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Overnight Priority Mail

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Attorney General Tim Fox
Office of the Attorney General
215 N. Sanders, Third Floor
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Dear General Fox:

Representatives of your office, the Compact Commission, the Legislative Services Division, and the Water Policy Interim Committee have been told that the Confederated Salish & Kootenai Compact violates Art. IX of the Montana Constitution. The common response has been to say that Art. IX § (3)4 states that "**[the] legislature shall provide** for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records." After emphasizing the phrase "the legislature shall provide," it is my understanding that your position has been that in ratifying the CSKT Compact the legislature would be doing exactly what the Constitution mandates, *i.e.*, providing for the administration of water rights. Your response is the same response that is overweeningly recited by the Compact Commission, the Legal Services Division, and the Water Policy Interim Committee. The purpose of this letter is to explain how illusory the response is.

The provisions of Art. IX of the Montana Constitution apply interactively to the State of Montana. Art. IX, § 3(1) provides that "[a]ll existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." The existing rights referred to in Art. IX are all water rights perfected in Montana by diversion and application to beneficial use under the territorial and common law of prior appropriation in Montana prior to 1973, the year the Montana Water Use Act was enacted.

Art. IX § 3(3) states that 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." This provision results from the federal government's initial deference to the emergence of territorial and state water law in the West, which was enacted into federal law through the Act of July 26, 1866, 14 Stat. 253, the Act of July 9, 1870,

16 Stat. 218, and the Desert Land Act of March 3, 1877, 19 Stat. 377. Finally, Art. IX § (4) of the Montana Constitution provides that "[t]he legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records."

The mandate to provide for state administration of water rights required: 1) the adjudication of all pre-1973 water rights recognized and confirmed in Art. IX § (3)1 in order to make them subject to administration; 2) the creation of a statutory procedure for perfecting new (post-1973) water rights and changes in place or purpose of use of both pre-1973 rights and newly permitted water rights; 3) the creation of a statewide system of *inter sese* adjudication wherein all water rights are determined as between individual water right owners and the state **and as among one another** in order to make the United States, on its own behalf, and on behalf of its Indian wards, subject to being named a party defendant in Montana's state court water rights adjudication under the McCarran Amendment; and 4) the creation of a system of administration for all interdependent, adjudicated water rights as among one another. As planned at the Constitutional Convention, on the same day the Montana Constitution was adopted, the Montana legislature created statutory schemes for all four of these prerequisites in order to enable the State to provide for the "control and regulation of the water rights" and the establishment of "a system of centralized records, in addition to the present system of local records." All four of these statutory schemes mandated by Art. IX of the Montana Constitution have statewide application for the simple reason that Montana's organic law does not carve out gaping geographical holes in its application.

If the legislature were to ratify the CSKT Compact it would:

1) Preclude the formal recognition of the individual water rights owned by both Tribal and non-Tribal irrigators in the Flathead, Mission, and Jocko irrigation districts on the Flathead Reservation, contrary to state and federal law;

2) Effectuate a taking of: a) the real property rights of some 23,000 non-Indians residing within the boundaries of the Flathead Reservation; b) the real property rights of the irrigators in the Flathead, Mission, and Jocko irrigation districts and c) the water rights appurtenant to their property within the boundaries of the Flathead Reservation, in violation of the Fifth Amendment of the United States Constitution;

3) Violate the equal protection clause of the United States Constitution;

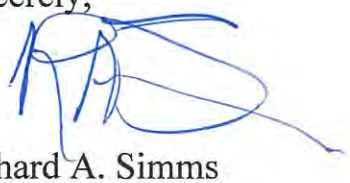
4) Usurp the system of statewide adjudication, administration, and regulation of water rights in Montana currently in place as a result of the mandate of Art. IX;

5) Vitiate the system of centralized records mandated by Art. IX;

6) Give plenary control over the administration of all water rights within the Flathead Reservation, whether "derived from tribal, state or federal law," to a single entity whose water rights are adverse to all other water rights in the relevant water basins in the pending statewide adjudication in the Montana Water Court;
7) Usurp McCarran Amendment jurisdiction over the United States, not only with respect to its own rights, but also for its claims of rights for the CSKT in trust;
8) Totally negate the contemplation of Art. IX with respect to state control over the adjudication and administration of the interrelated and conflicting water rights *inter sese*;
9) Take away the ability to administer the water rights of the United States on its own behalf and the water rights of the United States on behalf of its Indian wards as against the water rights of all non-Indian citizens of Montana residing in the affected water basins; and
10) Completely upend the object of Art. IX of the Montana Constitution and numerous laws enacted by the Montana legislature pursuant to the mandate of Art. IX.

In conclusion, the blind assertion that the ratification of the CSKT Compact would "provide for the administration of water rights pursuant to Art. IX of the Montana Constitution," is dead wrong under both federal and state water law. The conveyance of exclusive administrative authority to the Tribes under "The Law of Administration" means that the UMO (or the Law of Administration) "shall govern all water rights, whether derived from tribal, state, or federal law" and "shall control all aspects of water uses, changes of existing uses, enforcement of water right calls and all aspects of enforcement within the exterior boundaries of the Flathead Indian Reservation." In sum, the "Law of Administration" obliterates Art. IX of the Montana Constitution and all of the Montana law enacted pursuant thereto by the Montana legislature.[1] To conclude that the ratification of the CSKT Compact would "provide for the administration, control, and regulation of water rights" in Montana is completely inane.

Sincerely,



Richard A. Simms

[1] Pursuant to the "Law of Administration," "any provision of Title 85, MCA, that is inconsistent with this Law of Administration is not applicable within the Reservation."

Cc: Members of the Montana Reserved Water Rights Compact Commission
Members of the Water Policy Interim Committee
All Legislators
John Tubbs, Director of the Montana Department of Natural Resources and Conservation

Paper No. 3

January 08, 2015. Letter to Legislators Regarding the Lack of Quantification in the Proposed CSKT Compact

Prepared by Richard A. Simms

This paper discusses the substantive reduction of historic use of agricultural water in the Flathead Irrigation Project and its conversion to instream flow as an inappropriate and potentially illegal substitute for the quantification of the federal reserved water rights of the CSKT. The paper also discusses a number of tenets of federal law reserving Indian reservations and federal reserved water rights, including the fact that federal reserved water rights arise out of the federal reservation of land.

Letter from Attorney Richard A. Simms to Montana Legislators
On behalf of the Montana Land and Water Alliance, Inc.
EXECUTIVE SUMMARY

January 12, 2015

1. **The Tribes claimed and the 2013 Compact would have awarded 179,539 acre feet of water, measured at the farm turnouts, for the irrigation of 128,241.73 acres of land in the Flathead Irrigation Project. The historical duty of water in the Project was 4.7 acre feet per acre. The 2013 Compact reduced the historical duty by 3.3 acre feet per acre to 1.4 acre feet, diminishing the amount of water historically available to the irrigators on farm by 423,200 acre feet annually. This reduction in supply is carried into the new Compact.**

2. **The 2013 Compact, discussed above, would have permanently reduced the irrigators' water supply by 423,200 acre feet annually. The new Compact, released on January 7, 2015, preserves what would have been done by the 2013 Compact, but exacerbates the permanent reduction in the irrigators' water supply by 35,908 to 71,816 more acre feet annually by changing the measurement of the water delivered to the irrigators from the farm turnouts to a River Diversion Allowance.**

3. **The on-Reservation instream flows were created: 1) to provide a basis upon which to exercise Tribal control over all of the water entering the Reservation; 2) to impose numerous conservation measures on the Irrigation Project irrigators and to convert the water thus saved to Tribal instream flows; 3) to make it possible to control the "secretarial water rights" within the Irrigation Project; and 4) to make it possible to control all of the state-based, private diversions on the Reservation outside of the Irrigation Project to minimize their use of water. These four objectives are accomplished through the Tribes' on-Reservation instream flow claims, which are adopted in the Compact.**

4. **In the guise of off-reservation instream flows, the Compact would award the Tribes control over almost all of the water west of the Continental Divide in Montana, the use of which was previously under the control of the State of Montana for the beneficial use of its citizens.**

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Senator Debby Barrett, President of the Senate
Representative Austin Knudsen, Speaker of the House
All Legislators

Ladies and gentlemen:

In reaching agreement on the terms of the proposed Compact, the Tribes and the Montana Reserved Water Rights Compact Commission have tacitly agreed to transform federal reserved water rights under *Winters v. United States*, 207 U.S. 564 (1908), into Indian reserved water rights, greatly expanding the nature and scope of the permissible claims that Indian tribes can make under the Winters Doctrine.[1] An understanding of the relevant historical facts is important.

The Treaty of Hellgate created the Flathead Indian Reservation. When the Treaty was negotiated in 1855, the State of Montana did not exist. The Winters Doctrine did not exist either, and the United States had no legal basis at the time on which to claim water rights under federal law that might be held in trust for Indian tribes.

In the early 1800s, the United States was still in the process of acquiring western lands from various foreign powers. About 90% of the State of Montana became part of the public domain in the Louisiana Purchase in 1803. The northwest corner of Montana became part of the public domain of the United States by virtue of the Treaty of June 15, 1846, with Great Britain, and all of Montana became part of Washington Territory on March 2, 1853, two years ahead of the Treaty of Hellgate.

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[1] In *Winters*, the Court was confronted with a circumstance in which the United States needed water to supply a proposed irrigation project on the Ft. Belknap Indian Reservation when the Treaty creating the Reservation was silent with respect to water and the only other way to perfect a water right at the time was through Montana state law. To create a basis upon which to generate a water right under federal law, the United States Supreme Court held that **when the Unites States reserves land from the public domain for the purpose of creating an Indian Reservation, the Unites States impliedly reserved enough then unappropriated water to satisfy the purposes for which the lands were withdrawn.** The "Winters Doctrine" has been articulated in these terms by the Supreme Court ever since the doctrine was created in 1908.

In the middle 1800s, western expansion in the United States was growing rapidly. Pursuant to Art. XII of the Treaty of Hellgate, the Treaty would not become effective until its ratification by Congress in 1859, for a reason. In 1855, the President's representative, Washington Territorial Governor Isaac Stevens, negotiated the Treaty of Hellgate, in which the CSKT "hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them."[2] On March 8, 1859, Congress ratified the Treaty of Hellgate, making the Treaty effective and establishing that the Flathead Reservation was reserved from lands in the public domain by the will of the United States Congress. Prior to 1859, the Flathead Reservation did not exist, and the Tribes did not own "all the water in, on and under the Reservation."

According to the Tribes, the water rights on the Flathead Reservation were not impliedly reserved by the United States under *Winters* to satisfy the purpose for which the United States withdrew the land from the public domain. The Tribes assert that the Reservation lands were never a part of the public domain and that they created their own Reservation by virtue of their "time immemorial" occupation of the area.[3] The Tribes also assert that Art. III of the Treaty of Hellgate, which deals with access and rights of way, generates instream flow water rights. Specifically, the Tribes rely on the provision that states "the exclusive right of taking fish in all of the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . .." According to the Tribes, this language gives them instream flow rights on and off the Reservation with a "time immemorial" water right priority.

In recognizing the substance and scope of the CSKTs' Indian reserved water rights claims in the proposed Compact, the Compact Commission has agreed with the Tribes that the Tribes have always owned "all of the water in, on and under the [Flathead] Reservation." The Tribes and the Compact Commission have also agreed with the legal proposition that the Tribes reserved their own Reservation with a "time immemorial" water rights priority. The United States Supreme Court,

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[2] In Art. II of the Treaty the United States' reservation of lands from the public domain to create the Flathead Reservation was made from "the lands ceded" by the Tribes in Art. I. The lands were already a part of the public domain.

[3] As stated by Tribal Council, "the U.S. Supreme Court determined [in *Winters*] that the Tribes had reserved to themselves adequate water to satisfy the purposes for which the Reservation was created . . .." John B. Carter, "Indian Aboriginal and Reserved Water Rights, An Opportunity Lost," 64 Mont. L. Rev 377 (2003) See also the "Premise" of *CSKT v. U.S. Dept. of Interior Sec. Sarah Jewell, et al (CV-14-44-M-DLC), presently pending in federal district court: "The Tribes reserved from their aboriginal territory the Flathead Indian Reservation as their exclusive and permanent homeland pursuant to the Helllgate Treaty of July 16, 1855 (12 Stat. 975)," at ¶ 1.*

on the other hand, has never reached any of these legal conclusions in federal reserved water rights litigation, and it is highly unlikely that the Court ever will.

1) **The Tribes claimed and the 2013 Compact would have awarded 179,539 acre feet of water, measured at the farm turnouts, for the irrigation of 128,241.73 acres of land in the Flathead Irrigation Project. The historical duty of water in the Project was 4.7 acre feet per acre. The 2013 Compact reduced the historical duty by 3.3 acre feet per acre to 1.4 acre feet, diminishing the amount of water historically available to the irrigators on farm by 423,200 acre feet annually. This reduction in supply is carried into the new Compact.**

A Press Release issued by the Governor's Office on December 11, 2014, begins with the statement that "the Compact . . . protects all existing rights for stockwater, municipal, domestic, commercial, industrial and other non-irrigation uses, while respecting tribal and treaty rights." Conspicuously missing is a statement that the Compact would protect all irrigation rights. One of the possible reasons is that the Compact permanently reduces by 423,200 acre feet annually the irrigation rights appurtenant to all lands in the Flathead Irrigation Project, 90% of which are owned by non-Indian irrigators.

The Abstracts in three Appendices to the Compact quantify the Tribes' aboriginal and federal reserved water rights claims for "the Flathead *Indian* Irrigation Project."[4] Appendix 5 to the Compact contains three Abstracts, one for each division of the Irrigation Project. The Tribes' total claim for irrigation rights of 179,539 acre feet was calculated by multiplying the total acreage in each division by an allowable duty of 1.4 acre feet per acre:

District	Acres	Duty	Acre Feet
Jocko	10,604.82	1.4	14,847
Mission	13,077.87	1.4	18,309
Flathead	104,559.04	1.4	146,383
Project Total	128,241.73		179,538

[4] The "Flathead **Indian** Irrigation Project" is defined in the Compact as "the irrigation project developed by the United States to irrigate lands within the Reservation pursuant to the Act of April 23, 1904, Public Law 58-159, 33 Stat. 302 (1904), and the Act of May 29, 1908, Public Law 50-156, 35 Stat. 491 (1908)." When those Acts were passed , however, the "Flathead Irrigation Project" was a Reclamation Project. The Project was transferred to the BIA by the Secretary of the Interior in 1924. The Tribes proposed that the Compact redefine the Flathead Irrigation Project, attempting to turn it into an Indian Project, to obviate 25 U.S.C. § 463(a) of the Indian Reorganization Act of 1934 which explicitly preserved the lands and water rights developed "within any reclamation project heretofore authorized in any Indian reservation."

According to a 1938 Bureau of Indian Affairs Report, 490,859 acre feet of water were available contemporaneously to irrigate the 104,859 Project acres that were then irrigated, translating into an historical duty of water recognized by the BIA of 4.7 acre feet per acre.[5]

By reducing the historical duty of water on the Project of 4.7 acre feet per acre to 1.4 acre feet per acre, the Compact would permanently diminish the annual amount of water historically available to the irrigators by 423,220 acre feet. In addition, the Compact contains numerous provisions for the further diminution of the Project irrigation right to allow the Tribes to continue to convert the water from irrigation to instream flows, up to and including "decommissioning" the Flathead Irrigation Project. In the Water Use Agreement, annual payments made by the State of Montana for "irrigation rehabilitation and betterment" are discussed. Item 39(g) of the Agreement specifies that "in the event the annual payments described in 39(e), above, are no longer needed, **such as in the event the FIIP is decommissioned, all invested funds shall be dispersed for FIIP removal and landscape rehabilitation.**" In other words, if the reduction in the duty of water, combined with additional, mandatory conservation measures, cause the Irrigation Project to fail, the Tribes enlist the State of Montana to fund the removal of the Project works and the rehabilitation of the landscape.[6]

Because of the way in which the CSKT rights are quantified in the proposed Compact, the taking of 423,220 acre feet from the irrigators is not apparent, much less obvious to anyone diligent enough to read all 55 pages of the Compact and all 1,456 pages of the Appendices to the Compact, within which the Abstracts lie.

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[5] The Flathead Joint Board of Control, representing all of the irrigators in the Flathead Irrigation Project, has repeatedly attempted to obtain water distribution and Project diversion records from the Bureau of Reclamation and the Bureau of Indian Affairs, to no avail. In *Flathead Joint Board of Control v. United States Department of the Interior*, 309 F. Supp.2d 1217 (Mont. 2004), the Board of Control made a Freedom of Information Act request to the Bureau of Reclamation and the Bureau of Indian Affairs to obtain the same kind of information. Except for a small number of documents, their request was denied.

[6] In this regard, the Flathead Irrigation Project was designed and constructed by Reclamation to irrigate "all of the practicably irrigable acreage" on the Flathead Reservation. In *Arizona v. California*, 373 U.S. 346 (1963), the Supreme Court set the standard of "practically irrigable acreage" as a means of defining the limit on the amount of water reserved by the United States for both the present and future needs of the Indians. The Flathead Reservation is probably the only Indian Reservation in the country where the United States optimized the amount of the Winters Doctrine reserved right for the Tribes. Ironically, within three decades the Tribes walked away from their optimal federal reserved water right by the voluntary sale of individual allotments to non-Indians who now farm 90% of the land within the Irrigation Project.

The Appendices and the Abstracts have never been reviewed or explained for the Legislature.

2) **The 2013 Compact, discussed above, would have permanently reduced the irrigators' water supply by 423,200 acre feet annually. The new Compact, released on January 7, 2015, preserves what would have been done by the 2013 Compact, but exacerbates the permanent reduction in the irrigators' water supply by 35,908 to 71,816 more acre feet annually by changing the measurement of the water delivered to the irrigators from the farm turnouts to a River Diversion Allowance.**

The Flathead Irrigation Project is a large and complicated system designed to capture and divert all of the water needed to irrigate all of the practicably irrigated acreage on the Flathead Reservation. Prior to 1924, when the initial construction was completed, "Reclamation [had] constructed eight reservoirs and dams, eight diversion dams, 56 canals, and over 9,145 canal structures (bridges, culverts, pipes, and flumes). This included 863 miles of canals, 15 miles of drains, 75,957 feet of pipe, and 24 miles of roads."[7] The Project now "includes 15 reservoirs, over 1,300 miles of canal and lateral systems and approximately 10,000 minor structures" for the diversion, control, and application of the diverted water to beneficial use on individual farms or ranch properties. *Id.* at 3.

While the Project is large and complicated, the Reclamation Service strategically sited canal intakes along different stretches of the river system to divert the water from its natural course into the main canal system. Once the water is diverted into the main canal system it travels through the system and is ultimately diverted through smaller canals and laterals to the headgates of individual farms where it is turned onto farmland. Depending on the location of the individual farm turnouts and the distance the water has to be conveyed through the system, the losses that occur because of canal leakage, evapotranspiration by riparian trees and vegetation, and evaporation off the bare surface of the water, vary at individual farm turnouts. The actual water that reaches the farm turnout, however, is considerably less than the volume of water diverted at the river and stream courses.

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[7] Garrit Voggesser, "The Flathead Project," Bureau of Reclamation, 2001, at 23. After 1924, the Indian Service completed the construction of Kicking Horse Dam, Dikes, and Reservoir in 1930. The Indian Service completed the entire Flathead Irrigation Project in 1963. *Id.* at 26-27.

The new Compact would deliver the same 1.4 acre feet per acre or 179,538 acre feet as measured by a "River Diversion Allowance" as opposed to a "Farm Turnout Allowance." As a result, the losses of water between the river and stream diversions and the individual farm turnouts will have to be absorbed by the individual irrigators. This problem could have been solved by increasing the amount of water needed per acre (1.4 acre feet) to a higher number, but no adjustment was made to protect the irrigators.

The Tribes suggest that these losses could be as high at 20% to 40%.[8] Because the losses now fall on the irrigators' shoulders, the permanent annual reduction of the irrigators' water supply would increase from 423,200 acre feet by 35,908 (20%) to 71,816 (40%) acre feet more, *i.e.*, to a range from 459,108 to 495,016 acre feet annually in permanent water lost to the irrigators. Viewed in personal terms, the new Compact would reduce the average duty of water of 1.4 acre feet per acre so that individual deliveries would range from 0.84 acre feet per acre to 1.1 acre feet per acre. It is doubtful that any irrigator in the Project could get along with such a drastic reduction in annual water supply.

3) The on-Reservation instream flows were created: 1) to provide a basis upon which to exercise Tribal control over all of the water entering the Reservation; 2) to impose numerous conservation measures on the Irrigation Project irrigators and to convert the water thus saved to Tribal instream flows; 3) to make it possible to control the "secretarial water rights" within the Irrigation Project; and 4) to make it possible to control all of the state-based, private diversions on the Reservation outside of the Irrigation Project to minimize their use of water. These four objectives are accomplished through the Tribes' on-Reservation instream flow claims, which are adopted in the Compact.

To appreciate what the Tribes and the Compact Commission have done in the Compact, you have to step back and understand what it is they are trying to accomplish and exactly what Compact provisions they've crafted to get there.

The Confederated Salish and Kootenai Tribes have based their Compact negotiating position on the claim that their Tribal water rights have suffered from two principal "stresses," the first being their view that "the construction, operation

[8] Discussion by Seth Makepeace, the Tribal Hydrologist, and Wade Irion, a Tribal consultant from HKM, June 18, 2014, Helena Montana. See, also, CSKT Compact Technical Working Group, "Report of Findings," August 26, 2014.

and maintenance of the Flathead Irrigation Project "has severely degraded Tribal natural resources," and the second being their opinion that "ongoing water development [of both surface and ground water] under the State of Montana appropriation system" has "substantially diminished[ed] Reservation riparian and aquatic habitats."[9] Accordingly, **the Tribes have claimed "all [of] the water necessary to revitalize the pre-Treaty natural environment of the Reservation *and* such additional water necessary to satisfy the many purposes for which they reserved [the] Flathead Reservation as their permanent homeland."**[10] *Id.*, at 10. (*Emphasis added*).

Agreeing in principle with the Tribes' basic positions, the Compact Commission has agreed to convert ostensibly wasteful uses of Flathead Project irrigation water into instream flow rights owned by the Tribes and "to do this extraordinary thing" . . . [of] "remov[ing] non-Indian rights on the Reservation from the jurisdiction and control of the state." Comments of Chris Tweeten, Compact Commission Meeting, August 2, 2012. Based on the Tribes' claim that they own all of the surface and ground water on the Flathead Reservation and that **they should have plenary control over the administration of all of the water,** the new Compact simultaneously purports to: 1) roll into Tribal ownership any and all of the legal rights that non-Tribal irrigators have to irrigate lands in the Flathead Irrigation Project; 2) eliminate the State of Montana's constitutional mandate to administer public waters on the Flathead Reservation; and 3) take without compensation Flathead Irrigation Project water and to convert into on-Reservation instream flows with a time immemorial priority owned by the United States in trust for the Tribes.

There are three types of on-Reservation instream flows in the Compact, namely "Natural Node" flows (Appendix 10), "FIIP Instream Flows" (Appendix 11, and "Other Reservation Instream Flows" (Appendix 12). All together, it takes a total of 645 pages in the three Appendices to explain or "quantify" the instream flows. Exhibit A, attached hereto, shows the locations of the 102 Natural Node flows are in red, the 33 FIIP Instream Flows in blue, and the 49 other (non-FIP) instream flows in green so they can be referenced as they are discussed below.

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[9] CSKT Settlement Briefing Paper, July 27, 2010, at 2-3.

[10] Contrary to the Winters Doctrine, none of the federally reserved water rights claimed by the Tribes has been quantified based on an explication of the purposes for which the United States reserved the Flathead Reservation. The assertion that "a permanent homeland" was the basic purpose of the Reservation is inaccurate as a matter of historical fact, and the so-called purpose is nothing more than a meaningless generality adopted to avoid quantification of the federally reserved right on the basis of the actual purposes for which the Flathead Reservation was withdrawn from the public domain.

Initially, it should be noted that instream flow rights are conceptually different than typical water rights to divert water from a stream or river and apply it to beneficial use. Strictly speaking, instream flow rights are the antithesis of rights to divert and use water because their purpose is to preclude the diversion and use of water in order to maintain the volumes of water in a river or stream which are described as flow rates by the instream flow right. Federal reserved instream flow rights can be enforced against water rights perfected under regimes of state law only for three purposes: 1) to place a "call" on all upstream, junior water rights to force them to cease their diversions until the instream flow right is fully satisfied; 2) to preclude new uses of water under the doctrine of prior appropriation; and/or 3) to preclude transfers of prior appropriation water rights to private lands upstream of the instream flow rights. In other words, precluding the diversion of water by junior water right owners, as well as water development by new appropriations, is the only legal utility of an instream flow "water right."

a. Natural Node of "Natural Flow" Instream Flows.

The Natural Node instream flows are sometimes called the "Natural Flow" instream flows. Looking at Exhibit A, these flows (red) are located at the base of headwater streams, generally above existing water diversions and use under state law, but below all of the runoff area uninfluenced by the activities of man. The red dots are the points of administration. The "place of use" encompasses every reach of every stream that drains water to the Reservation. Looking to the east side of the Reservation, for example, these instream flow rights were designated to make it possible for the CSKT to exercise control over all of the natural runoff from the Mission Mountains that enters the Reservation. To the south, the instream flows are positioned to capture all of the natural runoff from the Rattlesnake Mountains, to the southwest all of the natural runoff from the Salish Mountains, and to the northwest all of the natural runoff from the Cabinet Mountains. In addition, points of administration are located internally on the Reservation at lower elevations of numerous mountainside stream systems.

The purpose of the Natural Node instream flows, in a nutshell, is to make it possible for the CSKT to exercise administrative protection over all "the waters in, on, and under the Reservation."[11] If the legal principles articulated by the United

[11] The volume of water that flows through each of the nodes is calculated for wet, normal, and dry years, while the instream flows are set based on the flows in wet years. This assumes that the stream flows entering the Reservation are characteristic of wet hydrologic conditions, but no provision is made in the Compact to adjust the flows in the stream system below these nodes to match the flow conditions in normal or dry years.

States Supreme Court were followed, the CSKT would not be allowed these instream flows.

b. FIIP Instream Flows.

While Art. VI of the Treaty of Hellgate contemplated the allotment of Reservation lands, the disposal of unallotted lands, and the direct sale of Reservation lands as in the Treaty with the Omahas, it wasn't until the Flathead Allotment Act of April 23, 1904, 33 Stat. 302, that Congress required the Reservation to be allotted in severalty to individual Tribal members and opened unallotted lands to settlement under the homestead and mining laws. In the Act of May 29, 1908, 35 Stat. 448, Congress amended the Flathead Allotment Act and authorized the creation of the Flathead Irrigation and Power Project to supply water to irrigate all of the irrigable land on the Reservation, whether owned by allottees, settlers, or purchasers of allotments.

Today, the Tribes describe the condition of the Irrigation Project as "deplorable" and maintain that its "construction, operation, and maintenance has severely degraded Tribal natural resources."[12] Consulting engineers for the Tribes have recommended such improvements as replacing existing turnouts with precast headgates that include flow meters, restricting livestock access to canals and laterals, the installation of automated water management equipment, the installation of fish protection structures, canal lining, canal realignment, the elimination of Spring flood flow application, and the use of new technologies, such as sprinkler instead of gravity flow irrigation.

The FIIP instream flows are flows that are theoretically calculated and made available, initially, by idealizing Irrigation Project management, operations, and efficiency and converting the "water saved" into the claimed instream flows. The first installment of saved water would come from the reduction of the duty of water on Project lands from 4.7 acre feet per acre to 1.4 acre feet, resulting in a "savings" of 423,200 acre feet annually, as was proposed in the 2013 Compact, discussed in Number 1, above.[13] The second installment would come from the new Compact through the change in the measurement of water delivered to the irrigators from the farm turnouts to a River Diversion Allowance, discussed in Number 2, above.[14] This would increase the "savings" of 423,200 acre feet annually to somewhere between 459,108 to 495,016 acre feet annually. Additional installments would

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12 Settlement Briefing Paper, July 27, 2010, at 6 and 7.

13 Pages 3-5.

14 Pages 5-6.

come from additional conservation measures imposed on the irrigators by means of rehabilitation and betterment projects idealized by computer modeling to hypothetically estimate addition water savings.

There are 32 FIIP instream flows in Appendix 11 of the Compact, twenty-one of which were quantified by the Tribes' contractor as a result of *Joint Board of Control v. United States and Confederated Salish & Kootenasi Tribes*, 832 F.2d 1127 (9th Cir. 1987), using three commonly accepted fishery methodologies to determine **minimum** instream flows, *i.e.*, the incremental instream flow methodology, the wetted perimeter methodology, and the Tenet method. The other 11 instream flows were added on top of the twenty-one interim instream flows without the use of any of these methodologies.

In the Compact, the Tribes and the Compact Commission increased the interim instream flows by 317.8% by ignoring the fact that the courts have recognized only **minimum** instream flows for fishery purposes when such flows have been recognized. The true underlying purpose of the large award of water is to give the Tribes administrative control over all of the water on the Reservation. When the 11 new instream flows were added, the Tribes and the Compact Commission increased the interim instream flows by 392%. They should have quantified the FIIP instream flows by establishing that the water is needed to satisfy the purpose for which the Reservation was created. Revitalizing "the pre-Treaty natural environment" was not one of the purposes of the Flathead Reservation.

c. The Other Reservation Instream Flows.

There are 82 instream flow rights shown on Exhibit A that were created to exercise Tribal control over the "Secretarial water rights" within the Flathead Irrigation Project (blue) and the "private water rights" outside of the Project (green).

The private water rights are located outside the Project. The Secretarial water rights are designated "non-FIIP" water rights because they are not served by the Project facilities. These rights were initially served by private ditches or springs within the Project, with some developed before the construction of the Project, and other developed contemporaneously with Project construction. The rights were identified by a Reclamation Commission created to determine how the rights should be treated. The net result was that the Secretary of the Interior recognized approximately 6,000 acres of valid, pre-Project rights that came to be

known locally as "Secretarial water rights." These are in fact state-based water rights that needed discrete protection because they are located within the Project, but are not being served by Reclamation's 93 water right filings under Montana law for the water rights to needed serve the Project.

By reference to Exhibit A, you can see the administrative points for the private rights in green and the Secretarial rights in blue. In each instance, the administration points are located below the lands served under the private and Secretarial rights and the upstream, Natural Node rights shown in red. Looking at Exhibit A, it becomes clear that the instream administration points for the private and the Secretarial rights were located where they are to enable the Tribes to exercise control over the intervening private and Secretarial rights.

These instream flow rights have no other purpose than leveraging the Tribal instream flow rights against the private and Secretarial rights in order to squeeze water out of these two kinds of state-based water rights to convert it to Tribal instream flows.

4) **In the guise of off-reservation instream flows, the Compact would award the Tribes control over almost all of the water west of the Continental Divide in Montana, the use of which was previously under the control of the State of Montana for the beneficial use of its citizens.**

In the first paragraph of their complaint in the pending federal district court action against the United States Department of the Interior and the Bureau of Indian Affairs, et al., the CSKT claim that they, as opposed to the United States, "reserved from their aboriginal territory the Flathead Indian Reservation as their exclusive and permanent homeland pursuant to the Hellgate Treaty." In ¶ 33, they state that "[u]nder Art. III [of the Treaty] the Tribes reserved their right to hunt, fish, and gather on **and off** the [Flathead Indian Reservation]." In the Compact negotiations, Art. III was the legal basis upon which the Tribes and the Compact Commission agreed to recognize off-Reservation instream flows.

Art III of the Treaty of Hellgate states: "The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; **as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . .."** (*Emphasis Added*). On its face, the right conferred by Art. III is a right of access held in common by the Tribes and the citizens of the Territory. A right owned in common is a right owned or shared equally by all members of the common group, which in this case includes

the Tribes and the non-Indian citizens of Washington Territory, who today are the non-CSKT citizens of the State of Montana. In recognizing a "time immemorial priority" for the claim of off-reservation instream flows, however, the Tribes and the Compact Commission have bifurcated the common right in Art. III, making the Tribes' portion of the right prior and paramount to the rights of the other citizens of Montana. There is absolutely no precedent for doing so, and the United States Supreme Court most certainly would not rewrite Art. III of the Treaty of Hellgate to recognize a so-called water right that would give the Tribes legal control over nearly of the water west of the Continental Divide in Montana.[15] See Exhibit B.

Art. III of the Treaty of Hellgate also conceptually limits any claim of a self-reserved Art. III water right to the Tribes' aboriginal territory. The CSKT "subsistence or ranging" area, where the Tribes have threatened to file 10,000 claims for "aboriginal" instream flows, was not part of the Treaty of Hellgate. The CSKT "aboriginal territory" was the primary area of occupancy and settlement to which the Tribes ceded, relinquished, and conveyed all right, title, and interest in exchange for the Flathead Reservation and $26,793,171.25 in cash.[16] The 12,000,000 acres they ceded lies west of the Continental Divide, and it was on these lands that Art. III of the Treaty provided access to fish at their usual and accustomed places.[17]

There is another reason fundamental to the fabric of western water law that the Supreme Court would not rewrite Art. III of the Treaty of Hellgate to give control of the public water supply to the Tribes as the Tribes and the Compact Commission have done. In *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), the Court concluded:

> We hold that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, . . . with the rights in each [state] to determine for itself to what extent the rule of appropriation or the common-law rule in respect to riparian rights should obtain. For since 'Congress cannot enforce either rule upon

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[15] According to the Tribes, they also have an Art. III right to control much of the water in eastern Montana. In this regard, the Tribes have repeatedly asserted that they will "file [over 10,000] claims for instream flows throughout their aboriginal territory" in Montana, including, in their opinion, their "subsistence territory" east of the Continental Divide. CSKT Settlement Briefing Paper, July 27, 2010. The chances of the United States Supreme Court recognizing any or all of the 10,000 claims throughout the State of Montana is close to nil.

[16] See Findings of Fact on Compromise Settlement, August 1, 1966, at 1. ICC Docket No. 61; ICC Docket # 50233, 86 Stat. 64.

[17] See Findings of Fact, August 3, 1959, Findings Nos. 17-19, ICC Docket No. 61.

> any state,' *Kansas v. Colorado*, 206 U.S. 46, 94 [1906], the full power of choice must remain with the state.'

On the basis of this law, the State of Montana rejected the common law of riparian rights and adopted instead the doctrine of prior appropriation. Pursuant to Art. IX, § 3 of the Montana Constitution, "[a]ll 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." Art. IX of the Montana Constitution applies both on and off the Flathead Reservation, though the Tribes and the Compact Commission have agreed in the Compact to "remove non-Indian rights on the Reservation from the jurisdiction and control of the state."

As explained above, the purpose or legal utility of a reserved instream flow water right is: 1) to preclude the continued use of existing of water rights perfected under state law through priority administration; 2) to prevent changes in use of existing water rights under state law; and/or 3) to preclude the development of new uses of public water under state law. Through the recognition of off-Reservation instream flows over nearly all of the off-Reservation waters draining to the Columbia River west of the Continental Divide, the Tribes would ostensibly be given the legal power to do each of the three things described above. While Art. IX of the Montana Constitution would still apply formally to the area draining to the Columbia, except on the Reservation, the significance of its application would be significantly diminished. See Exhibit B.

Conclusion

The United States Supreme Court has repeatedly held that federal reserved water rights are implied water rights that derive from the purposes for which the United States withdraws land from the public domain for a specific federal purpose. In the CSKT Compact, the basic mechanism for generating reserved rights is the use of a computer model to hypothetically idealize the management, operation, and efficiency of the Flathead Irrigation and Power Project in order to convert the water saved into 102 instream flows that portray the Flathead Reservation before man ostensibly ruined the area, all at the expense of 2,000 farmers and ranchers who use Project waters. If the goal is to kill the Flathead Irrigation Project, the Compact is a good start. The proposed Compact is not grounded, in any respect, on a Winters Doctrine reserved right that would be litigated in court.

Sincerely,

Richard A. Simms

Cc: Attorney General Tim Fox

Exhibit A: Map Locating On-Reservation Instream Flows
Exhibit B: Map Locating Off-Reservation Instream Flows

FLATHEAD RESERVATION
INSTREAM FLOW DATA

Appendix 10 FIP Natural Flows
Appendix 11 FIP Instream Flow Nodes
Appendix 12 Other Instream Flow

Historically Irrigated Acres
In or Out of FIIP Influence Area

In
Out
FIIP Canals

EXHIBIT A

CSKT Water Compact -
Off Reservation Water Rights Claims