Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER AND LOWER MISSOURI RIVER DIVISIONS
SPECIAL FORT PECK COMPACT SUBBASIN
* * * * * * * * * * * * * * * * * * * *

IN THE MATTER OF THE ADJUDICATION OF EXISTING AND RESERVED RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION WITHIN THE STATE OF MONTANA IN BASINS 40E, 40EJ, 40O, 40Q, 40R, & 40S	**CAUSE NO. WC-92-1**

MEMORANDUM OPINION

I. PROCEDURAL HISTORY

The Montana Reserved Water Rights Compact Commission was established in 1979 to negotiate agreements between the State, the United States, and Indian tribes for the federal and Indian reserved water rights in the State of Montana. Section 2-15-212, MCA. On April 10, 1985, the State and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (the "Compacting Parties") reached an agreement in accordance with § 85-2-702, MCA. The Fort Peck–Montana Compact ("the Compact") was subsequently ratified by the Montana Legislature, approved by the Governor of Montana, ratified by the Fort Peck Tribal Executive Board, and approved by the United States Departments of Justice and Interior.[1] The Compact is codified at

[1] The Compact was filed with the Secretary of State on April 30, 1985. Copies were then submitted on June 12, 1985, to Montana's Congressional Delegation, the Committee on Indian Affairs of the United States Senate, and the Committee on Interior and Insular Affairs of the United States House of Representatives.

§85-20-201, MCA. The State petitioned the Court for the commencement of special proceedings to review and approve the Compact.

On April 6, 1994, the Court entered its Findings of Fact, Conclusions of Law and Order granting the State's motion. The Court ordered the Compact incorporated into a preliminary decree for those basins located in and around the Reservation. Those basins are Big Muddy Creek (Basin 40R), Poplar River (Basin 40Q), the Missouri River below Fort Peck Dam (Basin 40S), Milk River below Whitewater Creek including Porcupine Creek (Basin 40O), Missouri River between Musselshell River and Fort Peck Dam (Basin 40E), and Missouri River between Bullwacker Creek and Musselshell River (Basin 40EJ), collectively referred to as the Special Fort Peck Compact Subbasin.

As authorized by § 85-2-218(1) and (3), the Court also designated the Special Fort Peck Compact Subbasin as a priority subbasin for the purposes of the special proceedings. As authorized by § 85-2-231(3), MCA, the Court designated all of the water right claims of the Assiniboine and Sioux Tribes, and the United States as the trustee for such Tribes, which were subject to adjudication under Title 85, Chapter 2, MCA (and recognized by the Compact), as a single class within the Special Fort Peck Compact Subbasin.

On April 6, 1994, a Notice of Entry of Fort Peck Compact Preliminary Decree and Notice of Availability was mailed to approximately 6200 persons claiming water rights within the Special Fork Peck Compact Subbasin and to other interested parties. Additionally, the Notice was published once a week for three consecutive weeks in twelve newspapers of general circulation covering the Special Fort Peck Compact Subbasin and the Upper and Lower Missouri River Divisions. A public meeting on the Compact, attended by approximately one hundred people, was held in Wolf Point, Montana on April 27, 1994.

Jeff Weimer, Gladys Connie Flygt, and Paul B. Tihista filed objections to the Compact. The State of Montana, joined by the Tribes and supported by the United States, moved to dismiss the objections, and the hearing on the motion was held on June 3, 1997. At the close of the hearing, the Court granted the State's Motion to Dismiss the Tihista objection. The Court denied the State's motions to dismiss the Weimer and Flygt objections, and set a final discovery schedule.

On February 9, 1998, the Tribes moved the Court for summary judgment dismissing the remaining objections and approving the Compact. The State of Montana and the United States filed supporting briefs. On February 10, 1998, the Objectors filed cross-motions for summary and partial summary judgment. The Tribes, the State of Montana, and the United States filed opposing briefs. The Court held a hearing on the motions on October 1, 1998. This Memorandum Opinion addresses the cross-motions for summary judgment on the objections to the Compact, and reviews and approves the Compact pursuant to the State's petition.

II. JURISDICTION

The Montana Water Court has jurisdiction to review the Compact under the authority granted by the McCarran Amendment of 1952 (43 U.S.C. § 666); §§ 85-2-231, 85-2-233 and 234, 85-2-701 and 702, MCA, and Article VII(B) of the Fort Peck - Montana Compact. *See also* Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 564 (1983), *reh. denied* 464 U.S. 874 (1983), and State ex rel. Greely v. Confederated Salish & Kootenai Tribes ("Greely II"), 219 Mont. 76, 89, 712 P.2d 754 (1985).

III. ISSUES PRESENTED IN THE OBJECTIONS

As previously noted, after notice was provided in accordance with the law, three objections to the Compact were filed. The objection of Paul B. Tihista was dismissed for lack of standing. *See* Order of June 10, 1997 and Supplemental Order of August 10, 2001.

The two remaining Objectors argue the Compact should be declared void because certain provisions do not conform to federal law and violate established principles and limitations now part of the Indian Reserved Water Right Doctrine. Specifically, the Objectors argue in their briefs that the Compact is void because it:

1. quantifies the Tribal Water Right according to the Practicable Irrigable Acreage standard ("PIA"), which is inappropriate for this reservation;

2. recognizes instream water rights, which are not supported by federal law;

3. grants reserved rights in groundwater, which are not supported by federal law;

4. authorizes diversion of the Tribal Water Right from sources that are not appurtenant to the reservation, which is contrary to federal law;

5 authorizes use of the Tribal Water Right outside the boundaries of the reservation, which is contrary to federal law;

6 authorizes alienation of the Tribal Water Right without Congressional approval, which is contrary to federal law; and

7. violates the Equal Protection Clause of the United States Constitution, because Article IV(A)(2) irrationally discriminates between certain water users and certain watersheds.

In responding to the objections, the Tribes, the United States, and the State of Montana argue that the Objectors essentially have no standing to raise these issues.

IV. STANDARD OF REVIEW

A. The Montana Water Court's Standard of Review in deciding whether to approve a compact or declare it void

The Montana Water Court may only approve a compact or declare it void. Section 85-2-233, MCA. In determining whether a compact should be approved or declared void, the Court has concluded that a compact is closely analogous to a consent decree and should be reviewed under the

same or a similar standard. A consent decree is "essentially a settlement agreement subject to continued judicial policing." Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. Ohio 1983). It is not a decision on the merits or the achievement of the optimal outcome for all parties, but is the product of negotiation and compromise. *See* United States v. Armour & Co., 402 U.S. 673, 681-82, (1971).

Objector Weimer contends that the Court should not apply the "consent decree" standard of review in its consideration of this Compact because there are objectors to the Compact, and consent decrees are not binding on third parties. Objector Weimer asserts that the Court should instead treat the Compact as a statement of claim, like any other statement of claim in the adjudication.

A properly filed statement of claim constitutes prima facie proof its content. Section 85-2-227, MCA. Once an objection to the claim is filed, the objector then has the initial burden of producing evidence that contradicts and overcomes one or more elements of the prima facie claim. Memorandum Opinion, Water Court Case 40G-2, p. 13 (March 11, 1997).

Sections 85-2-221 and 85-2-224, MCA set forth the filing deadlines and requirements for statements of claim. The Compact is not technically a statement of claim pursuant to these statutes. The Compact is an agreement negotiated between governments. It was negotiated and reviewed in open, public forums and approved by the U.S. Departments of Justice and Interior, and by the State and Tribal executive and legislative authorities. A statement of claim does not receive such a rigorous review when it is filed. Therefore, the standard of review between a statement of claim and a Compact is different. However, even if the Court accepted Objector Weimer's contention and treated the Compact as a statement of claim, the result in approving the Compact would be the same, because Objectors did not present evidence sufficient to contradict and overcome the prima facie Compact.

Before approving a consent decree, a court must be satisfied that the settlement is at least fundamentally fair, adequate and reasonable, and because it is a form of judgment, a consent decree must conform to applicable laws. United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990), *cert. denied sub nom.* Makah Indian Tribe v. United States, 501 U.S. 1250, (1991). The purpose underlying this judicial review is not to ensure that the settlement is fair as between the negotiating parties or to give the negotiating parties more time, but to ensure that other unrepresented parties and the public interest are treated fairly by the settlement. United States. v. Oregon, 913 F.2d at 581; Davis v. City and County of San Francisco, 890 F.2d 1438, 1445 (9th Cir. Cal. 1989); SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. Cal. 1984); Collins v. Thompson, 679 F.2d 168, 172 (9th Cir. Wash. 1982); and Norman v. McKee, 431 F.2d 769, 774 (9th Cir. Cal. supra *cert. denied*, 401 U.S. 912 (1971). While the settlement must be in the public interest, it need not necessarily be in the public's *best* interest, if it is otherwise reasonable. SEC v. Randolph, *supra* at 529.

In Officers for Justice v. Civil Service Comm'n, the Ninth Circuit Court of Appeals nicely summarizes the extent and limitations inherent in this kind of review:

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be *limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.* Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators. (Citations omitted) Ultimately, the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.' *City of Detroit [v. Grinnell Corp.], 495 F.2d [448], 468 [2d Cir. N.Y. 1974)].*

688 F.2d 615, 624-625 (9th Cir. Cal. 1982), *cert denied*, Byrd v. Civil Service Commission, 459 U.S. 1217 (1983).[2] The Ninth Circuit further explained that:

> The district court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a government participant; and the reaction of the class members to the proposed settlement. (Citations omitted) This is by no means an exhaustive list of relevant considerations, nor have we attempted to identify the most significant factors. The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claims advanced, the types of relief sought, and the unique facts and circumstances presented by each individual case.

Officers of Justice, 688 F.2d 615 at 624.

The Ninth Circuit has suggested that once a court is satisfied that the decree was the product of good faith, arms-length negotiations, a negotiated decree should be *presumptively* valid and the objecting party then "has a heavy burden of demonstrating that the decree is unreasonable." United States v. Oregon, 913 F.2d at 581. The First Circuit similarly observed:

> This [deference] has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement. . . . Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sits at the table. That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance. United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. Mass. 1990).

The Court also agrees with the suggestion of the United States found at page 5 of its Response to Objector Jeff D. Weimer Motion for Summary Judgment brief that the Court's level of

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[2] *See also* United States v. Armour & Co., 402 U.S. 673, 681-682 (1971) and Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574 (1984).

inquiry into a Compact depends on whether Objectors can establish the Compact will result in material injury to their claimed rights. If the answer is no, then the Court should apply a "fundamentally fair, adequate, and reasonable and conforms to applicable law" test. If by a preponderance of the evidence, Objectors can demonstrate that their claimed right is materially injured by the Compact, the level of inquiry employed by the Court into the basis of the reserved water rights should be commensurate with the degree of injury.

B. The "Consent Decree" Standard of Review applies only to compact review, and the specific provisions of this Compact and this review have limited precedential value for reserved water rights litigated before the Water Court.

Consent decrees do not generally establish precedents for unrelated proceedings. See e.g. Davis v. N.Y.C. Housing Authority, 839 F. Supp. 215, 225 (1993); Kelly ex rel. Michigan DNRC v. FERC, 321 U.S. App. D.C. 34 (1996); Office of Consumer Counsel v. FERC, 783 F.2d 206, 235 (D.C. Cir. 1986). A proposed settlement agreement or consent decree is not to be judged against a hypothetical or speculative measure of what might (or might not) have been achieved by the negotiators. Officers for Justice v. Civil Serv. Comm'n, 688 F.2d at 625. The United States Supreme Court has stated:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation... [T]he parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. United States v. Armour & Co., 402 U.S. 673, 681-82, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971).

The Standard of Review set forth in Part A, above, only applies to the Court's review of this Compact, and similar consent decree compacts. The results achieved in this Compact are not necessarily the results that would have been reached had these reserved water right claims proceeded

through litigation on the merits.

This Compact is the unique negotiated agreement which defines the reserved water rights of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, its use, development, and administration. Every other compact which may be presented to this Court will in turn be unique and specific to the history of the reserved right, resource availability, and its own negotiation tone and process. The parties to this Compact, and the negotiators to compacts generally enjoy considerable freedom in reaching the compacted results, and may achieve results through the compact process that are more favorable to their interests than would be achieved through litigation. If other parties claiming reserved water rights proceed to litigation on the merits before the Montana Water Court, the Court will have to draw hard lines and resolve ambiguous legal precedent on many of the issues which are given a broad brush in this Compact review.

IV. DISCUSSION

A. Standing to Object

The Tribes, the United States, and the State of Montana argue that the Objectors essentially have no standing to object to the Compact because the likelihood of actual harm to the Objectors caused by the enforcement of the Compact is remote.

The standing to object to a claim in the general adjudication process in Montana during the 1994 Compact objection period was established by statute and rule. Section 85-2-233, MCA (1993) provides that:

> (1) *For good cause shown* a hearing shall be held before the water judge on any objection to a temporary preliminary decree or preliminary decree by:
> . . .

(iii) any person within the basin entitled to receive notice under 85-2-232(1). . ."[3]

Rule 1.II(7) of the Montana Supreme Court Water Right Claim Examination Rules defines "good cause shown" to mean

> a written statement showing that one has a substantial reason for objecting, which means that the party has a property interest in land or water, or its use, that has been affected by the decree and that the objection is made in good faith, is not arbitrary, irrational, unreasonable or irrelevant in respect to the party objecting.

It is undisputed that Weimer and Flygt have claimed existing water rights within the Fort Peck Compact Subbasin.[4] Although their junior state-based water rights have not yet been finally adjudicated or actually affected by the enforcement of the Compact, the Court recognizes the *potential* for displacement or diminution of their rights in the future. The goal of Montana's statewide adjudication is to provide stability and certainty for water users by quantifying and adjudicating water right claims, including those of the Tribes, in a unified proceeding. Article I of the Compact states that one of the "basic purposes" of the Compact is "to settle existing disputes and *remove causes of future controversy* between the . . . Indians of the Fort Peck Reservation and other persons concerning waters of the Missouri River, its tributaries, and groundwater. . . ."

Given the Compact's stated purpose, the potential for future conflict, and the goal of the

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[3] Section 85-2-232(1) (1993) provides in relevant part that "the water judge shall serve by mail a notice of availability of the temporary preliminary decree or preliminary decree to *each person who has filed a claim of existing right within the decreed basin . . . .*"

[4] Flygt filed statement of claim 40EJ-W-202424-00 in Basin 40EJ (Missouri River between Bullwhacker Creek and Musselshell River) for the use of 160 miners inches of water (280 acre feet), for a reservoir and system of collection ditches, on an unnamed tributary to Dry Armelles Creek, which is tributary of the Missouri River well above Fort Peck Dam. The priority date claimed is 1942.

Weimer's predecessor-in-interest filed statement of claim 40E-W-122279-00 in Basin 40E (Missouri River between Musselshell River and Fort Peck Dam), for the use of 30 gallons per day per animal unit, for a small onstream reservoir designed to catch spring runoff, on an unnamed tributary of Seven Blackfoot Creek, which is tributary to the Missouri River well above Fort Peck Dam. Weimer's predecessor-in-interest was also issued Permit to Appropriate 40E-P-041261 in the same basin for the use of 8.0 acre feet per year, for another small onstream reservoir designed to catch spring runoff, on an unnamed tributary to Big Coulee Creek, which is also tributary to the Missouri well above Fort Peck Dam. The priority dates of these two claims are 1965 and 1982, respectively.

statewide adjudication, this Court concludes that for purposes of this review, the Objectors have sufficient standing to file objections to the Compact.

B. Validity of Compact

The Objectors have not claimed, nor does the Court conclude based on the evidence before it, that the Compact is the product of fraud, overreaching, or collusion. Therefore, the Water Court will focus the remainder of this Memorandum on whether the Compact, taken as a whole, is fair, adequate and reasonable to all concerned, including whether it conforms to existing federal law and policy, and whether summary judgment should be granted against Objectors.

C. Indian Reserved Water Rights in the Montana General Stream Adjudication

Indian reserved water rights were first recognized by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908), a case arising in the Milk River in northern Montana. The Winters Court held:

> The power of the Government to reserve the waters [of the Milk River] and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888 [treaty date], and it would be extreme to believe that within a year Congress destroyed the reservation and . . . took from [the Indians] the means of continuing their old habits, yet did not leave them the power to change to new ones.

207 U.S. 564, 577 (1908). In Cappaert v. United States, a more contemporary United States Supreme Court decision, Chief Justice Burger, writing the unanimous opinion, summarized the Reserved Water Rights Doctrine as follows:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

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> In 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.

426 U.S. 128, 138-139 (1976). Although Cappaert involved federal reserved water rights for a national monument, Chief Justice Burger noted that the doctrine applies to Indian reservations and other federal enclaves and encompasses water rights in navigable and nonnavigable streams. Ibid.

Montana law has long acknowledged the existence of Indian reserved water rights and distinguished those rights from state appropriated water rights. In Greely II, the Montana Supreme Court recognized the distinctions and held that "[s]tate-created water rights are defined and governed by state law" and "Indian reserved water rights are created or recognized by federal treaty, federal statutes or executive order, and are governed by federal law." 219 Mont. at 89-90, 95.[5] In the absence of controlling federal authority, the Water Court is required to follow the directives of the Montana Supreme Court. Greely II, 219 Mont. at 99-100.

Whether by adjudication or by negotiation, determining the scope and extent of Indian reserved water rights has proved difficult at best. *See e.g.,* Greely II, 219 Mont. at 92; Ciotti, 278 Mont. at 60. As articulated by the United States Supreme Court, the Reserved Water Rights Doctrine is vague and open-ended and has been construed both broadly and narrowly by subsequent federal and state courts.[6] After nearly one hundred years of legislation, litigation, and policy-

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[5] *See also,* Confederated Salish & Kootenai Tribes v. Clinch ("Clinch"), 297 Mont. 448, 451-453, 992 P.2d 244 (1999); In re Application for Beneficial Water Use Permit ("Ciotti"), 278 Mont. 50, 56, 923 P.2d 973 (1985); and State ex rel. Greely v. Water Court ("Greely I"), 214 Mont. 143, 691 P.2d 833 (1985).

[6] For cases applying the doctrine broadly, *see e.g.* Colorado River Water Conservation District v. United States, 424 U.S. 808, 818 (1976); United States v. Ahtunum Irrigation Dist., 236 F.2d 321, 326 (9th Cir. 1956); Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908). For cases applying the doctrine narrowly, *see e.g.* Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979); United States v. New Mexico, 438 U.S. 696, 715 (1978); Cappaert v. United States, 426 U.S. 128 (1976); In re the General Adjudication of all rights to Use Water in the Big Horn River System ("Big Horn"), 753 P.2d 76 (Wyo 1988);

making, there are still no bright lines clearly and consistently delineating the Doctrine. Most of the legal issues inherent in the Doctrine remain unsettled and hotly debated and are now complicated by decades of distrust and competing policies.

Senate Bill 76 was passed in 1979 to expressly recognize Indian reserved water rights and incorporate them into the state-wide general adjudication. Greely I, 214 Mont. at 146.[7] To expedite and facilitate the difficult process of comprehensively and finally determining Indian reserved water rights in Montana, the legislature created a nine-member Montana Reserved Water Rights Compact Commission. The Commission has the authority to "negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts,"[8] the terms of which will ultimately be included in the preliminary and final State decrees pursuant to Montana law. This Compact is a product of that negotiation process.

D. The Authority of the Montana Legislature to Enter Reserved Water Rights Compacts

The Montana Legislature possesses all the powers of lawmaking inherent in any independent sovereignty and is limited only by the United States and Montana Constitutions. *See e.g.,* Hilger v. Moore, 56 Mont. 146, 163, 182 P. 477, 479 (1919), and State ex rel. Evans v. Stewart, 53 Mont. 18, 161 P. 309 (1916).

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and In re the General Adjudication of All Rights to Use Water in the Gila River System and Source ("Gila River III"), 989 P.2d 739 (1999). For cases distinguishing between Indian reserved water rights and other federal reserved water rights, *see e.g.,* Clinch, 297 Mont. 448, 992 P.2d 244 (1999); Greely II, 219 Mont. 76, 89-90, 712 P.2d 754 (1985). For cases that do not distinguish between Indian reserved water rights and other federal reserved water rights, *see e.g.,* Colorado River, at 811; United States v. District Court for Eagle County, 401 U.S. 520, 524 (1971); Cappaert v. United States, 426 U.S. at 138; and Arizona v. California, 373 U.S. 546, 601 (1963).

7 Section 85-2-701, MCA (1979) sets forth the legislative intent as follows:

> **Legislative Intent.** Because the water and water rights within each water division are interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. Therefore, it is the intent of the legislature that the attorney general's petition required in 85-2-211 include *all claimants of reserved Indian water rights* as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666. . .

8 Section 23-15-212, MCA

Our government has long been known to be one of delegated, limited and enumerated powers. Kansas v. Colorado, 206 U.S. 46, 81-82 (1907), *citing* Martin v. Hunter's Lessee, 1 Wheat 304, 324 (1816).[9] Those powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Art. X, U.S. Constitution.[10] Although the history of the relationship between the Federal Government and the States in the reclamation of arid lands of the Western States is both long and involved, through it runs the consistent thread of purposeful and continued deference to state water law by Congress and, more recently, a blossoming sensitivity to the impact of the implied-reservation doctrine upon those who have obtained water rights under state law. California v. United States, 438 U.S. 645, 653 (1978) and United States v. New Mexico, 438 U.S 696, 699, 701, 702-705, 718 (1978).

In 1972 the people of Montana ratified a new constitution. The Montana Constitution provides in Article IX(3) as follows:

> **Water rights.** (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
> . . . .
> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
>
> (4) The legislature shall provided for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

Pursuant to Art. IX, Section 3(4), Mont. Const. 1972, the legislature enacted the Montana Water Use Act of 1973. Title 85, Chapter 2 of the Montana Code Annotated. The Water Use Act governs the administration, control and regulation of water rights within the state of Montana.

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[9] It can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. Ibid.

[10] *See also* Kansas v. Colorado, 206 U.S. 46, 79 (1907), and United States v. Rio Grande Irrigation Company, 174 U.S. 690, 703 (1899).

Greely II, 219 Mont. 76, 712 P.2d 754 (1985) and § 85-2-101, MCA.

As long as the State acts within the parameters of the State and federal constitutions, Montana has broad authority over the administration, control and regulation of the water within the State boundaries. Accordingly, if the State negotiates, approves, and ratifies a compact that grants more water to a reserved water right entity than that entity might have obtained under a strict adherence to the "limits" of the Reserved Water Right Doctrine through litigation and does so without injuring other existing water users, the State is effectively allocating and distributing surplus state waters to that entity to resolve a dispute. In the absence of material injury to existing water users, the merits of such public policy decisions is for the legislature to decide, not the Water Court.

Therefore, in the absence of clear federal authority prohibiting the various Compact provisions and in the absence of demonstrated injury to Objectors by these provisions, the Compacting Parties are within their authority to craft creative solutions to resolve difficult problems caused by ambiguous standards. In reviewing creative solutions found in a compact, the Court has used the balancing test described earlier to determine whether the resulting compact is fundamentally fair, adequate and reasonable, and conforms to applicable law.

E. The Fort Peck-Montana Compact

1. Quantification

The scope and extent of the Tribal Water Right is set forth in Article III of the Compact. Article III(A) sets forth a general statement of the right:

> The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation have the right to divert annually from the Missouri River, certain of its tributaries, and ground water beneath the Reservation the lesser of (i) 1,050,472 acre-feet of water, or (ii) the quantity of water necessary to supply a consumptive use of 525,236 acre-feet per year for the uses and purposes set forth in this Compact with a priority date of May 1, 1888, provided that no more than 950,000 acre-feet of water, or the quantity of water necessary to supply a consumptive use of 475,000 acre-feet may be diverted annually from surface water sources. This right is held in trust by the United States for the benefit of the Tribes and is further defined and limited as set forth in this Compact." Section 85-20-201, MCA

The Objectors contend that use of the practicably irrigable acreage standard (PIA) to quantify the Tribal Water Right is inappropriate, and that even under that standard, the Tribal Water Right was incorrectly quantified.

There is no more contentious issue in Indian water law than the quantification of Indian reserved water rights. It is clear from the parties' briefs and the record before the Court that quantification of federal reserved water rights is a task of enormous complexity, to be determined without the benefit of clear or conclusive federal law, and with the potential for impacting or displacing some existing state-based water rights.

Quantification of an Indian reserved water right is governed by the amount necessary to fulfill the purposes of the reservation. *See* United States v. New Mexico, 438 U.S. 696 (1978), Cappaert v. United States, 426 U.S. 128 (1976), Arizona v. California, 373 U.S. 546 (1963), and Winters v. United States, 207 U.S. 564 (1908). However, there is no clear consensus among the federal courts as to how the "purpose" of the reservation is to be determined, the proper quantification standard to apply, or the method for quantifying the rights based on that standard.

In Winters, the Supreme Court held that when the primary purposes of an Indian reservation are not clearly articulated, the purposes must be liberally, not strictly, construed from the perspective of the Indians. 207 U.S. 564, 576-577 (1908).[11] In Arizona v. California, the United States Supreme Court held that Indian reserved water rights must be quantified to "satisfy the future as well as the

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[11] In Winters, the United States Supreme Court concluded that: "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it." 207 U.S. at 577. In United States v. Adair, the Ninth Circuit Court of Appeals quoted with favor the principle that: "While the purpose for which the federal government reserves other types of lands may be strictly construed . . . the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained. . . . Additionally, where interpretation of an Indian treaty is involved, not only the intent of the Government, but also the intent of the tribe must be discerned." 723 F.2d 1394, 1409 (9th Cir. 1983), *quoting* W. Canby, American Indian Law 245-246 (1981), and *citing* Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 675-676 (1979). *See also* United States v. Winans, 198 U.S. 371, 381 (1905); Colville Confederated Tribes v. Walton, 647 F.2d 42, 47-48 (9th Cir. 1981), *reversed* on other grounds in 752 F.2d 397 (1981); and Greely II, 219 Mont. at 90, 91.

present needs of the Indian[s]" and that given the uncertainty of a tribe's future needs, "the only feasible and fair way by which reserved water for the reservations [at least for agricultural purposes] can be measured is irrigable acreage." 373 U.S. at 601.[12]

In United States v. New Mexico, however, the same Court held that application of the doctrine is limited to only that amount of water *strictly necessary* to fulfill the *original, primary* purposes of the reservation, no more. 438 U.S. 696, 700 (1978). Also, the New Mexico Court apparently introduced a "sensitivity" concept into the required analysis so that "the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and the Congress' general policy of deference to state water law." *See* dissent of Justice Powell at 718 citing the majority opinion at 699, 701-702, and 705.

Neither the United States Supreme Court, nor any other federal court, however, has held that PIA is the *only* standard that may be applied. In recent years, the PIA standard has been criticized as being too complex, overgenerous at the expense of state water users, and anachronistically assimilistic for modern times.[13] The Objectors embrace some of these criticisms. Such criticism of

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[12] In Arizona both the Master and the Supreme Court rejected the State's argument that "the quantity of water reserved should be measured by the Indians' 'reasonably foreseeable needs." Adoption of the PIA standard was essentially a compromise between a standard that would be fair to the Indians and one that would provide certainty and finality for competing water users. In exchange for a generous standard and application (essentially the *maximum* amount the tribes could claim under the State's "reasonable needs" test, whether the tribes would ever actually need or use the water or not), the reserved water rights of the tribes were finally quantified and forever fixed in an amount that could not be enlarged, even for changed circumstances in the future. 373 U.S. 546, 600-601 (1963).

The fact that most of the agricultural land on the Fort Peck Indian Reservation has never been irrigated, therefore, does not necessarily argue against application of the PIA standard. In Greely II, the Montana Supreme Court observed that most Indian reservations use only a fraction of their reserved water rights and that: "The Water Use Act, as amended, recognizes that a reserved right may exist without a present use. Section 85-2-224(3), MCA, permits a 'statement of claim for rights reserved under the laws of the United States which have not yet been put to use.' The Act permits Indian reserved rights to be decreed without a current use." 219 Mont. at 93-94. *See also* Section 85-2-234(6), MCA, and Clinch, 297 Mont. at 452.

[13] *See e.g.* Peter W. Sly, Reserved Water Rights Settlement Manual 194 app. A (1988), at 104; Alvin H. Shrago, *Emerging Indian Water Rights: An analysis of Recent Judicial and Legislative Developments*, 26 Rocky Mt. Min. L. Inst. 1105, 1116 (1980); *Indian Reserved Water Rights: Hearings before Senate Comm. On Energy and Natural Resources*, 98th Cong., 2d Sess. 27-28 (1984)(Western States Water Council, Report to Western Governors); and Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 Ariz. L. Rev. 195 (1994). *See also* Wyoming v. United States, 492 U.S. 406 (1989); and Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 Land & Water Rev. 1, 6 (1992) (in which he asserts that Chief Justice Rehnquist and Justices White, Scalia, and Kennedy would have reversed use of the PIA standard in the Big Horn River adjudication).

the PIA standard was reflected in a more stringent application of the standard in the Big Horn adjudication in Wyoming,[14] and in the United States Supreme Court's *per curium* decision affirming the application, albeit by an evenly divided Court.[15] Despite its recent criticism, no court has yet rejected the PIA standard and the Montana Supreme Court has expressly approved it. Greely II, 219 Mont. at 93-94. The PIA standard remains the principle method of quantifying Indian reserved water rights for agricultural purposes. Therefore, the Compacting Parties' determination of the scope and extent of the Tribal Water Right by using the practicably irrigable acreage standard was appropriate and is not contrary to federal law or policy.

To quantify the Tribal Water Right, the parties agreed to use the Ten Year Plan formulated by the President's Water Policy Committee as an analytical guide and retained competent and experienced water resource specialists to assist them.[16] After several months of study, Stetson Engineers concluded that 501,755 acres (approximately one-quarter of the Reservation) could be irrigated out of the Missouri River.[17] The State's water resource specialists conducted their own investigation of Reservation lands, and, using the "prime and important" land classification of the

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14 In Big Horn, 753 P.2d 76 (Wyo 1988), the Wyoming Supreme Court was more sensitive to state-held rights by requiring that factors such as land arability, engineering and economic feasibility must be considered in determining whether reservation land was practicably irrigable for purposes of the PIA standard.

15 Wyoming v. United States, 492 U.S. 406 (1989).

16 Final Report of Tribal Negotiating Team to Fort Peck Tribal Executive Board on Fort Peck-Montana Water Compact ("Tribal Report"), p. 12., which is attached as Exhibit 1 to the Affidavit of Tribal Chairman Caleb Shields, filed March 21, 1997. *See also* Affidavit of D. Scott Brown, program manager of the Compact Commission, filed March 10, 1997; Affidavit of Thomas Stetson, Stetson Engineers, water resource specialist for the Tribes, filed as Exhibit 2 to the Affidavit of Caleb Shields, filed March 21, 1997. D. Scott Brown is the program manager overseeing the State's participation in the settlement negotiations and the data and analysis produced by the State's soil scientist, hydrologist, attorney and the DNRC. Stetson, who was the Tribes' water resource and civil engineer specialist, has served as an expert witness in Arizona v. California, Big Horn, Gila River III, and most other significant Indian reserved water right cases in the last twenty years.

17 Tribal Report, p. 13. In making that determination, Stetson Engineers reviewed extensive data from the Soil Conservation Service, the Bureau of Indian Affairs, historical hydrological stream flow data, and data on the quantity and quality of groundwater. They interpreted numerous aerial photographs, analyzed the climate and available surface water measurements, determined the available water supply and existing uses in each watershed, developed 27 maps showing land classifications, and ultimately determined the extent of the practicably irrigable acreage on the Reservation and the amount of water required per acre.

Soil Conservation Service, concluded that 487,763 acres on the Reservation were irrigable from the Missouri River (less than a 3% difference). The State then, apparently, discovered an oversight in its calculations and accepted the Stetson acreage determination.[18]

The Bureau of Indian Affairs did a title study and concluded that 291,798 of the 501,755 potentially irrigable acres are owned by the Tribes or Tribal Members or are within the Fort Peck Irrigation Project.[19] After negotiation, the Compacting Parties agreed to calculate a fixed Tribal Water Right based only on those acres presently in Indian ownership, rather than a fluctuating right based on future increases and decreases in Indian ownership.[20] The parties agreed to an average water duty of 3.6 acre-feet per acre, and this resulted in the annual diversion figure of 1,050,472 acre-feet.[21] Consumptive use was calculated by the parties to be 1.8 acre-feet per acre for full service irrigation at 50 percent average efficiency. Therefore, "the Tribal Water Right is stated alternatively in terms of the lesser of diversions and consumptive uses, whichever is less."[22]

In negotiating Article III of the Compact, the Tribes recognized that the Compact must provide some protection for existing non-Tribal uses to be politically acceptable, even if litigation would not have protected those uses.[23] The protection for existing state uses is set forth in Art. IV(A) of the Compact. The Tribes agreed not to divert surface water from the mainstem of the Milk River and, with some exceptions, to subordinate the Tribal Water Right to four categories of existing uses on the remaining Missouri River "north-south" tributaries within the Reservation (but not on the Missouri River mainstem):

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18 Tribal Report, pp. 2-4,13-14.

19 Tribal Report, p. 14.

20 Tribal Report, pp. 14-15.

21 Tribal Report, p. 15.

22 Tribal Report, p. 15, n. 23.

23 Tribal Report, p. 32.

(a) the beneficial uses of water with a priority date of December 31, 1984, or earlier established under the laws of the State and identified in Appendix A to this Compact;

(b) such rights of the United States Fish and Wildlife Service to the waters of Big Muddy Creek for the Medicine Lake National Wildlife Refuge as may be finally determined by the state water court;

(c) beneficial uses of water for domestic purposes;

(d) beneficial uses of water for stock watering purposes in existence prior to December 31, 1984, and beneficial uses of water for stock watering subsequent to that date not in excess of 20 acre-feet per year for each impoundment.[24]

The protected existing state uses identified in Appendix A of the Compact are almost all for irrigation.[25] The Tribes have estimated that "about 19,500 acres in all are irrigated on a regular basis (full-service irrigation) in these watersheds. About 13,000 additional acres are served by "water spreading" during periods of high stream flow, usually during the early spring. The . . . full-service irrigation diverts about 70,000 acre-feet and consumes about 35,000 acre-feet a year. The water spreading . . . consumes about 6,000 acre-feet annually. Most of the full-service irrigation is done from groundwater, not surface flow. Of the 19,500 acres served by full-service irrigation, almost 12,000 acres are irrigated by groundwater pumping. Use of groundwater is especially prevalent in the Porcupine Creek and Big Muddy Creek watersheds, where a total of almost 10,000 acres (mostly outside the reservation) are irrigated by groundwater."[26]

The Tribes also determined that most of the acres irrigated under existing state-based water rights (approximately 25,000 of 32,000 acres) are outside the Reservation boundaries.[27] Under the Compact, these existing irrigation uses would be protected from the Tribes' prior senior right.[28]

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24 Section 85-20-201, MCA, Fort Peck-Montana Compact, Article IV(A)(3)(a)-(d). *See also* Tribal Report, p. 15, and D. Scott Brown Affidavit, p. 4.

25 Tribal Report, p. 32.

26 Ibid.

27 Tribal Report, p. 33

28 Ibid.

In addition, approximately 1,500 acre-feet of existing municipal uses (mostly on the Poplar and Big Muddy River), 2,100 acre-feet per year of existing industrial and commercial uses (mostly on the Big Muddy River), and any existing federal reserved water rights in Big Muddy Creek and its tributaries for maintaining the Medicine Lake Wildlife Refuge are also protected.[29]

With the exception of the wildlife refuge, the Compact protects nearly 44,600 acre-feet per year of consumptive uses, which is split nearly equally between surface flows and groundwater.[30] The Tribes point out that "most surface water available in these streams during the irrigation season in normal years will be used by non-Indians exercising their state law based water rights."[31] Therefore, they conclude that by ratifying the Compact, the Tribes are foreclosed from developing substantial new appropriations from these tributary streams.[32]

Objector Weimer argues that factual disputes exist concerning the factors used to determine the quantity of the Tribal Water Right and that summary judgment is not appropriate on the quantification issue. Although Weimer identified several factors, he primarily addresses the number of irrigable acres on the reservation. He argues that a February 20, 1985 Memorandum from the Supervisor of the Hydrosciences Section of the DNRC to the Water Management Bureau Chief creates a material issue of fact.

The DNRC Memorandum concludes that approximately 167,000 acres of irrigable land could be supplied from the Milk and Missouri Rivers by the diversion of approximately 603,000 acre feet of water, that available tributary flow was limited to approximately 122,000 acre feet, and that about 133,000 acre feet was available from groundwater.[33] The Memorandum further predicts that if tribal

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29 Ibid.

30 Ibid.

31 Tribal Report, pp. 33-34.

32 Ibid.

33 Memorandum, page 18.

use of tributary water under a reserved rights settlement was not subordinated to existing non-tribal use, tribal users would likely displace some or all of an estimated 10,000 acres of non-tribal irrigation.[34]

Because of the short time available for DNRC to conduct its analyses, several simplifying assumptions were made in the Memorandum and no attempt was made to distinguish between tribal and non-tribal ownership of irrigable lands along the Milk and Missouri Rivers.[35] The Memorandum received "little critical technical review" and DNRC expressed hope in its transmittal document that "the Commission can take the time to have these results reviewed carefully by individuals outside the Department." See February 25, 1985 transmittal document from Larry Fasbender, Director of the Department of Natural Resources and Conservation, to Gordon McOmber, Chairman of the Reserved Water Rights Compact Commission.

There is nothing in the record indicating the February 20, 1985 Memorandum was ever critically and technically reviewed or that the simplifying assumptions were tested. As a result, the Memorandum has a hypothetical or speculative quality to it and the Court cannot conclude it introduces factual uncertainty. Simmons v. Jenkins, 230 Mont. 429, 432, 750 P.2d 1067 (1988) and Officers for Justice, 688 F.2d 615 at 624-625.

At most, the Memorandum represents one hasty determination of one hypothetical PIA scenario that might result if the reserved water right were litigated to a conclusion. One important concern from the State's perspective is definitely highlighted by the DNRC Memorandum. Irrigation on as many as 10,000 acres of non-tribal lands irrigated from the "north-south" tributaries within the reservation would have to be curtailed if the parties pursued litigation to its ultimate conclusion. See Memorandum at page 14. Under the Compact, irrigation on over 9,000 acres of

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34 Memorandum, page 14.

35 Memorandum, pages 1 and 18.

these non-Tribal lands will never be curtailed by the exercise of the Tribal Water Right because the Tribal Water Right is subordinated to most of the water usage on these non-Tribal lands.

Given the detailed and comprehensive research and analysis involved in determining the Tribal Water Right by the Compacting Parties and the protections provided the most threatened existing state uses of water, the Court concludes that Article III of the Compact is within the authority of the legislature, and is fundamentally fair, adequate and reasonable to all concerned.

2. Groundwater

Article III(A) and (I) of the Compact expressly extends the Tribal Water Right to groundwater. The Objectors contend that extension of the Tribal Water Right to groundwater is either not supported by, or is contrary to, federal law.

Whether Indian reserved water rights include groundwater is another unsettled question of federal law. In Cappaert v. United States, the United States Supreme Court noted that none of its cases have applied the doctrine of implied reservation of water rights to groundwater. The Court avoided directly confronting the issue by finding that the water in Devil's Hole was in fact surface water, albeit underground. 426 U.S. 128, 142 (1976).

The paucity and ambiguity of federal law and policy with respect to reserved water rights in groundwater has led to inconsistent rulings on the subject. For example, in 1968 the Federal District Court of Montana observed that "whether the [necessary] waters were found on the surface of the land or under it should make no difference." Tweedy v. Texas Company, 286 F.Supp. 383, 385 (D. Mont. 1968). According to Judge Rodeghiero, the Montana Supreme Court appears to tacitly agree. *See* dissenting opinion of Judge Rodeghiero in Clinch, 297 Mont. 448 at 458, ¶ 32 ("the majority apparently assumes that groundwater is included within the Tribes' reserved water right.")

In Big Horn, the Wyoming Supreme Court acknowledged:

> The logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater. *See Tweedy v.*

> *Texas Company*, 286 F.Supp. 383, 385 (D.Mont. 1968) ("Whether the [necessary] waters were found on the surface of the land or under it should make no difference"). Certainly the two sources are often interconnected. *See* § 41-3-916, W.S. 1977 (where underground and surface waters are "so interconnected as to constitute in fact one source of supply," a single schedule of priorities shall be made); Final Report to the President and to the congress by the National Water Commission, Water Policies for the Future 233 (1973) (groundwater and surface water 'often naturally related'); *Cappaert v. United States*, *supra* 426 at 142-143, 96 S.Ct. at 2071 (citing additional authority for this effect)."

753 P.2d 76, 99-100 (Wyo. 1988). Despite the Wyoming Supreme Court's recognition of the logic of including groundwater in Indian reserved water rights, it nevertheless declined to do so, because it could find no controlling federal law on the issue. Ibid. at 100.

In Gila River III, the Arizona Supreme Court found the Big Horn decision declining Indian reserved water rights in groundwater, unpersuasive. Instead, it found support for recognizing such rights in Winters, Arizona, and Cappaert:

> If the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

989 P.2d 739 at 747. Accordingly, the Gila III Court held that "the federal reserved water rights doctrine applies not only to surface water but to groundwater," but only "where other waters are inadequate to accomplish the purpose of the reservation." Ibid.

Given the unsettled state of federal and state law with respect to the issues, the Water Court finds that extension of the doctrine to groundwater in Article III of the Compact is neither supported by, nor prohibited by, controlling federal law. Recognizing this fact, the parties reasonably chose to avoid the risk of litigation by negotiating this issue through the Compact process.

The parties recognized the potential adverse impact reserved groundwater rights could have on existing junior state water rights. Thus, Article V(D)(1)(a) and (b), provides that, with the

exception of those tribal uses protected in Article IV, neither the State nor the Tribes shall authorize or continue the use of groundwater without the consent of the other if the use will either:

(a) result in degradation of the instream flows established pursuant to section L of Article III; or

(b) contribute to permanent depletion or the significant degradation of the quality of a ground water source which in whole or in part underlies the Reservation.[36]

In Paragraph 2 of Article V(D), the Tribes agree not to authorize a new use of groundwater which interferes with the state authorized groundwater rights protected by Article IV of the Compact, unless the State consents.[37] Article III(I)(1)-(3) provides implicitly that the Tribes cannot divert groundwater outside the Reservation for use within the Reservation, or market groundwater off the Reservation.[38] The State was not seriously concerned with tribal uses of groundwater because the Tribes are relatively downstream users and their uses are unlikely to impact surface flows, particularly on the Missouri River.[39] Therefore, in order to protect existing water rights, the State apparently was willing to authorize the Tribes to access a resource that might contain otherwise unappropriated or untapped surplus state waters.

3. Changes in Use and Instream Use

Article III(D) of the Compact provides that Tribes can put water to use for any purpose on

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[36] Section 85-20-201, MCA and Final Report, pp. 44-45.

[37] Section 85-20-201, MCA and Tribal Report, p. 45

[38] The question of groundwater could have been litigated, of course, but if a court held groundwater was a component of the reserved water rights doctrine then the Compacting Parties might have had to address the implications arising from Sporhase v. Nebraska, 458 U.S. 941 (1982), and City of Altus v. Carr, 225 F.Supp. 828 (W.D. Tex. 1966), *summarily aff'd*, Carr v. City of Altus, 385 U.S. 35 (1966). By negotiating the groundwater issue, the Compacting Parties could add another dimension of contractual protection to the State's groundwater resources.

[39] Tribal Report, pp. 45-46. The Tribes acknowledge that "very little is known concerning groundwater sources on the Reservation. Without years of study, it simply cannot be determined whether groundwater can be safely pumped from aquifers below the Reservation without depleting those aquifers. The quality of groundwater is questionable as well. Less is known about groundwater in this area than any other technical matter relating to the Tribes' water rights. We thus will be uncertain for many years as to whether and to what extent groundwater resources will be available in practice to the Tribes." Tribal Report, p. 48.

the Reservation, "without regard to whether such use is beneficial as defined by valid state law," but "[n]o use of the Tribal Water Right may be wasteful or inconsistent with the terms of this Compact."[40]

One of the specific changes in use authorized by the Compact is the right to change diverted uses into instream flow uses. Article III(L) provides that "[a]t any time within five years after the effective date of this Compact, the Tribes may establish a schedule of instream flows to maintain any fish or wildlife resource in those portions of streams, excluding the mainstem of the Milk River, which are tributaries of the Missouri River that flow through or adjacent to the Reservation."[41] These instream flow uses will have all the characteristics of the Tribal Water Right, including a priority date of 1888 and the subordination provisions in Article IV of the Compact.[42]

Flygt (whose claims are not on any of these tributaries) contends that the Tribes' right under the Compact to use the reserved water "for any purposes," including instream flow, is contrary to the prevailing principles by which Indian reserved water rights are established. This objection necessarily raises the issue of whether the purposes for which an Indian reservation was established limit the uses to which reserved water may be put.

Federal courts have not yet conclusively decided this issue. No standards have been developed concerning permissible changes in the nature of use or place of use of Indian reserved water rights.[43] The clearest Supreme Court pronouncement on the issue appears with no explanation in a supplemental decree entered in Arizona v. California, in which the United States Supreme Court approved the parties' stipulation that the Tribe's reserved water right for irrigation could be used for

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40 85-20-201(III)(D), MCA; Tribal Report, pp. 8-9.

41 85-20-201(III)(L); Tribal Report, p. 47.

42 Tribal Report, p. 47.

43 *See* Ranquist, The Effect of Changes in Nature and Place of Use of Indian Rights to Water Under the 'Winters Doctrine,' 5 Nat. Res. L 34, 35-36 (1972).

non-agricultural purposes.[44] The Court decreed:

> The foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation [of the practicably irrigable acres within the reservations] . . . shall not constitute a restriction of the usage of them to irrigation or other agricultural application. If all or part of the adjudicated water rights of any of the . . . Reservations is used other than for irrigation or other agricultural applications, the total consumptive use . . . shall not exceed the consumptive use that would have resulted if the diversions . . . had been used for irrigation of the number of acres specified for that Reservation. . . .

439 U.S. 419, 422 (1979). This decree confirmed the conclusions of the Special Master in the 1963 Arizona v. California case:

> This [method of quantifying water rights] does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses . . . . The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.

Report of Simon H. Rifkind, Special Master to the Supreme Court 265-166 (December 5, 1960), in the case of Arizona v. California, 373 U.S. 546 (1963).

In Colville Confederated Tribes v. Walton, the Ninth Circuit Court of Appeals recognized the right of the Tribes to change the use of part of their reserved water right from irrigation and fishery maintenance to an instream flow sufficient to permit natural spawning. The Court observed that:

> When the Tribe has a vested property right in reserved water, it may use it in any lawful manner. As a result, subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water. . . . We recognize that open-ended water rights are a growing source of conflict and uncertainty in the West. . . . Resolution of the problem is found in quantifying reserved water rights, not in limiting their use.

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[44] Specifically, for recreation and housing developments.

647 F.2d 42, 48, *cert.* denied 454 US 1092 (9th Cir. Wash. 1981).

The Montana Supreme Court has recognized that Indian reserved water rights include water "for future needs and changes of use." Greely II, 219 Mont. 76, 97 (1985). In contrast, in Big Horn III, the Wyoming Supreme Court rejected the argument that the Tribes could change the use of their reserved right from agricultural uses to any other purpose, including instream flows. 835 P.2d 273 at 278.

Recognizing a potential adverse impact on state water users, the Compact provides that the diversion of the Tribal Water Right, including water allocated to instream flow purposes, in the watersheds of seven "north-south" Reservation tributaries of the Missouri River and all groundwater shall be subordinated to certain referenced uses. In addition, any use of the Tribal Water Right outside the Reservation must be "beneficial" as that term is defined by valid state law. To protect state water users from increased depletion of water sources resulting from changes in use not anticipated in the original quantification process, Article III(A) and (F) provide a cap on the amount of water that may be diverted and the amount that may be consumed. As instream flows could deprive an upstream state water user of that quantity of water, the Tribes agreed in Article III(L) to count the instream flows as a consumptive use and to require the State's consent before any change from that consumptive use to instream use.[45]

Given the lack of conclusive federal law with respect to the issues, the provisions negotiated by the parties to protect existing state water uses, and the current federal policy of encouraging tribal self-sufficiency on the reservations,[46] the Water Court concludes that Articles III(A), (D) and (L) authorizing the Tribal Water Right to be used "for any purpose," including the establishment of

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45 85-20-201(III)(A) and (F), Tribal Report, p. 47.

46 *See e.g.*, 55 FR 9223, "Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims," Department of the Interior, March 12, 1990.

instream flows, is within the authority of the legislature, and is fundamentally fair, adequate and reasonable to the parties and all those concerned.

4. Off Reservation Diversion, and Off Reservation Use and Marketing

Article III(A) and (I) authorize the Tribes to divert the Tribal Water Right from certain off-reservation surface water locations, including the mainstem of the Missouri River above Fort Peck Dam. Article III (D), (E), (F), (G), (I), (J), and (K) of the Compact authorize the Tribes to transfer their reserved water right use "within or outside the Reservation" to the extent authorized by federal law.[47] The Objectors contend that use of the Tribal Water Right by the Tribes or other persons off the reservation violates the purpose of an Indian reserved water right and violates federal law. Objectors specifically contend that the United States Supreme Court has limited Indian reserved water rights to on-reservation diversions through its statements that such water rights reserve "appurtenant" water. The Objectors similarly contend that authorization to transfer part or all of the Tribal Water Right for off-reservation use is contrary to federal law and policy, specifically, United States Supreme Court case law and the Indian Non-Intercourse Act of 1901, 25 U.S.C. § 77.

The United States Supreme Court has described the Reserved Water Rights Doctrine in terms of reserving "appurtenant" water:

> "This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves *appurtenant* water then unappropriated to the extent needed to accomplish the purpose of the reservation."

Cappaert, 426 U.S. 128 (1976). In Winters v. United States, the Court recognized that the governmental policy of creating reservations was to change the habits of nomadic Indians to an agricultural way of life. 207 U.S. 576 (1908). The Court stated that without water, the lands ceded

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[47] 85-20-201, MCA. Article III (K) provides:"As an incident to and in exercise of the Tribal Water Right, the Tribes may transfer within or outside the Reservation, as authorized by federal law and this Compact, the right to use water but may not permanently alienate such right or any part thereof." Article III (K) authorizes the Tribal Water Right to be exported outside the State. Article II (24) defines a "transfer" to mean "any authorization for the delivery or use of water by a joint venture, service contract, lease, sale, exchange or other similar agreement."

to the Tribes were worthless, and concluded that the government thus reserved waters for use by the Tribes. Id.

a. Off-Reservation Diversions

Objectors contend that no authority exists allowing the Tribal Water Right to be diverted from off-reservation sources, and are particularly concerned about the Tribal Water Right being possibly diverted from the mainstem of the Missouri above Fort Peck Dam. Objector Weimer cites to the above cases, as well as the Conference of Western Attorneys General American Indian Law Deskbook, 184 (1993) as authority that "[i]n general discussions of reserved water rights, the U.S. Supreme Court limits the doctrine to waters appurtenant to a reservation." Id at 11. Essentially, Objectors contend that off-reservation sources are not appurtenant to a reservation, and because the U.S. Supreme Court cases only discuss reserved water rights as reserving "appurtenant" waters, reserved water rights cannot be diverted from off-reservation sources.

In considering the authorities presented by Objectors and the Court's own review, the Objectors are correct that no federal authority exists that explicitly discusses the off-reservation diversion of Indian reserved water rights. However, the Objectors present no direct, binding authority prohibiting off-reservation diversion of these rights as provided in the Compact, and the Court has found none. These cases allow for the reservation of appurtenant water rights. None of the United States Supreme Court cases cited by the Objectors include a ruling on whether a reserved water right may be diverted off the reservation.

At least one commentator has stated that the United States Supreme Court has extended Indian reserved water rights to an off-reservation source, although the Court did so without comment as to the basis for the decision in either the decree or the opinion.[48]

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[48] Indian Reserved Water Rights: The *Winters* of Our Discontent, 88 Yale L. Journal 1689, 1697, 1699 (1979), footnotes 54 and 60.

The Water Court finds that extension of the Reserved Water Rights Doctrine to off-reservation diversions in Article III of the Compact is neither directly supported by, nor prohibited by, controlling federal authority. Recognizing this fact, the parties chose to avoid the risk of litigation by negotiating the issues through the Compact process. As stated above in Section IV(D) of this Memorandum, in the absence of clear federal authority prohibiting the Compact provisions, the Compacting Parties are within their authority to create such provisions.

The Compact places some basic limitations on the Tribes' ability to divert water from off the Reservation. These are summarized on pp. 18-23 of the Tribal Report, to include:

First. [P]aragraph 2 of Article III(K) requires the Tribes to give the State at least 180 days advance written notice of any proposed transfers of water from the Missouri River outside the Reservation, including Fort Peck Reservoir, and the opportunity to participate in the water marketing venture as a substantially equal partner with the Tribes.

Second. [P]aragraphs 5 and 6 of Article III(K) limit the total consumptive use of water that may be marketed outside the Reservation by the Tribes in any year to (1) 50,000 acre-feet (2) plus 35 percent of any amount over 200,000 but less than 300,000 acre-feet authorized to be transferred by the State under state law, (3) plus 50 percent of any amount over 300,000 acre-feet authorized to be transferred by the State under state law. Paragraph 6 provides that if the State is not itself authorized to transfer at least 50,000 acre-feet of water annually, the Tribes may market water subject to any volume limitations provided by federal law, or if there are no federal limitations, subject to any volume limitations imposed by state law on holders of state water rights. In no event shall the quantity limitation on the Tribes be less than 50,000 acre-feet per year.

Third. [S]ection D of Article III provides that ["outside the Reservation, any use of water in the exercise of the Tribal Water Right shall be beneficial as defined by valid state law on the date the Tribes give notice to the State of a proposed use outside the Reservation."] Although the State cannot generally regulate tribal water marketing, it could under this provision ban a particular use of water proposed to be marketed by the Tribes outside the Reservation if the use proposed was non-beneficial under state law.

Fourth. [S]ection E of Article III provides that the Tribes or any diverter or user of water marketed by the Tribes shall comply with valid state laws regulating the siting, construction, operation or uses of any industrial facility, pipeline or the like which transports or uses the water outside the Reservation. This Section is intended to apply statutes such as the State's Major Facilities Siting

Act to industries using or transporting water marketed by the Tribes outside the Reservation.

Fifth. [T]he limitations on monthly diversions that Tribes may take from the Missouri River in Section F of Article III impose a constraint on diversion of water for marketing outside the Reservation, as well as on-reservation uses such as irrigation. . . .

Sixth. [U]nder Section G of Article III the Tribes must comply with any valid state law prohibiting or regulating export of water outside the State at the time of a proposed transfer. . . .

Seventh. [S]ection I of Article III sets the sources from which diversions may be made for uses outside the Reservation. Paragraph 3 of Section I provides that the Tribes can divert water for marketing outside the Reservation from the mainstem of the Missouri River from Fort Peck Reservoir or downstream. This paragraph and III(J)(3) provide that diversions from the mainstem of the Missouri River can also be made *upstream* from Fort Peck Reservoir, but these must comply with all state laws and secure the consent of the State legislature. . . .

Eighth. [W]hile diversions from Fort Peck Reservoir or downstream from Fort Peck Dam do not have to comply with state regulatory and administrative requirements, the Tribes are required by III(J)(1) to give advance notice to the State showing that:

> (1) the off-reservation use of water will be beneficial as defined by valid state law;
>
> (2) the means of diversion and construction and the operation of any diversion works outside the Reservation are adequate;
>
> (3) the diversion will not adversely affect any federal or state water right actually in use at the time notice is given without the owner's consent;
>
> (4) that the proposed use does not cause any unreasonable significant environmental impact;
>
> (5) that the larger diversions in excess of 4,000 acre-feet per year and 5.5 cubic feet per second of water will not:
>
> > (i) substantially impair the quality of water for existing uses in the source of supply;

(ii) be made where low quality water can economically be used and is legally and physically available to the Tribes for the proposed use;

(iii) create or substantially contribute to saline seep; or

(iv) substantially injure fish or wildlife populations in the source of supply.

Paragraph 2 of Article III, Section J authorizes legal challenges to proposed off-reservation diversions within 30 days after expiration of the notice given the State by the Tribes, in a court of competent jurisdiction, by the State or a person whose rights are adversely affected by the diversion or proposed use. If a court case is brought, the Tribes have the initial burden of proving by a preponderance of the evidence that the notice was sufficient to show the above five items. Pursuant to Article II(23), the notice given to the State by the Tribes will be provided to the Director of the State Department of Natural Resources and Conservation. The Court has no reason to conclude that the Director would not promptly provide personal notice to potentially affected state-based water users.

Although the Compacting Parties were free to negotiate the provisions regarding off-reservation diversions due to the absence of federal law to the contrary, these notice provisions and limitations confer additional protection for any state-based water users that could potentially be affected by such off-reservation diversions. The Water Court concludes that the provisions in Article III(A) and (I) authorizing off-reservation diversion of the Tribal Water Right are fundamentally fair, adequate and reasonable.

b. Marketing, Off-Reservation Use, and the Indian Non-Intercourse Act

The Objectors have stated that based upon cases such as New Mexico, 438 U.S. 696, 699 (1978), Walton, 647 F.2d 42, 48 (1981), Cappaert, 426 U.S. 128 (1976), and Winters, 207 U.S. 564 (1908) "[t]here is no legal authority for removing the reserved right from the reservation." Objector

Weimer's Brief in Support of Motion for Summary Judgment, p. 10. Objector Flygt states that she is "unaware of any standard which attaches marketability and off-reservation use to a reserved water right established by Congress." Objector Flygt's Motion for Partial Summary Judgment and Brief in Support, p. 12. Objector Flygt also contends that such off-reservation use conflicts with the "primary purpose doctrine" as set forth in Winters and subsequent cases, in that the primary purpose of the Fort Peck Reservation should be interpreted as providing a means for the Tribes to become "a pastoral and agricultural people." Id. at 7.

The federal courts have not yet conclusively decided whether Indian reserved water rights may be severed and transferred apart from the land. Some cases suggest that reserved water rights are inseparably appurtenant to the reservation and may not be used elsewhere. *See e.g.* Cappaert, 426 U.S. 128 (1976) and New Mexico, 438 U.S. 696, 699 (1978). Other cases, however, suggest that once quantified, Indian reserved water rights are vested property rights which the Indians may use and transfer in any lawful manner. *See e.g.*, Walton, 647 F.2d 42 (1981) and Arizona, 373 U.S. 546 (1963).

The Objectors also contend that the Indian Non-Intercourse Act of April 12, 1901, 25 U.S.C. 177, prevents the off-reservation use, and specifically marketing, of reserved water rights. The Act provides that:

> No purchase, grant, lease, or other conveyance of *lands*, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. (Emphasis added)

25 U.S.C.S. § 177 (2001). The consent of the United States is required for such transactions to be effective. *See e.g.* County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985), *reh den.* 471 U.S. 1062 (1985).

Article III(J) of the Compact expressly prohibits the *permanent* alienation of any part of the Tribal Water Right, either on or off the Reservation, and Article III(K) authorizes the Tribes to

transfer a portion of the Tribal Water Right only "as authorized by federal law and this Compact." Accordingly, an off-reservation transfer will happen only if Congress authorizes it to happen.[49] If a future off reservation transfer is prosecuted without the authorization of federal law and the Compact, then any aggrieved person has recourse to the appropriate judicial system.

Objectors are correct that no federal authority exists that explicitly discusses the off-reservation use and marketing of Indian reserved water rights. However, the Objectors present no direct, binding authority prohibiting off-reservation use and marketing of these rights as provided in the Compact, and the Court has found none. These cases allow for the reservation of appurtenant water rights. None of the United States Supreme Court cases cited by the Objectors include a ruling on whether a reserved water right may be used or marketed off the reservation.

The Water Court finds that extension of the Reserved Water Rights Doctrine to off-reservation uses and marketing in Article III of the Compact is neither supported by, nor prohibited by, controlling federal law. Recognizing this fact, the parties chose to avoid the risk of litigation by negotiating the issues through the Compact process. As stated above in Section IV(D) of this Memorandum, in the absence of clear federal authority prohibiting the Compact provisions, the Compacting Parties are within their authority to create such provisions.

The State and the Tribes recognized the potential impact the right to transfer part or all of an Indian reserved water right for off-reservation use could have on those holding state water rights.[50] To protect those state water rights, the Compacting Parties included certain restrictions in the Compact. The Tribal Report, pages 18-23, summarizes these restrictions as set forth above in

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[49] According to one commentator, the Compact was specifically structured to avoid the necessity for immediate congressional approval for fear that downstream Missouri River states would withhold their consent due to the potential implications of the Compact's water awards on their future water supply. *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 Ariz. L. Rev. 195, n. 215.

[50] The Water Court notes that the junior water rights owned by the Objectors are diverted from unnamed tributaries to tributaries of the Missouri River many miles upstream from the Fort Peck Indian Reservation.

Section IV(D)(4)(a) of this Memorandum.

Paragraph 2 of Article III, Section J authorizes legal challenges to proposed off-reservation uses within 30 days after expiration of the notice given the State by the Tribes, in a court of competent jurisdiction, by the State or a person whose rights are adversely affected by the diversion or proposed use. If a court case is brought, the Tribes have the initial burden of proving by a preponderance of the evidence that the notice was sufficient to show the above five items. Pursuant to Article II(23), the notice given to the State by the Tribes will be provided to the Director of the State Department of Natural Resources and Conservation. Again, the Court has no reason to conclude that the Director would not promptly provide personal notice to potentially affected state-based water users.

Although the Compacting Parties were free to negotiate the provisions regarding off-reservation use and marketing of the Tribal Water Right due to the absence of federal or state law to the contrary, these notice provisions and limitations in the Compact confer additional protection for any state-based water users that could potentially be affected by such off-reservation diversions. The Court recognizes the extensive restrictions placed on off-reservation transfers. In light of the absence of federal law to the contrary, and considering the notice provisions in the Compact and additional restrictions on off-reservation marketing, the Water Court concludes that the provisions set forth in Article III (D), (E), (F), (G), (I), (J), and (K) authorizing transfers of the Tribal Water Right for off-reservation use are not in violation of federal law or policy, are within the authority of the legislature, and are fundamentally fair, adequate and reasonable.

5. Equal Protection

Finally, the Objectors contend that Article IV(A) violates the Equal Protection Clause of the Montana Constitution, because if applied as agreed, it would subordinate the Tribal Water Right to *some* junior state water rights on *some* watersheds, but not all junior state-based water rights on all

watersheds.

Equal Protection of the law requires that all persons be treated alike under like circumstances. Classification of persons is allowed as long as it has a permissible purpose. Billings Assoc. Plumbing, Heating, & Cooling Contractors v. Bd. Of Plumbers, 184 Mont. 249, 602 P.2d 597 (1979), *citing* Montana Land Title Ass'n v. First Am. Title, 167 Mont. 471, 539 P.2d 711 (1975) and United States v. Reiser, 394 F. Supp. 1060 (D.C. Mont. 1975), reversed on other grounds by United States v. Reiser, 532 F.2d 673 1976. The applicable test is whether the classification is rationally related to a legitimate governmental interest. Montana Const. D & F Sanitation Serv. v. Billings, 219 Mont. 437, 713 P.2d 977 (1986).

The Objectors admit that any injury they may suffer as a result of not being included among the protected junior state water uses is merely potential and not actual. They have not yet received a "call" for their water and, given the facts, they probably never will. As the State points out, "[g]iven the extremely small size of Mr. Weimer's and Mrs. Flygt's claims, the odds that the Tribes would bother to exercise a call against them are extremely small. The fears of Mr. Weimer and Mrs. Flygt that the Tribes would seek to secure water from [an unnamed tributary] to Dry Armelles Creek, and an unnamed tributary of Seven Blackfoot Creek, both ephemeral streams, rather than from the adjacent Fort Peck Reservoir, are simply illogical."[51]

The Tribes emphasize this remoteness and further argue that under the Compact they could only make an upstream call in a year when they are actually using the water, when storage in the Fort Peck Reservoir is unavailable, and the flows of the Missouri River are less than one million acre-feet i.e. less than one-quarter of the lowest flows for any year on record (in the drought of the 1930s).[52]

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[51] State of Montana's Memorandum in Support of Motion to Dismiss Objections and to Approve Fort Peck-Montana Compact, filed March 10, 1997, p. 4, n. 1.

[52] Assiniboine and Sioux Tribes of the Fort Peck Reservation Responsive Memorandum of the Fort Peck Tribes to Objectors, filed April 15, 1997, p. 5.

Although the Objector's standing to raise the constitutionality of the subordination provisions of the Compact is questionable, Olson v. Dept. of Revenue, 223 Mont. 464, 469-470, 726 P2d 1162 (1986), *citing* Chovanak v. Mathews, 120 Mont. 520, 188 P.2d. 582 (1948), the Court will discuss this matter further.

More of the reasoning behind the subordination provisions is described by D. Scott Brown in his Affidavit, filed with the Water Court on March 10, 1997:

> The Compact Commission's studies indicated that on the Milk River and the "north-south tributaries" (i.e. Porcupine Creek, Poplar River, Big Muddy Creek, Little Porcupine Creek, Wolf Creek, Tule Creek and Chelsea Creek), it would be difficult to protect existing users -- most of whom had priority dates junior to the Tribe -- and recognize the Tribal Water Right. In fact, most existing users on those streams already experienced shortages even without the addition of potential new uses. Devising a method to allow for the protection of those junior users thus became one of the main priorities of the Compact Commission in further negotiations.
>
> In an effort to secure such protections, the Compact Commission and Tribes agreed to shift any new tribal uses away from the Milk River and the "north-south tributaries" toward the Missouri River, where there was available unappropriated water. The general approach that was settled on was to secure protections for water users on the Milk River and "north-south tributaries" by providing the tribes with greater flexibility to market and use its Missouri River water.

The Tribes agreed to negotiate the issue because of the importance they attach to off-reservation marketing of their water, and because they recognized that a Compact must provide some protection for existing uses to be politically acceptable, even if successful litigation would not have protected those uses.[53] While it was apparently worth subordinating part of their Tribal Water Right to a *limited* number of existing uses on a *limited* number of sources, it would be unreasonable to expect the Tribes to do the same for *all* existing junior uses on *every* water source that "might" be influenced by the exercise of the Tribal Water Right. Requiring all concessions to be applied equally across-the-board would unduly restrict and likely defeat the negotiation and settlement process.

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53 Tribal Report, p. 32

Forced to choose, it was rational and reasonable for the State to protect junior water users on the north-south tributaries with perennially low flows that surely would be displaced by the exercise of the Tribal Water Right, over the junior water users on the abundant mainstem of the Missouri River or its intermittent tributaries that are many miles away and whose potential for injury is very remote.

The subordination provisions of Article IV are the result of a negotiation process intended to serve the legitimate governmental purpose of completing the state-wide adjudication process as quickly and efficiently as possible, thereby providing certainty and finality for all water users and developers. Accordingly, the Water Court concludes that the subordination provisions of Article IV do not violate the Equal Protection clause of the Montana Constitution.

VI. FUNDAMENTAL FAIRNESS OF COMPACT AS A WHOLE

After more than four years of intense, adversarial negotiations, the Fort Peck-Montana Compact was concluded "finally and forever" determining the Tribal Water Right of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. The Compact was authorized by federal and state law, negotiated by competent professionals experienced in the field of water resource law and knowledgeable about the water needs of the State and the Reservation. They in turn were advised by competent specialists in the field of water resource analysis and water law. The investigation conducted by the parties and their specialists was comprehensive, involving extensive research and surveys, data interpretation, soil and water analysis, financial analysis and numerous calculations and projections.

It is clear that the Compact is not the product of fraud or overreaching by or collusion between the Compacting Parties. The factual and legal positions of the parties were vigorously debated and often seemed irreconcilable. In 1983, the first proposed Compact was rejected by the Governor's office, and negotiations broke off altogether. Negotiations commenced one year later, and additional concessions to resolve disputed issues were made on both sides of the negotiating

table.

A careful balancing of various facts went into settling the final Compact. Potential adverse effects on the State, the Tribes and the junior state water uses were fairly considered, and a number of reasonable provisions were ultimately included to protect against such effects. Out of over 6,200 potentially effected water users who received notice of the Compact, only three objections were filed, and one of those objections was subsequently dismissed for the objector's lack of standing.

None of the provisions of the Compact are prohibited by federal law or policy. The goals of finally and conclusively quantifying the Tribal Water Right and completing the Montana comprehensive water right adjudication substantially outweigh the minimal potential for injury to the Objectors' remote, junior water rights. The Compact has been ratified by the Montana Legislature, approved by the Governor, ratified by the Fort Peck Tribal Executive Board, and approved by the United States Departments of Justice and Interior. The Compact as a whole carries a strong presumption of fairness, adequacy, and reasonableness.

Just as this Court concluded in its "Order to Confirm and Approve the Northern Cheyenne Tribal Water Right contained in the Northern Cheyenne Compact," filed August 3, 1995, this Compact resolves legal issues and rights that began over one hundred years ago and achieves an end result that could never be reached were the Tribal Water Right litigated before this Court. Like the Northern Cheyenne Compact, the Fort Peck-Montana Compact is a remarkable achievement for a settlement process created in 1979 as an untried, first of its kind concept, and it validates the confidence reposed by the 1979 Legislature in the Reserved Water Rights Compact Commission, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, and the United States that good faith negotiations can achieve solutions to difficult problems.

VII. SUMMARY JUDGMENT

A. Standard of Review for Summary Judgment

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), M.R.Civ.P. In applying the standard, all reasonable inferences are viewed in the light most favorable to the party opposing summary judgment. Erker v. Kester, 296 Mont. 123, 988 P.2d 1221, 1224 (1999). However, the facts presented in opposition must be of a substantial and material nature. Brothers v. General Motors, 202 Mont. 477, 658 P.2d 1108 (1983). Speculation is not sufficient to raise a genuine issue of material fact. Cheyenne Western Bank v. Young, 179 Mont. 492, 587 P.2d 401 (1978); State v. DeMers, 192 Mont. 367, 628 P.2d 676 (1981). Absent affirmative evidence to defeat the motion, the motion is properly granted. In re Estate of Lien, 270 Mont. 295, 892 P.2d 530 (1995), *overruled* on other grounds in Estate of Daniel G. Bradshaw, 305 Mont. 178, 24 P.3d 211 (2001).

B. Discussion

The issues set forth in the cross motions for summary judgment have been addressed in the above discussion concerning the objections to the Compact, and such discussion is incorporated herein. The Objectors in this case have failed to prove by more than mere speculation that any genuine issues of material fact remain for the Montana Water Court to decide. The Objectors have failed to provide the affirmative evidence necessary to defeat the motion and overcome the strong presumption of reasonableness, fairness, and legal sufficiency this Compact carries with it.

All negotiations and adjudications quantifying Indian reserved water rights involve extensive and complex disputed issues of facts and law. They inherently involve competing interests in a scarce resource, the allocation of which must be determined by ambiguous, perhaps anachronistic

law, evolving governmental policies, and increasingly sophisticated science – all amidst rapidly changing circumstances, within the confines of a complex adjudication process. That is precisely the incentive for the negotiation and settlement of complex water right adjudications.

In the negotiation process, the uncertainties inherent in the determination of the Assiniboine and Sioux Tribal Water Right were employed by the parties as tools to gain leverage and bargaining power. Compromise moved the process forward.[54] In exchange for saving the cost and inevitable risk of litigation, the parties each gave up something they might have won in trial at the Montana Water Court.[55] In the settlement process, the parties resolved to their own satisfaction all of the remaining issues of fact and law. It is not for the Montana Water Court to re-negotiate those disputes or rule on their merits.

CONCLUSION

For the reasons set forth above and further detailed in the submissions of the parties, the Court has entered its Order Approving and Confirming the Fort Peck-Montana Compact and dismissing the objections thereto.

DATED this 10 day of August, 2001.

C. Bruce Loble
Chief Water Judge

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[54] *See e.g.* SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984), citing United States v. Armour & Co., 402 U.S. 673, 681 (1971).

[55] Armour, *supra*, at 681

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