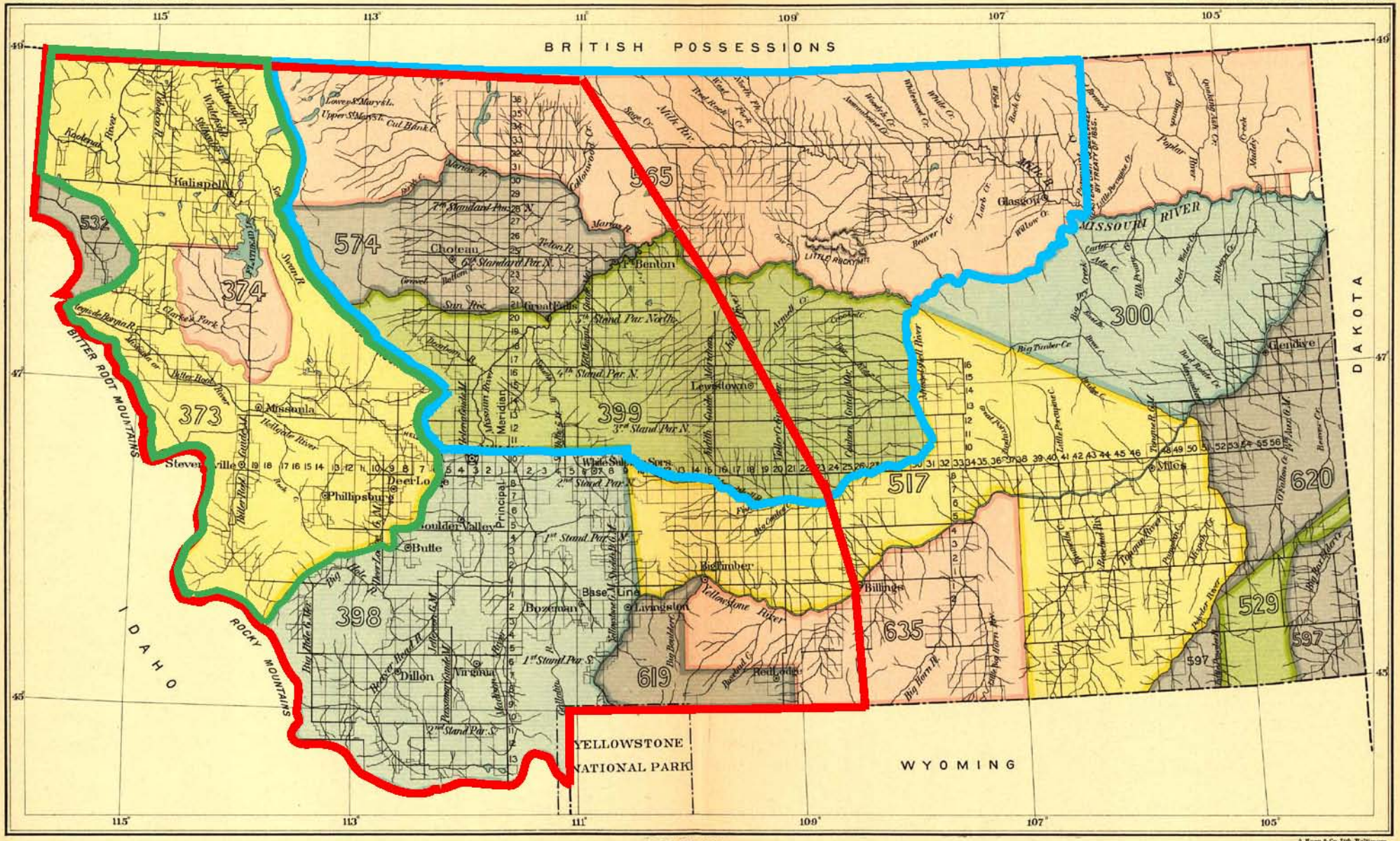
* Data Source: Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution 1896 - 1897.



Indian Land Areas Judicially Established 1978

Data Sources:
This map was digitized from the 1993 USGS map "Indian Land Areas Judicially Established 1978" (original 1:4000000 scale ; Albers Projection).

Map Information:
Lambert Azimuthal Equal Area ; Scale 1:5845860
The numbers on the map represent the lands of original tribal occupancy that were judicially established through the U.S. Indian Claims Commission or the U.S. Court of Claims in 1978. Please reference these numbers with the accompanying sheets entitled "Indian Lands Judicially Established- CAST 7/97".



1855 Lame Bull / Judith River Treaty Boundaries

Per CSKT "Subsistence" Map

Claims Commission Judicially Determined Ceded Lands

MONTANA 1
SCALE, 45 MILES TO 1 INCH

A. Hoen & Co. lith. Baltimore.