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IN THE WATER COURTS OF THE STATE OF MONTANA
UPPER AND LOWER MISSOURI RIVER DIVISIONS
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.	Cause No. WC-92-1

ASSINIBOINE AND SIOUX TRIBES' OF THE FORT PECK RESERVATION JOINDER TO STATE'S MOTION TO DISMISS OBJECTIONS AND TO APPROVE THE FORT PECK-MONTANA COMPACT

The Assiniboine and Sioux Tribes of the Fort Peck Reservation (Tribes) join in the State's Motion to Dismiss Objections and to Approve the Fort Peck-Montana Compact for the following reasons.

The Tribes generally agree with the arguments presented by the State concerning the dismissal of the objections (State Mem. pp. 3-6). The Tribes also support approval of the Compact.[1] The Compact's fundamental fairness, reasonableness and conformity to applicable law is demonstrated by the facts that (1) the United States, Tribes and State engaged in nearly five years of intense, adversarial negotiations leading to the Compact, and (2) at the end of these negotiations in April 1985, the final Compact was ratified by both the Montana Legislature and Fort Peck Tribal Executive Board, and

[1] The Tribes do not, by joining in the State's Motion, subscribe to every word in the State's Memorandum. For example, the Tribes do not agree that their quantified water right is in any way "conditional" (State Mem. p. 10).

approved for the United States by the Attorney General and Secretary of the Interior. The course of these negotiations is fully described in the "Final Report of the Tribal Negotiating Team to Fort Peck Tribal Executive Board on Fort Peck-Montana Water Compact" dated April 19, 1985, which is attached to the Affidavit of Tribal Chairman Caleb Shields. (Exhibit 1). The Affidavit of the Tribes' expert hydrologist, Thomas Stetson (Exhibit 2), delineates how the quantification of the Tribes' water right and protection of certain existing uses were arrived at.[2/]

The Tribes agree that the Compact should be approved and join in the State's motion.

RESPECTFULLY SUBMITTED this 17th day of March, 1997.

/s/ Reid Peyton Chambers

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed a true and accurate copy of the foregoing Joinder of Assiniboine and Sioux Tribes of the Fort Peck Reservation to State's Motion to Dismiss Objections and to Approve Fort Peck-Montana Compact, postage prepaid, by U.S. mail, to the following:

Mrs. Gladys Connie Flygt
1626 Capital Avenue
Madison, WI 53705

[2/] Mr. Stetson's affidavit references a series of 27 maps he developed showing the irrigable lands on the Reservation by classification. Mr. Brown's affidavit for the State likewise references these maps. The Tribes have obtained these original maps from Mr. Stetson's office, and will present them to the Court at the hearing on the Motion so that they may be part of the Court's permanent record.

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DATED: March 17, 1997

/s/ Reid Peyton Chambers
Reid Peyton Chambers

EXHIBIT 1

COUNTY OF ROOSEVELT)
) ss
STATE OF MONTANA)

AFFIDAVIT OF CALEB SHIELDS

Caleb Shields, being duly sworn, deposes and states:

1. I am the Chairman of the Fort Peck Tribal Executive Board. I have been Chairman since November 1991. From November 1975 until 1991, when I was elected Chairman, I served as a member of the Tribal Executive Board, which is the legislative governing body of the Assiniboine and Sioux Tribes of the Fort Peck Reservation.

2. When the Tribes decided to negotiate with the State of Montana concerning possible settlement of our water rights litigation, I was appointed to the tribal negotiating team. I attended most of the negotiating sessions with the State's Reserved Water Rights Compact Commission between 1980 and 1985 when a compact was agreed upon. I became the Tribe's principal representative in the negotiations in 1984 and 1985 and personally attended all negotiating sessions in those years. When the compact was presented to the State legislature in April, 1985, I presented the Tribes' testimony in support of its ratification.

3. I have reviewed and am familiar with the attached "Final Report of Tribal Negotiating Team to Fort Peck Tribal Executive Board on Fort Peck-Montana Water Compact," dated April

Exhibit 1

19, 1985. This report was submitted to the Fort Peck Tribal Executive Board before it approved the compact, and accurately summarizes the compact and the negotiating process by which it was concluded.

Subscribed and sworn to this 19th day of June, 1996.

Caleb Shields

Caleb Shields

Notary Public

My Commission expires: 4/8/99

FINAL REPORT OF TRIBAL NEGOTIATING TEAM

TO

FORT PECK TRIBAL EXECUTIVE BOARD

ON

FORT PECK-MONTANA WATER COMPACT

April 19, 1985

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FINAL REPORT OF TRIBAL NEGOTIATING TEAM

TO

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ON

FORT PECK-MONTANA WATER COMPACT

April 19, 1985

Introduction

In the spring of 1979, all tribes in the State of Montana became embroiled in water rights litigation with the State and with private water users claiming rights under state law. This came about because the Montana legislature was considering, and ultimately passed, legislation in 1979 to subject all water rights within the State to adjudication in the state court system. This state legislation included Indian reserved rights.

Shortly before the legislation passed, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, supported by many other Montana tribes, persuaded the United States Departments of Justice and the Interior to file several cases in federal court to adjudicate all water rights on streams in Montana where Indian reserved water rights exist. After the State legislation passed, the State also sought to initiate water adjudications in its court system. For the next four years, the United States, the State and the Tribes litigated the issue of whether the cases should proceed in federal or state court. The Assiniboine and Sioux Tribes were very active in this litigation resisting state court jurisdiction all the way to the Supreme Court. However, in July 1983, the United States Supreme Court held that the federal court cases should be stayed or dismissed and the state court proceedings should go forward.

The Montana water legislation provided that the state court proceedings should be stayed on any stream system where an Indian tribe that claimed reserved rights had entered into water Compact negotiations with the State. A Commission was established by the State for the purpose of negotiating with tribes.

In 1980, the Assiniboine and Sioux Tribes of the Fort Peck Reservation served notice on this Commission that the Tribes were willing to negotiate. The Tribal Executive Board was skeptical as to whether these negotiations would be productive, but believed that efforts should be made to see if negotiations could be successful before continuing litigation.

After more than four years of negotiations, a final Compact has now been concluded. This Compact has recently been submitted for ratification to the legislature of the State of Montana. By this report, the tribal negotiating team submits the Compact to the Tribal Executive Board. The tribal negotiating team recommends ratification.

The purpose of this Report is to describe to the Tribal Executive Board completely and in detail on the proposed Compact and on the negotiations between the State and the Tribes that produced it. The Report will first review the history of the negotiations, and then summarize the essential components of the Compact by topic.

I. HISTORY OF THE NEGOTIATIONS

The first negotiating session was held on December 12, 1980, in Billings. The tribal negotiating team -- Chairman Norman Hollow and Board members Walter Clark and Caleb Shields -- attended. Reid Chambers, one of our tribal attorneys, attended this and every other meeting in the negotiations.

At this time (until his resignation at the end of the 1982 calendar year) the Chairman of the State Commission was Henry Loble. In addition to Chairman Loble, various staff and members of the State Compact Commission attended the December 12, 1980 meeting. Representatives of the United States also attended that meeting. These federal representatives changed from meeting to meeting over the four and one-half year period. There was, however, always at least one representative from the Department of the Interior at every meeting.

A transcript was kept of the December 12, 1980 meeting and of a second negotiating session, held in Poplar on the Fort Peck Reservation on September 24, 1981. By the time of this Poplar meeting, at the request of the Tribal Executive Board the United States had hired an expert engineering firm for the Tribes, Stetson Engineers of San Francisco, California.

At the Poplar meeting, the parties agreed that a schedule should be established for technical studies. These studies concerned land classification, the available water supply in each watershed and existing water uses. Since the exchange of this information was largely technical, we agreed that negotiations should proceed in a series of technical subcommittee meetings, with legal and technical representatives of each side present. Mr. Chambers and representatives of Stetson Engineers always attended these technical subcommittee meetings, as did at least one member of the tribal negotiating team and one representative of the Secretary of the Interior. The persons in attendance varied, and no written transcripts were kept of any of these technical subcommittee meetings.

A technical subcommittee meeting was held on January 22, 1982 in Los Angeles, California, which we refer to as the third meeting overall in the negotiations. A fourth meeting was held on March 18, 1982, a fifth meeting on July 20, 1982, and a sixth meeting on November 9 and 10, 1982, all in Billings. Between these meetings, our legal and technical advisors communicated frequently by telephone with their counterparts in the State. On October 15, 1982, Chairman Loble and Mr. Chambers briefed high Interior Department officials in Washington, D.C. on the progress that had been made, and asked that a policy-making official of the Department attend future meetings. Mr. David Lindgren of the Under Secretary's staff was designated by the Department as its representative.

Following the November 1982 meeting in Billings, the Tribes, the State, and the Department of the Interior believed that an agreement in principle was sufficiently close that attorneys for the Tribes, State and United States should draft a possible Compact. After a number of negotiating sessions between the attorneys, a Compact was presented to a meeting on February 9, 10 and 11, 1983 in Denver, Colorado (the seventh overall meeting in the negotiations). While no transcript was made of this meeting, it was attended by the entire tribal negotiating team, tribal attorneys Chambers and William Perry, and Mr. Stetson and his colleague, Dr. Mesghinna. Mr. Lindgren and other Interior Department officials, including Joseph Membrino, the Assistant Solicitor for Indian Water, attended, as did representatives of the United States Army Corps of Engineers and of the United States Fish and Wildlife Service. By the time of this Denver meeting, Gordon McOmber had been selected to succeed Henry Loble as chairman of the Reserved Water Rights Compact Commission. Mr. McOmber had not been a member of the Commission previously. He and several members of the Commission attended the Denver meeting.

Following the Denver meeting, it appeared that agreement had been reached and a Compact could be finalized for presentation to the 1983 Montana Legislature and the Tribal Executive Board. A draft Compact was circulated in late February. (This 1983 Compact is Appendix B to this Report). Only minor changes remained to be made.

In early March 1983, however, the State Commission abruptly advised the tribal negotiating team that it would not submit a Compact to the 1983 legislative session, and left the bargaining table to reconsider its positions. The tribal negotiating team was stunned by that event. We informed the State that the Tribes were prepared to resume negotiations at any time, but only on the basis of the substantive agreements that had been concluded and embodied in the draft 1983 Compact.[1]

In January 1984, the State Commission sent to the Tribes and the United States a new draft Compact which the Commission believed could be passed through the legislature. The tribal negotiating team rejected this draft Compact out of hand as containing substantial deviations from the terms of the 1983 Compact and refused to negotiate on the basis of the State proposal.

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[1] Copies of letters exchanged between Chairman Hollow and Compact Commission Chairman McOmber concerning the State's refusal to continue negotiations are contained as Appendix E.

Ultimately, the State and the Tribes did agree to hold a negotiating session in Billings, Montana on November 13 and 14, 1984 (the eighth overall meeting). To avoid any possible misunderstanding, the Tribes insisted that a written transcript[2] be kept of this and all subsequent meetings. This meeting (and all subsequent negotiations) were attended by representatives of the Governor, Attorney General and State Department of Natural Resources. The Tribes insisted that representatives of these offices be present at all future meetings, because we believed that the State's withdrawal in 1983 from negotiations had been caused in large part by these officials and agencies. (Tr. Nov. 13, 1984, pp. 98-100).

The Tribes were represented at the Billings November 13 and 14 meeting by Chairman Hollow, Board members Shields and Bemer, Mr. Chambers and Mr. Stetson. The Compact Commission Chairman, Mr. McOmber, began the November 13 meeting by apologizing to the Tribes for the breakdown of the negotiations in 1983. He conceded that the Commission had erred by failing to clear the proposed Compact it had agreed to with all state agencies, and said this had caused the breakdown in negotiations. (Tr. Nov. 13, 1984, pp. 3-4).

Chairman Hollow replied that he and the tribal negotiating team had spent a great deal of time on the earlier negotiations. Chairman Hollow stated that the negotiating team had supported the Compact proposed in 1983 because we were convinced that it was in the best interests of the Tribes. The Chairman pointed out that the Commission's abrupt withdrawal from the negotiations had subjected the tribal negotiating team to unwarranted criticism. Chairman Hollow agreed to continue negotiations, but only on the basis that the essential elements of the earlier agreement favorable to the Tribes would not be reduced in value. Chairman Hollow warned the Commission that the Tribes were also certainly prepared to litigate if the Commission did not make reasonable efforts to resolve the matter. (Tr. Nov. 13, 1984, pp. 7-9).

As the Billings meeting proceeded, the State amended and explained many of its positions, so that it appeared that an agreement along the lines of the concepts agreed to in 1983 might be possible. The negotiating team agreed to meet with the State again early in 1985, after the Christmas holiday.

This session, and two others that followed it, were held in Helena, so that state legislative and executive officials could attend during the 1985 legislative session.

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[2] In describing some of the Compact provisions in this Report, we will refer to the various transcripts.

These sessions as well were attended by Mr. Shields, tribal attorney Chambers, and tribal engineer Stetson. The State was represented chiefly by Chairman Gordon McOmber, and by the new chief Commission negotiator, Urban Roth. The Interior and Justice Departments sent representatives to every meeting in Helena, as did the United States Army Corps of Engineers. The Interior Department's Assistant Solicitor, Joseph Membrino attended every meeting in 1985 as the Secretary's personal representative.

The first meeting in 1985 (the ninth meeting overall) was, as noted, held in Helena on January 8 and 9. A subsequent meeting was held in Helena on January 28 and 29, 1985 (the tenth meeting). The final formal meeting between the parties took place in Helena on February 27 and 28, 1985 (the eleventh meeting). At these meetings, agreement in principle was reached on all major points.

During February, drafts of a potential Compact were circulated between the parties. During and after the February 28, 1985 meeting, the parties continued with their efforts to reduce this agreement in principle to a mutually agreeable written Compact. This required one further informal negotiating session the night of March 18 and the morning of March 19 in Billings, where Mr. Chambers and Mr. Stetson met with Mr. McOmber, Mr. Roth, and other representatives of the State. No Interior Department representative was present at this session, but Mr. Membrino was advised of the issues being discussed by telephone. At length, final Compact language was agreed upon in early April 1985. It is now ready to be presented to the Tribal Executive Board for ratification. It is Appendix A to this Report.

II. PROVISIONS OF THE COMPACT

The four essential components of the Compact are as follows:

(1) The quantity of water reserved for the Assiniboine and Sioux Tribes;

(2) Recognition that the Tribes have authority to market water outside the boundaries of their Reservation without complying with state water law;

(3) Protection of all existing tribal uses of water and certain existing state law rights to water on tributaries to the Missouri River, and of all present and any future state rights on the Milk River.

(4) Provisions concerning tribal administration of water rights reserved to the Tribes, and resolution of disputes between the Tribes and tribal water users, on the one hand, and the State and state water users, on the other hand.

In addition, there are provisions dealing with the use of ground water, with tribal instream flows, with the finality, ratification and binding effect of the Compact, with relinquishment and reservation of other rights and with enacting further legislation. We report below, by topic, on these provisions. In general, they lend themselves to an Article-by-Article analysis of the Compact, beginning with Article III.[3]

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[3] Article I is an introductory statement of general purposes. The first purpose of the Compact is to determine finally and forever all federal reserved rights of the Tribes to the use of water. Another purpose of the Compact is to settle the existing litigation, both in federal and state court, as it relates to the Tribes' water rights. The pending state court litigation will determine the water rights of all non-Indians. But the Tribes' water rights as established in the Compact would be final and conclusive in all court proceedings. A final purpose is to remove causes of future controversy over water rights.

Article II is a series of 28 definitions. Where relevant to the discussion of a topic in this Report, these specific definitions are discussed in the text or referenced by a footnote.

A. QUANTITY AND BASIC USES OF THE TRIBAL WATER RIGHT

(Article III, Sections A,B,C,D, H and I)

(1) Summary of Compact Provisions

The Tribes' reserved water rights are determined finally and forever by this Compact. They are referred to throughout the Compact as "the Tribal Water Right."[4]

The annual quantity of this Tribal Water Right "is the lesser of (i) 1,050,472 acre-feet of diversions or (ii) the quantity necessary to supply a consumptive use of 525,236 acre-feet."[5] The priority date of the Tribal Water Right is May 1, 1888,[6] the date that the Fort Peck Reservation was established by statute. This priority date attaches to all exercises of the Tribal Water Right. Section A provides that this right is held in trust by the United States for the benefit of the Tribes.

Section A of Article III contains one limit on the quantity of the Tribes' water right. Total diversions from surface water are limited to 950,000 acre-feet, and consumptive uses to 475,000 acre-feet, per year. Whenever annual surface water diversions reach 950,000 acre-feet, the balance of the Tribes' right, or 100,472 acre-feet per year, must be diverted from ground water. The Tribes have the right to divert ground water as well as surface water under the Compact; we discuss use of ground water separately below, see pp. 44-47.

Article III B, which establishes who may use the Tribal Water Right, is discussed at pp. 10-11, infra.

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[4] This term is defined in Article II(25) as the right to divert and use water as confirmed by Article III.

[5] Article III A.

[6] This priority date was discussed and tentatively agreed upon as early as December 1980. (Tr. December 12, 1980, p. 661. See also Tr. September 24, 1981, pp. 26, 28.) Since it is earlier than any state law priority date in the area, the tribal negotiating team did not insist on an earlier 1873 executive order or aboriginal date. There would be no practical difference between these and an 1888 date.

When water is used for an industrial or non-irrigation purpose, the amount of water actually consumed can be measured.[7] This cannot be done for irrigation uses. The Tribes and State agreed in Section C of Article III on a consumptive use for irrigation which would be conclusively established by Section C of Article III: [8]1.8 acre-feet per acre per year for full service irrigation[8] and 0.[9]48 acre-feet per acre per year for partial service irrigation.[9] Thus, if 100,000 acres are actually in full service irrigation by tribal water users in a particular year, the consumptive use is conclusively deemed to be 180,000 acre-feet for that year. No measurement of actual consumptive use is made for irrigation uses. (An identical formula is provided for users of rights established under state law by Article IV B (3).)[10]

Article III D provides that the Tribes can put water to use for <u>any</u> purpose on the Reservation, without regard to whether that use is beneficial under state law and without observing any other state law restrictions, so long as the use of water on the reservation is not wasteful.[11] Water can be freely shifted within the Reservation from one purpose to another, such as from irrigation to industrial or mineral development, or recreation.[12] Uses outside the Reservation

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[7]Such consumptive use is defined by Article II(5). Its measurement is "the quantity of water diverted less the quantity of reusable return flow within the State." Reusable is also defined by Article II(22).

[8]This term is defined by Article II (11).

[9]This term is defined by Article II (17).

[10]If reservoirs are constructed in the future for conservation storage, evaporation is counted as a consumptive use in the manner set forth in Article II(4). The evaporation from any reservoir presently in operation is not counted. (Tr. Feb. 27, 1985, pp. 52-56).

[11]E.g., Tr. Sept. 24, 1981, p. 32; Tr. Feb. 27, 1985, p. 61. The term "wasteful" is defined in Article II (28) as "the unreasonable loss of water through the design or negligent operation of a diversion or of a water distribution facility."

[12]E.g., Tr. Sept. 24, 1981, pp. 29-32.

must be "beneficial" as that term is defined by valid state law. We discuss this provision in the off-Reservation water marketing section of this Report, pp. 18-28, infra.

Article III H provides that the Tribal Water Right is not abandoned or forfeited by non-use. This is a standard characteristic of federal reserved rights, but not of rights established pursuant to state law.

Section I of Article III provides (in paragraph 1) that the Tribes can divert[13] water from any surface water source within the Reservation except for surface water from the mainstem of the Milk River. Paragraph 1 also confirms the Tribes' rights to divert water from any ground water source on the Reservation. But paragraphs 2 and 3 of Section I provide that the Tribes cannot divert ground water outside the Reservation for use within the Reservation, or market ground water off the Reservation.[14]

Article III B deals with persons who may use the Tribal Water Right. Their uses shall count as part of the ceiling amounts authorized for diversions and consumptive uses. Under Section B, the following uses of water are part of the Tribal Water Right: (1) uses by the Tribes, (2) uses by Indians[15] on the Reservation, (3) uses by non-Indian

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[13]Diversion is defined in Article II (7). It includes removal of ground water from its location by means of a "pump", "well" or "other" "structure or device." The 1983 Compact had defined domestic use as including "production" of water. This was sticken in the present definition as redundant, since ground water as well as surface water is diverted.

[14]Uses of ground water are discussed in pp. 44-47, infra.

[15]The term "Indian" is defined more broadly than just enrolled tribal members. It includes members of other federally recognized tribes and persons recognized by the Secretary of the Interior as eligible to hold trust or restricted property on the Reservation. Article II(13). This definition was supplied by tribal attorney Chambers in response to the State's request for a definition of the term "Indian." Letter to Marcia Rundle, February 1, 1985. This letter is Appendix C to this Report.

successors-in-interest to Indian allottees[16] on the Reservation, (4) uses by persons within the Fort Peck Irrigation Project,[17] (5) uses by persons authorized to use waters by the Tribes by a water marketing or deferral agreement; and (6) uses by any other person on the Reservation for whom the United States holds water in trust.[18]

These uses of course cannot exceed the amount of water the Tribes are authorized to use under the Compact. And, as we discuss below,[19] except for uses of water within the Fort Peck Irrigation Project or by non-Indians on the various tributaries of the Missouri River with whom the Tribes execute "deferral" agreements, the Tribes are authorized by the Compact to administer the uses of water by these persons and have final and exclusive jurisdiction to resolve any water disputes between these persons.

(2) Background

Quantification of the Tribal Water Right: The quantity of water constituting the Tribal Water Right was established in the following fashion. At the first meeting in December 1980, the State agreed that the Winters Doctrine "is a fact of life," and proposed to study and analyze the factors in the Ten Year Plan formulated by the President's Water Policy Committee (attached to the Report as Appendix D). (Tr. Dec. 12,

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[16]Some non-Indian successors-in-interest to Indian allottees claim a federal reserved right to use water. The Compact provides that the state water courts shall not determine any such claim, Article X A(2), and that the Tribes will decide and administer all such claims. Article VI B(1).

[17]The Fort Peck Irrigation Project is defined in Article II(9) as "those irrigation systems and works constructed pursuant to the Act of May 30, 1908, 35 Stat. 558, and all lands receiving water from such systems and works."

[18]Some of these persons have rights established pursuant to state law. These uses count as part of the Tribal Water Right, and Article V C provides that the State shall not hereafter administer them or issue any new rights to such persons on the Reservation until and unless the Tribal Water Right is fully exercised.

[19]pp. 35-44, infra.

1980, pp. 8, 30-33).[20] The Tribes and State agreed to go through each of the factors enumerated in the Ten Year Plan, and identify the factors (such as climate) that could be agreed upon and those (such as practicably irrigable acreage) requiring technical study (Tr. Dec. 12, 1980, pp. 66-69). A highly capable engineering firm with experience in Indian and other water cases, Stetson Engineers, was retained by the United States to assist the Tribes. At the negotiating session in Poplar on September 24, 1981, Mr. Stetson outlined the technical studies his firm would make "over the next few months."

> "[W]e are also going over those Soil Conservation Service and BIA data for the four counties.
>
> "We have obtained the aerial photos on which they map that; we've made copies of those, and we are now interpreting those, and we will be planimetering from those the irrigable acreage.
>
> "We will also be looking at the surface water hydrology. We are compiling the data on the surface water measurements that are available, and we will be looking into the ground water from the point of view of

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[20] Chairman Loble stated:

> "[W]e have suggested to some of the other tribes that preparation for negotiations might possibly follow the ten-year plan of the President's Water Policy Committee,....
>
> I was struck when I read the report of the Water Policy Committee on Indian reserved rights with the way it was laid out and the manner in which you go about trying to make a determination of what those rights might be and the investigation and analysis necessary to provide a basis upon which you would proceed to finally negotiate your rights, and I think it's applicable here. It may be expensive to get all those facts together, but there's some indication in there that federal help might be obtained." (Tr. Dec. 12, 1980, p. 8.)

> whatever data are available in the way of ground water in the general area. We will probably, as we move along and determine irrigable acreage and the potential sources of water supply for those areas, we will then probably develop some conceptualized plans. That would be three or four months down the line. We've got to get the other work done first. And as to where we would make the diversions, where the canals would be located, where the booster pumps would be, what types of irrigation we would use in the various fields, what types of crops. We will be going through the determination of the net water requirements, consumptive use, deficiencies, diversion requirements, all that type of information as we move along.
>
> "So I would say that within the next three or four months we will have a fairly general handle on what kind of acreage we are talking about, how many acres of irrigable land, how it could be developed, what methods of irrigation, what types of crops can be grown, and that sort of thing, and have some preliminary figures on quantification." (Tr. Sept. 24, 1981, pp. 42-43).

The State experts agreed to do their own land classification (id., pp. 45-46), and that both the tribal and state experts would exchange standards being used for analysis and interpretation (id., pp. 48-50). It was agreed that soils studies and land classifications and water supply studies would be completed by February, 1982. By March 1982, the State agreed to identify all existing uses on the tributary streams (except the mainstem of the Milk River). (Tr. Sept. 24, 1981, pp. 73-74, 78-83, 88-91.)

Stetson Engineers carefully studied all existing data for all lands on the Reservation. After several months of study, Stetson Engineers determined that 501,755 acres -- nearly one-quarter of the Reservation -- could feasibly be irrigated out of the Missouri River. In making that determination, Stetson Engineers analyzed the Soil Conservation Service data for all lands on the Reservation. They identified all irrigable lands, and planimetered them to determine acreages. Irrigable lands were classified in Classes II, III and IV. There were no Class I lands and only 19,870 acres were Class IV. Climate was carefully analyzed. This entire analysis was presented to the tribal negotiating team, and

thereafter to the Commission at the January 20, 1982 technical subcommittee meeting in Los Angeles, California. The lands determined to be irrigable by Stetson Engineers were shown on a series of 27 maps prepared by them.

By the March 1982 Billings meeting, the State's experts had reviewed Mr. Stetson's analysis, and completed their own review of Reservation lands. The State used the "prime and important" land classification of the Soil Conservation Service and agreed that 487,763 acres on the Reservation were irrigable from the Missouri River. The State decided that their studies verified the irrigable acreage determined by Stetson Engineers, and ultimately accepted the Stetson acreage determination. Both Stetson Engineers and the State experts considered that a 300-foot elevation above the Missouri River would be an economically feasible service area. Therefore, the lands that were analyzed were those below the 2,300 foot contour.[21] That covers about half the lands on the Reservation, including almost all reservation lands in the Poplar and Big Muddy watersheds.

Some of these irrigable acres on the Reservation are owned today by non-Indians. 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 Indians[22] or are within the Fort Peck Irrigation Project. The

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[21]This was originally proposed by Stetson Engineers as an economically feasible service area and accepted by the State.

Stetson Engineers also classified lands above the 2,300 foot contour, as did the State, but ultimately concluded that water could not economically be provided to these lands from the Missouri River. The Tribes can use the Tribal Water Right to irrigate these lands above 2,300 feet, and cut off new non-Indian uses to do so, but the most likely sources of water would be ground water or stored surface water. Storage would likely be expensive. See discussion, p. 34.

[22]As noted, "Indians" is defined in Article III(13) of the Compact to include (1) enrolled members of the Fort Peck Tribes, (2) any member of a federally recognized tribe, and (3) any person who holds or is recognized by the Interior Department as eligible to hold trust or restricted property on the Reservation.

Tribes' water right was calculated by considering only these acres presently in Indian ownership.[23]

At the November 1982 Billings meeting the parties agreed to an average water duty of 3.6 acre-feet per acre. This resulted in the annual diversion figure of 1,050,472 acre-feet. Consumptive use for irrigation was calculated to be 1.8 acre-feet per acre for full service irrigation, because a 50 percent average efficiency was agreed to.[24] The Tribal Water Right in Section A is thus stated alternatively in terms of diversions and consumptive uses, whichever is less.

Places of diversion: Early in the negotiations, the Tribes agreed to emphasize diversion of water out of the Missouri River. They finally agreed not to divert surface water from the mainstem of the Milk River (see, e.g., Tr. Sept. 24, 1981, pp. 40, 56), because Stetson Engineers advised the tribal negotiating team that most if not all Indian lands that

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[23]The 1,050,472 acre-foot ceiling on diversions in the Compact is a firm quantification of the Tribal Water Right. In 1983, the State had agreed that the quantity of the Tribes' water rights should increase if Indian ownership of irrigable land on the Reservation increases, and decrease if it decreases. Article III A of the 1983 Compact thus used the entire 501,755 acres as a maximum irrigable land base, but provided that the Tribes could only irrigate lands in Indian ownership or within the Fort Peck Irrigation Project at a given time, and set out a procedure for periodic determination of those lands. In 1984, the State proposed a firm quantification (Tr. Nov. 13-14, 1984 at 139; Memorandum No. 251-84 from Sonosky, Chambers, Sachse & Guido, dated November 15, 1984, and enclosed in Appendix G), and after negotiation (e.g., id. Tr. 140-143), the tribal negotiating team agreed.

[24]In measuring diversions and consumptive uses, agreement was reached at the February 27, 1985 meeting on how evaporation from storage reservoirs constructed for conservation (carry-over) storages would be measured. (Tr. 52-56). Net evaporation from a reservoir built in the future for "conservation (carry-over) storage" will be counted as a consumptive use of water to the extent that such evaporation loss exceeds the consumptive use that occurred in the reservoir area before construction of the reservoir. Evaporation of a reservoir built for "regulatory storage" as part of a distribution system is not. These terms are defined in Article II (4) and (20). Impoundment of water in an on-stream reservoir counts as a diversion, measured as provided in Article II (7).

could receive water from the Milk River can be served from the Missouri. The Missouri River has a far more dependable supply of water during the growing season, and its quality is much superior to that of the Milk River as it enters the Reservation. The Wiota Unit of the Fort Peck Irrigation Project historically diverted from the Milk River, but has substituted Missouri River water for those diversions. One ground water diversion by an Indian near the confluence of the Milk River and Porcupine Creek is protected by the Compact. Article IV A(1)(d).

The Tribes can also divert from any tributary surface water source (other than the mainstem of the Milk River) and from any ground water source on the Reservation. However, unlike diversions from the mainstem of the Missouri River, these diversions are subject to a protection of existing Indian and non-Indian tributary surface and ground water diversions (contained in Article IV and described pp. 28-35). In addition, the Tribes can divert surface water outside the Reservation for use on the Reservation or for water marketing. See pp. 17-25.

(3) Benefits to the Tribes

The Compact's provision of over 1,050,000 acre-feet in diversion as the Tribal Water Right is vastly larger than any amount of water ever confirmed to an Indian tribe.

To give some idea of the size of the Tribes' water right confirmed in the Compact, we offer the following comparisons. The entire flow of the Missouri River at Culbertson, Montana, just east of the Reservation, averages about 7 million acre-feet a year. The flow in drought years of the 1930s was around 4 million acre-feet a year. Moreover, since the Tribes' rights to the Missouri River are recognized in the Compact as prior and paramount to any use under state law beginning after 1888, in years of shortage the Tribes' right from the Missouri River would get satisfied first. Since present consumptive uses of the Missouri River in Montana are well under 2 million acre-feet, no shortage is likely at present or in the foreseeable future. But if water development continues, or Congress or the courts or the states of the Missouri River Basin agree to "apportion" the Missouri River among all the states of the Basin, Montana's share could become fully used and the Tribes' right could then become very valuable, either to use on the Reservation or to market outside the Reservation.

In one Supreme Court case, five tribes along the Colorado River in Arizona and California were decreed the right to divert about 900,000 acre-feet, all together. The trial court decision in the recent Wyoming case involving the Wind River Reservation, which is about the same size as Fort Peck,

adjudicates a reserved water right of slightly less than 500,000 acre-feet for those tribes to irrigate just over 100,000 acres of land.

The Tribes' water right is also much larger than any existing Indian water projects. For example, the Navajo Irrigation Project can divert about 370,000 acre-feet to irrigate 110,000 acres (although the Navajo Tribe may have additional water rights). Each reservation's situation is, of course, different. But by any measurement the right to divert 1,050,000 acre-feet to irrigate nearly 300,000 acres is, we concluded, a very, very large right.

Most importantly, the 291,798 acres were determined irrigable by Stetson Engineers, the Tribes' experts. These include essentially all irrigable lands within several miles of the Missouri River, and all irrigable lands in the watershed of the Big Muddy Creek on the Reservation, as well as most irrigable lands within the watershed of the Poplar River on the Reservation.

B. WATER MARKETING AUTHORITY

(Article III, Sections K,D,E,F,G,I & J)

(1) Summary of Compact Provisions

Discussion of the marketing authority provided in the Compact most logically begins with Article III, Section K. Paragraph 1 of that Section authorizes the Tribes to transfer the right to use water "within or outside the Reservation" to the extent authorized by federal law.

No other provision of the Compact restricts marketing within the Reservation, other than general requirements such as that the use not be "wasteful", Art. III D, and the overall quantity limitations. Marketing on the Reservation is thus free from state regulatory or administrative control.[25]

However, Paragraph 1 of Section K strictly prohibits permanent alienation of any part of the Tribal Water Right, either on or off the Reservation. Any transfers may therefore be only for a term not to exceed 50 years. No sale of the water right or any portion of the water right can ever be made by the Tribes.

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[25]The State agreed that the Tribes could do whatever water marketing they wished on the Reservation if the diversions were made within the Reservation. (Tr. Jan. 9, 1985, pp. 128-129; Tr. Jan. 28, 1985, pp. 62-63.).

The other limitations on water marketing authority in the Compact apply only to off-reservation diversions or uses. There are eight basic limitations, and we describe them in the following pages.

First, paragraph 2 of Section K requires the Tribes to give the State at least 180 days advance written notice of any proposed transfers[26] 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.[27] Paragraph 3 of this section imposes an identical obligation on the State with respect to a State transfer of water used or diverted from Fort Peck Reservoir or from the Missouri River below Fort Peck Dam.[28]

Second, paragraphs 5 and 6 of Section 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. (Amounts marketed by the Tribe are not counted as part of the amounts authorized by State law).[29]

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[26]A transfer is broadly defined in Article II(24) to mean "any authorization for the delivery or use of water," including any "joint venture, service contract, lease, sale [or] exchange."

[27]The State must decide whether to accept the opportunity within 180 days after it is offered. The Tribes are required to give the State a reasonable amount of time to secure approval of its participation under state law, but are not required to allow unreasonable delays in either the administrative process or any resulting litigation.

[28]The partnership is to be "substantially equal." The parties are given some latitude, within that framework, to negotiate exact terms and conditions. The Tribes and the State are expected, however, to assume substantially equal obligations (e.g., contribute equal amounts of water to the marketing project), and receive substantially equal benefits.

[29]These basic quantity limitations were agreed to at the

(Footnote Continued)

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. So if the State in the future absolutely prohibited water marketing by itself and any of its water users, the Tribes could market subject to any limitations on tribal water marketing imposed by federal law. But in no event would the Tribes be allowed to market less than 50,000 acre-feet per year.

Third, Section D of Article III provides that outside the Reservation, the Tribes can market water for any purpose that is beneficial as that term "is defined by valid state law" on the date the Tribes propose to market the water. 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 nonbeneficial under state law. For example, state law has excluded coal slurry pipelines as a beneficial use. However, the State would have to ban similar uses by all its citizens as well as by the Tribes. It could not discriminate against the Tribes.[30]

Fourth, Section E 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.[31]

(Footnote Continued)
February 28, 1985 Helena meeting (Tr. Feb. 28, 1985, pp. 24-34).

[30]Also, the State could not ban a proposed tribal use by making its definition of what constitutes a beneficial use more restrictive after the Tribes give notice of a proposed transfer.

[31]The Section provides that the user must apply for and obtain any authorization required by state law prior to making
(Footnote Continued)

Fifth, the limitations on monthly diversions that the Tribes may make from the Missouri River in Section F impose a constraint on diversion of water for marketing outside the Reservation (as well as for on-reservation uses such as irrigation). The lowest monthly limits, however, are 40,000 acre-feet per month, and these are in the winter months. Consequently, a consistent year-round municipal and industrial marketing program would not reach these diversion limits until it diverted 480,000 acre-feet per year. The monthly limits are much larger in the spring and summer to accommodate probable irrigation in addition to municipal and industrial marketing. For example, a diversion of 215,000 acre-feet is authorized for July. Thus, assuming the overall annual consumptive use ceiling was not exceeded, for example, the Tribes could divert 40,000 acre-feet in July for municipal and industrial marketing and 175,000 acre-feet for irrigation.[32]

Sixth, under Section G 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. Montana law has prohibited "exports" of water, but this law may be changed in the future. There is also some question as to whether this state law is invalid because it conflicts with the commerce clause of the United States Constitution. (Tr. Nov. 13-14, 1984, p. 32.)

Seventh, Section 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

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(Footnote Continued)
a diversion or use. The last phrase of the section provides that once authorization has been obtained, the diversion or use may then be made unless it has been found unlawful by a court having jurisdiction over the parties and subject matter.

Under existing law, non-Indian companies or even Tribes must comply generally with state law outside the Reservation. E.g., Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Tr. Nov. 14, 1984, pp. 131-133. State law cannot, however, regulate the use of a trust resource. Id. For that reason, state water laws do not apply to the use of the reserved water right under the Compact.

[32]The Tribes must report the amount of actual annual Missouri River diversions to the United States Army Corps of Engineers. These diversions may be made without making any payment to the United States.

mainstem of the Missouri River from Fort Peck Reservoir or downstream.

This paragraph and paragraph 3 of Section J of Article III provide that diversions from the mainstem of the Missouri River can also be made upstream from Fort Peck Reservoir. These, however, must comply with all state laws,[33] and secure consent of the State legislature.

The Tribes can also authorize persons who have rights under state law to divert and use surface water outside the Reservation from the tributaries other than the Milk River that cross the Reservation by entering into "deferral agreements" with them.[34] Deferral agreements are somewhat different from water marketing agreements on the mainstem of the Missouri River. Through these deferral agreements, the Tribes could agree to accept compensation for subordinating the Tribes' rights to the person making the diversion for a term of years. No ground water can be diverted for marketing outside the Reservation or be the subject of a deferral agreement. Unlike Missouri River water marketing, the person making the agreement with the Tribes would have to comply with state water laws as well as the terms of the agreement with the Tribes.

Eighth, while diversions from Fort Peck Reservoir or downstream from Fort Peck Dam do not have to comply with state regulatory and administrative requirements,[35] the Tribes are required by paragraph 1 of Section J[36] 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;

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[33] Also, in the area of the Missouri River above the Reservoir, the Tribes would have to give prior notice to the operators of the nearest dams -- probably either the United States Army Corps of Engineers or the Montana Power Company.

[34] Article III K(4).

[35] See, e.g., Tr. Feb. 28, 1985, pp. 15-16 (remarks of Mr. Roth).

[36] The requirements of this paragraph also apply to diversions from the mainstem of the Missouri River and Fort Peck Reservoir outside the Reservation for use within it.

(2) the means of diversion and construction and operation of any diversion works outside the Reservation are adequate;

(3) the diversion will not adversely affect any federal or state water right[37] actually in use at the time notice is given[38] unless the owner consents;

(4) that the proposed use does not cause any unreasonable significant environmental impact;[39]

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[37]In testing whether an existing right is adversely affected, paragraph 4 of Section J treats the right to be transferred as having certain characteristics - an 1888 priority date, a point of diversion, a purpose of use and a consumptive use. It also provides that the right has not been adandoned or forfeited.

For rights actually in use at the time of transfer, these characteristics are the existing point of diversion, purpose of use and consumptive use. If the right is not actually in use, the point of diversion is the point at which the water would first flow on or adjacent to the Reservation, the purpose of use is irrigation, and the consumptive use is 1.8 acre-feet per acre. The paragraph provides that deeming the purpose of use as irrigation is not intended to constrict its being marketed. It is simply an administrative convenience. The State believed that some use must be specified, and irrigation was selected because, as discussed pp. 11-15, supra, the entire Tribal Water Right was quantified as an irrigation use. But although an actual irrigation use would have a period of use in the growing season only, the paragraph makes it clear that the use can be freely transferred to another purpose without restriction.

[38]At the request of the State, a provision was added at the end of paragraph 1 to the effect that if consent of the owner is given, that shall not exempt the owner from any provisions of state law. For example, if at the time consent is given, state law requires an owner of a state water right to use his water, that requirement would be preserved under the Compact.

[39]Any adverse impact of the use must be shown to be both unreasonable and significant before this standard is transgressed. The tribal negotiating team therefore agreed to

(Footnote Continued)

(5) that 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;[40]

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

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

The State wished to impose these and additional standards on tribal water marketing outside the Reservation because similar standards are contained in state law. The tribal negotiating team pointed out that state law may well become more liberal in the future, and resisted any state law restrictions on the Tribes' federally protected right to market water. In the end, the tribal negotiating team agreed to the

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(Footnote Continued)
its inclusion in the Compact as adding little if anything to settled law. For example, a transfer of water that significantly adversely affects the environment may already be subject to federal law constraints, such as the National Environmental Policy Act, 42 U.S.C. 4321 et seq.; see Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).

[40]The tribal negotiating team pointed out to the Commission in March 1985 when this provision was circulated by the Commission, that the Compact's legal exclusion of lower-quality ground water from the Tribes' marketing authority meant that the only source legally available to the Tribes was the Missouri River, a relatively high quality source. The tribal negotiating team thus suggested that this provision be deleted as inapplicable. The Commission agreed that the provision certainly would not be read to bar tribal marketing in the Missouri River mainstem, but was nonetheless desired by the Commission because of a facially similar provision in the State's water marketing legislation. Since the mainstem Missouri River is the only source "legally available" to the Tribes for any proposed use served by water marketing, there will not be any circumstances where this provision could operate in practice to restrict marketing.

restrictions in paragraph J(1) described above, but not to broader ones sought by the State,[41] because the tribal negotiating team concluded that the above requirements could be easily satisfied for diversions out of the mainstem of the Missouri River in Fort Peck Reservoir or downstream. For example, it is extremely unlikely -- given the amount of water in the mainstem -- that a diversion could adversely affect existing users at the time it is made, impair Missouri River water quality, create saline seep, or the like. It was important to the State that criteria similar to those in state statutes appear to be mirrored in the Compact, and so long as these criteria could be easily satisfied by mainstem Missouri River diversions, the tribal negotiating team acceded to them.

Paragraph 2 of Section J authorizes legal challenge to a proposed diversion only within 30 days after expiration of the notice given the State by the Tribes,[42] in a court of competent jurisdiction,[43] and by the State or a person whose rights are adversely affected by the diversion or use proposed. If a court case is brought, the Tribes agree under the Compact to assume the burden of going forward and of proving by a preponderance of the evidence that the notice was sufficient to show the above five items. The tribal negotiating team believes this is a satisfactory burden to meet, since the planning phase of any marketing opportunity should consider these factors and the Tribes must show compliance with them

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[41] For example, the tribal negotiating team successfully resisted proposals by the State that diversions not interfere with "projected" demands on the state water supply, that a diversion should be "reasonable" or produce "benefits for the State."

[42] This notice must be given at least 180 days prior to the diversion. Thus, if notice is given more than 210 days prior to the diversion, which should be done if the marketing is carefully planned, litigation must be brought in advance of the diversion. If possible, notice should be given as soon as practicable so that any litigation can be finished or well on the way to decision before a proposed diversion is scheduled to commence.

[43] This term is defined as a state or federal district court having jurisdiction over the subject matter and parties, or a tribal court having such jurisdiction if all parties consent. Article II (6). The tribal negotiating team did not concede that state courts have jurisdiction over the subject matter, where Indian reserved water rights are involved.

only by presenting evidence more persuasive than is presented by any challenger. Any challenge to proposed tribal water marketing must proceed in court and not before any state administrative tribunal.

The legal authority for tribal water marketing implicates federal law as well as the Compact. The Indian Trade and Intercourse Act, 25 U.S.C. 177, bars conveyances of Indian resources without congressional authorization. Congress has authorized tribes and allottees to lease natural resources, which include water, when leasing trust or restricted land, 25 U.S.C. 415. In addition, some tribes have entered into water marketing agreements of various sorts, and where challenged these agreements have been sustained. United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956). To be safe, however, the tribal negotiating team decided to seek specific congressional authorization of the Tribes' water marketing authority. In Article XII, the Tribes and the State agree to petition Congress to enact legislation patterned after the Indian Mineral Development Act of 1982, 25 U.S.C. 2101 et seq. (Tr. Feb. 28, 1985, pp. 35-36).[44] This is the only congressional legislation required in the Compact.

Finally, it should be noted that Article III of the Compact places two significant limitations on the State with respect to tribal water marketing. First, as noted, under paragraph 3 of Section K, the State must offer the Tribes substantially equal participation in any state water marketing opportunity in Fort Peck Reservoir or from the mainstem of the Missouri River below the Dam. (The United States has agreed that the State can market up to 300,000 acre-feet from Fort Peck Reservoir, but state law has not yet implemented that large an authority.) Second, in paragraph 7 of Section K the State agrees not to tax the proceeds the Tribes receive from water marketing. This was agreed to February 28, 1985 (Tr. p. 14).

(2) Background

From the earliest part of the negotiations, the Tribes expressed an interest in having their authority to market water outside the Reservation confirmed in any settlement that was reached. This was discussed at the first meeting in Billings on December 12, 1980 (Tr. 53-58). In October 1982, after substantial negotiations, Chairman Loble agreed in principle to tribal water marketing authority in

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[44] In the negotiations, the Commission agreed that the Governor would also support such legislation. (Tr. Feb. 28, 1985, pp. 35-36.)

return for agreement by the tribal negotiating team to protect all existing uses established pursuant to state law on the various tributaries of the Missouri River that flow through or are adjacent to the Reservation. This protection, which is a part of the Compact, is contained in Article IV, and is discussed in greater detail below in this Report, pp. 28-35.

As the marketing provisions were refined by negotiation in late 1982 and early 1983, the United States Department of the Army and Department of Energy insisted upon some limitations on the amounts of water that would be diverted from the Missouri River at particular times of the year to protect somewhat the navigational and hydropower production activities of the United States. These limitations were negotiated at the Denver meeting in February 1983. They were contained in the 1983 Compact, and are now contained in somewhat simpler form as Section F of Article III in the 1985 Compact.

Also, the State insisted in 1983 that diversions for Tribal water marketing comply with valid state law prohibitions against exporting water out of the State, and that off Reservation marketing should be limited to the Missouri River and its tributaries outside of the Yellowstone River Basin. This was also agreed to in both 1983 and 1985, and forms the basis for Sections G and I, paragraph 3.

In its January 1984 proposal, the State asserted the position that all tribal water marketing outside the Reservation should be subject to all state laws. At the November 1984 meeting in Billings, the tribal negotiating team rejected this proposal. The tribal negotiating team reminded the State that State agreement to tribal water marketing authority had served as the basis for the Tribes' protection in 1983 of all existing uses on the various tributary streams to the Missouri River that flow through the Reservation. We insisted that the State would have to agree to a water marketing authority of substantial potential economic value to the Tribes if a settlement was to be reached. The negotiating team did not view the State 1984 proposal as allowing for significant economic value, since it is unlikely that anyone would purchase water marketed by the Tribes if they also had to comply with all state law provisions. In the view of the negotiating team, such persons would simply comply with state laws and make the diversions themselves. The negotiating team expressed a willingness to be flexible on details of water marketing so long as the tribal authority recognized was of substantial economic value. (Tr. Nov. 13-14, 1984, pp. 32-34, 68, 111-112, 119-122, 125-137).

During 1985, discussions about water marketing occupied a major part of the negotiations. During its 1985 legislative session, the State legislature was considering and

ultimately adopted new legislation essentially conferring a monopoly upon the State Department of Natural Resources to lease water within the State of Montana. Commission member Dan Kemmis, a member of the legislative task force that developed this legislation, reported on the draft legislation at the January 8 and 9 meeting in Helena (Tr. pp. 8-20). Commissioner Kemmis indicated that the legislature was unlikely to authorize general water marketing by state water users, and would even insist upon tight restrictions as to water marketed by the State. He stated that environmental and public interest criteria and limits on the quantity to be marketed would be contained in that legislation.

Because the state water marketing legislation restricts the amount of water the State can market, the Commission was insistent that the Tribes be limited in quantity. (E.g., Tr. Jan. 28-29, 1985, pp. 82, 134-140.)[45] The tribal negotiating team resisted quantity limitations, but finally agreed to that concept in view of the overall benefits to the Tribes under the Compact. (Tr. Feb. 28, 1985, pp. 24-34). On the other hand, while the state water marketing legislation enacted in 1985 confers authority to market water exclusively in the State Department of Natural Resources, the tribal negotiating team was concerned with the possibility that the State may in the future drop this public leasing concept and simply allow private water users to make commercial marketing transactions. This concern gave shape to the requirements of Section K, paragraphs 5 and 6.

(3) Benefits to the Tribes

The tribal negotiating team believes that this water marketing authority creates an opportunity which may someday be of great economic value to the Tribes. The restrictions that we agreed to were drafted so that they could be complied with easily for diversions from Fort Peck Reservoir and the mainstem of the Missouri River. There is an ample water supply there, and it is unlikely that a diversion will adversely affect an existing user, impair water quality, create saline seep or injure fish or wildlife populations in the River. Although a use cannot cause unreasonable and significant environmental damage and must comply with certain state regulations such as

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[45] Partial agreement in principle had been reached on other provisions concerning tribal transfers of diversions from the Missouri outside the Reservation at the January 28, 1985 Helena meeting (Tr. p. 138; see also Tr. Jan. 8-9, 1985, pp. 21-28, 103, 128-131). The State at that time agreed to the reciprocal joint venture arrangement contained in Section K, paragraphs 2 and 3 (Tr. Jan. 28-29, 1985, pp. 87, 141).

the Major Facilities Siting Act, the tribal negotiating team believes any major industry proposing to transport and use the water outside the Reservation must comply in substance with these requirements as part of its own planning process and under existing law. The requirements should therefore not be burdensome to the Tribes. And the prospect that the State will be a participant in tribal water ventures increases the likelihood that the State will be cooperative as marketing opportunities arise.

Of course, it is impossible now to estimate the economic value of the Tribe's power to market water outside the Reservation in the future. Since there presently seems to be substantial water in Fort Peck Reservoir and in the River below it, it is unlikely that any industrial or commercial user will pay for water from the Tribes in the near future, perhaps even in the next several decades. That could change, however, either if water development continues to increase in the downstream states or in Montana,[46] or if the Missouri River is legally "apportioned" among the states of the Basin, and Montana reaches the limit of its apportioned share. No one can tell whether, or when, these events might happen. But if they occur, the authority to market water could become very valuable, probably far more valuable than water devoted to agriculture.

C. PROTECTION OF EXISTING USES

(1) Summary of Compact Provisions

Article IV of the Compact protects existing uses, both Indian and non-Indian, on the various tributaries that traverse and ground water basins that underlie the Reservation,[47] from all future uses authorized by either the Tribes or the State. As to new uses, all new tribal uses have priority over all new State uses, irrespective of when commenced.

Section A of Article IV sets forth the existing uses that are protected. The first priority is Indian uses. In paragraph 1, existing uses of water by Indians on the Reservation are given the first right on all of the tributaries. There are approximately 950 acres of existing

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[46] Water development has been relatively constant in Montana in recent decades.

[47] These tributaries are defined in Article II (27).

uses for irrigation.[48] In addition, all existing or future uses by Indians within the Reservation for stock watering purposes not in excess of 20 acre-feet per year for each impoundment, and all existing and future uses for domestic purposes[49] are protected over all existing state law uses without regard to when these uses commence. This means that Indians may divert and use surface or ground water in the future for domestic or protected stock watering uses irrespective of any other right to water or ground water underlying the Reservation.

Next, paragraph 3 of Article IV subordinates the remainder of the Tribal Water Right on the tributaries (but not on the Missouri mainstem) to four categories of uses established pursuant to state law:

> (1) Beneficial uses of water with a priority date of December 31, 1984, or earlier which are identified in Appendix A of the Compact;[50]

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[48]After the Compact was executed, the Tribes discovered that a tribal member, Mr. Charles Brocksmith, was preparing to irrigate 300 acres near the confluence of Porcupine Creek and the Milk River. The parties agreed to an amendment that would protect this proposed use. It is contained as paragraph 1(d) to Section A. Mr. Brocksmith's withdrawal proposes to use ground water, which is also the source of at least one of the other protected existing Indian uses. All withdrawals enumerated in paragraph 1 are protected irrespective of any existing uses under state law.

[49]Domestic uses are defined in Article II(8).

[50]Appendix A indicates the source of a diversion, its location in terms of whether it is on or off the Reservation, the nature of use, and the maximum number of acres or acre-feet per year which are protected.

For example, the Appendix provides that new uses of the Tribal Water Right will not interfere with full service irrigation of 158 acres from surface water within the Porcupine Creek watershed off the Reservation. The State supplied these acreages as existing uses and Stetson Engineers verified them.

Section B of Article IV provides that the State may not (1) shift from surface to ground water (or vice versa), or (2) shift an off Reservation use to an on Reservation one (or vice

(Footnote Continued)

(2) Rights of the United States Fish and Wildlife Service for Medicine Lake Wildlife Refuge out of waters of the Big Muddy Creek as finally determined by the state water court;

(3) Beneficial uses of water for domestic purposes; and

(Footnote Continued)
versa), or move water from one watershed to another (say from Porcupine Creek to the Poplar River). An irrigation use may be shifted to another use only if acreage is retired from irrigation.

To illustrate, if the water courts and the State administrative mechanism determine that there are really only 100 acres irrigated outside the Reservation from the surface water of Porcupine Creek with a priority date of December 31, 1984 or earlier, only 100 acres would be protected. The State could not shift that protected use or the remaining 58 acres to another location, such as Porcupine Creek on the Reservation, or the Poplar River. Similarly, the State could not transfer any of the protected acreage irrigated from surface water so as to increase the protected acres irrigated from ground water in the Porcupine Creek watershed above the 4,123 acres outside the Reservation protected by the Compact. The State could of course authorize 58 additional acres (or any other amount) to be irrigated in 1985 or later, but those acres would not be protected from new tribal uses.

Similarly, if the state water courts and the administrative mechanism ultimately determine that 200 acres are actually irrigated from surface water of Porcupine Creek outside the Reservation with priority dates of 1984 or earlier, only 158 acres would be protected. The rest would be subordinated to the Tribal Water Right.

In all, the State reported that filings in their water courts on the tributaries cover claimed irrigation for approximately 56,000 acres, much more than is protected in Article IV. (Tr. Jan. 28, 1985, pp. 23-24.) But both the State experts and Stetson Engineers believe these are greatly inflated. In any event, only 32,000 acres total are protected from future uses of the Tribal Water Right. In short, the protected acreages in each category in Appendix A are a maximum for that category. If the actual acreage in any category is determined to be more, the Tribes are not obliged to protect it, whatever its priority date. And if the actual acreage irrigated prior to December 31, 1984 is determined to be less for a particular category, the Tribes are required to protect less.

(4) Beneficial uses for stock watering purposes in existence prior to December 31, 1984, and any new stockwatering uses not in excess of 20 acre-feet per year for each impoundment.

Paragraph 3 also makes it clear that the Tribal Water Right on the mainstem of the Missouri River is not subordinated to any water uses on the tributaries. Also, paragraph 4 of Section A makes it clear that the Tribal Water Right is prior to all uses of surface and ground water in the State with a priority date later than May 1, 1888, other than those specifically protected in Article IV.

Under Section B of Article IV, no changes in use under state law can interfere with a use of the Tribal Water Right existing at the time of the change, or change the amount of surface water flowing onto the Reservation within any watershed, or shift between ground water and surface water or from one watershed to another.[51] Also, if a protected agricultural use is changed to a nonagricultural use, or a storage reservoir is constructed, land must be retired from irrigation service. Finally, any new non-irrigation uses are subject to monitoring of diversions and return flows by both the Tribes and the State at the expense of the owner.

(b) Background

The protection of state water rights in paragraph 3 of Section A as against future exercises of the Tribal Water Right was essentially negotiated between the parties during 1982. At the September 1981 Poplar meeting, the State proposed that the parties study and discuss a sharing of shortages on the tributary streams. The tribal negotiating team refused to discuss the matter at that meeting at all (Tr. Sept. 24, 1981, pp. 87-88). After the State agreed in principle to the practicably irrigable acreages determined by Stetson Engineers in March, 1982, the negotiating team undertook to consider an apportionment of the annual flow of the various tributaries between the State and the Tribes on a percentage basis. The tribal negotiating team also considered the protection of a certain number of acre-feet per year of existing uses on each tributary.[52] We did this because a settlement then seemed

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[51] See n. 50, supra.

[52] At the Billings meeting on November 13 and 14, 1984, the tribal negotiating team reviewed various alternatives to the

(Footnote Continued)

possible, and we recognized that a Compact must provide some protection for existing uses to be politically acceptable, even if litigation would not protect those uses.

The State supplied Stetson Engineers with estimates of existing uses by watershed, and in September 1982, Stetson Engineers and various experts from the State travelled along the tributaries to verify actual uses on each tributary system. When the State Commission agreed to tribal water marketing authority in October 1982, the negotiating team then agreed to protect all existing uses on those tributaries. At the Denver meeting in February 1983, the tribal negotiating team agreed also to protect, in addition to existing uses, permits issued by the State on the tributaries that have not yet become an actual use of water.

The basic structure of Article IV of the 1983 Compact generally survived in the present Compact. The protected existing state law uses are almost all for irrigation. 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 regular or "full service" irrigation diverts about 70,000 acre-feet and consumes about 35,000 acre-feet a year. The water spreading, or "partial service irrigation" consumes about 6,000 acre-feet annually.

Most of the "full service" irrigation is done from ground water, not surface flow. Of the 19,500 acres served by full service irrigation, about 12,000 acres are irrigated by ground water pumping. Use of ground water is especially prevalent in the Porcupine Creek and Big Muddy Creek watersheds, where a total of about 10,000 acres (mostly outside the Reservation) are irrigated by ground water. In all, about 50 percent of the diversions authorized by state law and protected by the Compact are from ground water. Much of this is probably pumped from a ground water basin that is an ancestral channel of the Missouri River.[53]

(Footnote Continued)
subordination ultimately provided in Article IV. The negotiating team made it clear that if the State wished to retain that degree of protection, the Tribes must retain the basic advantages provided to them in the 1983 Compact. (Tr. 92-94, 122).

[53]Little is known about this ground water source. It may or may not be connected hydrologically to the Big Muddy Creek or the present Missouri River.

Most of the acres irrigated under state law rights are outside the Reservation. Of the 32,000 acres receiving some irrigation service, about 25,000 are outside the Reservation boundaries -- approximately 12,500 acres in the Big Muddy watershed, 7,500 acres in the Poplar watershed and 5,000 in the Porcupine Creek watershed (which, as noted, is mostly ground water pumping). Under the Compact, these existing irrigation uses would be protected, and the Tribes would allow them to continue forever, despite the Tribes' priority under the Winters Doctrine.

Existing municipal, industrial and commercial uses are also protected by the Compact. There are about 1,500 acre-feet per year of existing municipal uses (mostly on the Poplar and Big Muddy) and 2,100 acre-feet per year of industrial and commercial uses (mostly on the Big Muddy).

The Interior Department also insisted that the Tribes protect Interior's existing uses of the Big Muddy Creek and its tributaries outside the Reservation for the Medicine Lake Wildlife Refuge, as those uses are ultimately decreed in court. (This may require that the Tribes participate in those court proceedings to be sure no excessive rights are awarded to the Department of Interior.)[54]

Except for the wildlife refuge, for which there are no dependable figures, this Compact protects about 45,000 acre-feet per year of consumptive uses -- about half from surface flows and half from ground water. This means that most, if not all, surface water available on these streams during the irrigation season in normal years will be used by non-Indians claiming water under state law.

New tribal uses from ground water are prior to any new state uses. So it is theoretically possible that the Tribes can develop new ground water uses in these areas. Little is known about ground water sources. We simply do not know and cannot determine how much ground water can safely be pumped without depleting the supply. It may be more, or it may

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[54]The Tribes resisted this provision, and a great deal of time was spent negotiating about it at the February 1983 meeting in Denver. (Tr. Nov. 13, 1984, p. 77). Interior insisted upon this provision because the rights of the wildlife refuge would otherwise become junior to state uses commenced since the 1930s, when the refuge was established. The tribal negotiating team ultimately agreed, in part because the refuge may assist in maintaining instream flows on Big Muddy Creek that would otherwise have to be established by the Tribes and thus count as a consumptive use of the Tribal Water Right.

even be less, than is now being pumped. Consequently, the Tribes may be able to use ground water in places, but we cannot presently be certain of that.

Except where ground water can be used, for the Tribes to develop major new uses on the tributaries, storage reservoirs must be constructed on the tributaries to capture winter run-off. (And any non-Indian storage of size on the tributaries will almost surely be required as a practical matter to negotiate a deferral agreement with the Tribes.) The major part of the flow in these streams is in the winter and early spring, so such storage facilities are of course theoretically possible. Potential sites were identified in the Morrison-Maierle water inventory in the mid-1970s. But Stetson Engineers believes that these facilities would probably be so expensive that they would not be feasible, at least for irrigation use. The Tribes must assume, therefore, that if they ratify the Compact, the Tribes are foregoing substantial new uses of water on these tributary streams. This, as noted, is the major component of the Compact that is not favorable to the Tribes.

(3) Benefits to the Tribes

The benefits to the Fort Peck Tribes of protecting existing uses -- including existing state uses -- must be evaluated in the context of the Compact as a whole. In the judgment of the tribal negotiating team, this protection was a worthwhile exchange for other tribal benefits agreed to by the State in the Compact.

Some provisions in Article IV are favorable to the Tribes. Existing and proposed Indian uses, and existing and future Indian uses for stock water and domestic purposes, are not subordinated to the current state uses. While the proposed Compact allows existing uses under state law to continue, it of course provides that any new uses authorized by the State -- whether of surface flow or ground water -- would be subordinate and junior to the Tribes' rights. The Compact, as noted, allows persons who apply for such rights in 1985 or thereafter to make "deferral agreements" with the Tribes by which the Tribes will not interfere with those junior rights. These agreements could conceivably be lucrative for the Tribes, although whether and on what terms the Tribes will enter into such agreements is of course a policy decision for the Tribal Executive Board.

Finally, under the Compact the Tribes could acquire lands with a state law water right -- either on[55] or off the Reservation -- and use that protected right or retire it from use. This may be a promising development strategy to be explored by the Tribes in the future.

D. ADMINISTRATION OF WATER RIGHTS AND RESOLUTION OF DISPUTES AMONG WATER USERS

(Articles V and VI)

(1) Summary of Compact Provisions

Section A of Article V provides that the United States will continue to administer uses of water received from the Fort Peck Irrigation Project. This project is constructed pursuant to the Act of May 30, 1908 which opened the Reservation to non-Indian settlement. Approximately half of the lands now receiving water from the project are owned by Indians, and approximately half are owned by non-Indians. The United States successfully administers this project at the present time, and the parties agreed that it will continue to do so.

Section A also provides that the United States has final and exclusive jurisdiction to resolve all disputes concerning uses of water received from the Project. This jurisdiction is subject to any judicial review provided by applicable law. This means that any person receiving water can appeal an administrative decision of the United States to a court, if permitted by law (such as under the Administrative Procedure Act, 5 U.S.C. § 550 et seq).

Section B provides that the Tribes shall administer the Tribal Water Right. Paragraph 1 of Section B also provides that the Tribes shall have the final and exclusive jurisdiction to resolve all disputes between users of the Tribal Water Right with two exceptions. Those exceptions are: (1) disputes which concern uses of water from the Fort Peck Irrigation Project; and (2) disputes involving persons using the Tribal Water Right outside the Reservation pursuant to deferral agreements.[56]

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[55] If the acquired land and rights are within the Reservation, any uses of the rights would count as part of the Tribes' overall water right. Use of acquired land and rights outside the Reservation would not count. Article VIII A(2) and (3).

[56] These deferral agreements are discussed supra, p. 21.

Paragraph 3 of Section C of this Article provides that the State shall not administer any part of the Tribal Water Right.

Paragraph 2 of Section B provides that the Tribes shall adopt a water code and submit it to Secretary of Interior for approval within one year after ratification of the Compact. The tribal water code shall take effect 18 months after ratification of the Compact, unless it is disapproved by the Secretary. The Secretary has agreed to lift the existing moratorium on tribal water code approvals by the Department of the Interior so as to permit consideration and approval of a Fort Peck Tribal Water Code.[57]

Paragraph 2 of Section B provides that the Tribes shall not administer the Tribal Water Right in a manner which denies any person a water right owned by that person which arises under the laws of the United States. This means that in administering the tribal water code, the Tribes must give effect to any binding provision of federal law which confers a vested water right on an allottee or a successor-in-interest to an Indian allottee. As noted, under Article III B uses of water by successors-in-interest of Indian allottees do count as part of the Tribal Water Right to the extent they arise under federal law. The rights of such persons are to be determined by the Tribes under the water code, and not by the state court system. Article X A(2). The Tribes must follow federal law in making that determination.

In paragraph 3 of Section B, the Tribes agree to give the State notice of each existing use of the Tribal Water Right. In paragraph 4, the Tribes agree to notify the State within 60 days after the end of each quarter year of all new uses of surface and ground water authorized during the preceding quarter, and of all new uses actually commenced

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[57] Tr. Feb. 28, 1985, p. 38.

Until a tribal water code is adopted and approved, the Secretary shall administer and enforce the Tribal Water Right as trustee for the Tribes.

The tribal negotiating team agreed that the tribal water code drafted by its attorney would require the Tribes to give some prior public notice before applications for a permit and to submit a copy of the draft water code to the State before it is adopted. (Tr. Feb. 27, 1985, pp. 24-26; Tr. Feb. 28, 1985, pp. 37-38)

during that quarter.[58] In paragraph 2 of Section C the State agrees to provide identical information to the Tribes with respect to all existing uses and future uses authorized by the State on the mainstem of the Missouri River below Fort Peck Dam and on all tributaries of the Missouri River that flow through or are adjacent to the Reservation, except the mainstem of the Milk River.

Section C deals with State administration of water rights. It provides that the State shall administer all rights to the use of surface and ground water within or outside the Reservation which are not part of the Tribal Water Right to the fullest extent allowed by law,[59] and has the final and exclusive jurisdiction to resolve all disputes between users of rights established under state law. This means that the State can administer any rights to the use of water by non-Indians, even on the Reservation, except for rights -- arising under federal law -- of (1) successors-in-interest to Indian allottees, (2) persons receiving water from the Fort Peck Irrigation Project, or (3) of transferees of the Tribal Water Right.[60]

Paragraph 3 of Section C provides that the State will not issue any new authorization for the use of water within the Reservation to the Tribes, to any Indian, to any non-Indian successor-in-interest to an allottee by virtue of a right arising under federal law[61] or to the United States as trustee for any of those persons. This prohibition continues until and unless the Tribal Water Right confirmed in Article III is fully utilized at the time an application is made. If that time

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[58] The quarter year period was agreed to on February 27, 1985 (Tr. pp. 9-11).

[59] The limitation -- "to the fullest extent allowed by law" -- was inserted because there are some water rights other than the Tribal Water Right, such as those belonging to other Indian tribes, which the State does not have jurisdiction to administer.

[60] The water marketing provisions govern transferees. See discussion pp. 17-28, supra.

[61] However, the Tribes can acquire lands or water rights established by state law on the Reservation. Art. VIII A(3). If they use those water rights, the use will count as part of the Tribal Water Right.

ever arises, the Tribes, Indians, successors-in-interest to Indian allottees or the United States could apply to use water complying with all state law principles. (Tr. Feb. 27, 1985, p. 21).

Section D of Article 5 deals with regulation of ground water. We will discuss this subject separately, pp. 44-47, infra.

As noted, Article V deals with dispute resolution. If a dispute is just between persons entitled to use the Tribal Water Right, the Tribes have final and exclusive jurisdiction to resolve that dispute, except where uses of water of the Fort Peck Irrigation Project or under a deferral agreement are concerned. If the dispute concerns any use of water of the Fort Peck Irrigation Project, the United States has final and exclusive jurisdiction to resolve it. And if a dispute exclusively concerns only persons entitled to use water rights established under state law, the State has final and exclusive jurisdiction to resolve that dispute.

Article VI establishes a joint Tribal-State Board to resolve other conflicts arising under the Compact. Section D provides that the Board has jurisdiction over the following three types of disputes between the Tribes or persons using the Tribal Water Right, on the one hand, and the State or persons claiming rights to use water under state law, on the other hand:

(1) Any controversy over the use of ground water[62] to which the Compact pertains;

(2) Any controversy over the use of surface water within the Reservation or from any tributary to the Missouri River that flows through or adjacent to the Reservation, except the mainstem of the Milk River;[63] and

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[62]Ground water is discussed at pp. 44-47, infra. The Compact pertains to ground water sources which in whole or in part underlie the Reservation. Article V D(1).

[63]These tributaries are defined in Article II(27).

Thus, the jurisdiction of the Board would not extend to a possible dispute between a person claiming a right to use water on head water tributaries of the Missouri River, such as the Gallatin River, and the Tribes or tribal water users on the mainstem of the Missouri. (Tr. February 28, 1985, p. 14-20).

(Footnote Continued)

(3) Any controversy as to the meaning of the Compact.

The Board has "exclusive" jurisdiction rather than "final and exclusive" jurisdiction as to these disputes. This is because decisions of the Board are subject to appeal to a "court of competent jurisdiction," as will be discussed below. In contrast, decisions of the United States, Tribes and State are appealable only as provided by their laws. For example, disputes between tribal water users will be resolved by procedures established by the Tribes. The decision pursuant to those tribal procedures will be final. The same is true for disputes resolved by the United States and the State.

The composition of the Board is established in Section B of Article VI, which provides that the Board shall consist of three members. One member will be appointed by the Governor of Montana, or, if he or she makes no such appointment, shall be the Governor. A second member will be appointed by the tribal chairman, or, if no appointment is made, will be the Tribal Chairman. The salary and expenses of those members are to be borne by the State and Tribes respectively. (Tr. Feb. 27, 1985, p. 47). A third member will be appointed by agreement of the other two members. If agreement cannot be made, paragraph 2 of Section B provides for each member to prepare a list of nominees, for the other member to strike all but one of the names nominated by the other member, and for the chief judge of the United States District Court for the District of Montana to then select the third member from the two final nominees.[64]

Members of the Board will serve for a fixed term, as provided in the Compact, because the parties desired to create a Board with some impartiality rather than one subject to removal at the will of the State or the Tribes. (Tr. Feb. 27, 1985, p. 31). Two members of the Board will constitute a quorum if reasonable notice has been provided in advance to the absent member. Board meetings may be in person or, in appropriate circumstances, by telephone. All decisions are to be made by a majority of the Board (in contrast to the 1983

(Footnote Continued)
The jurisdiction of the Board also would not extend to any dispute concerning the uses of surface water on the mainstem of the Milk River.

[64] If the chief judge declines to make the selection, the Compact provides that the chief justice of the Montana Supreme Court should make it.

Compact, which required unanimity). This is to facilitate an expeditious decision which is often required in a wet water controversy.[65]

Section E of Article VI sets forth the powers and duties of the Board. The Board may administer oaths to witnesses, take evidence under oath, and issue subpoenas to compel the attendance of witnesses or production of documents or other evidence. Subpoenas are enforceable in the courts of the Tribes and the State on the same basis as subpoenas issued in civil actions by those courts.

The Board is required to hold hearings and give advance notice to the Tribes, State and all parties to any proceeding. The Tribes, the State and all parties are entitled to be heard, to present material evidence, to cross-examine witnesses and to be represented by counsel at their own expense at all hearings.

Paragraph 3 of Section E provides that the Board may enter orders granting temporary or preliminary injunctive relief after hearings but may not award money damages. These orders may be enforced by petition to a "court of competent jurisdiction".[66]

Paragraph 4 authorizes the Board to adopt rules and regulations to govern its procedures (e.g., Tr. Feb. 27, 1985, p. 40) consistent with all terms of Compact, and provides that records of the Board shall be open to public inspection except for privileged information.

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[65]The parties agreed that in such circumstances some decision should be made to immediately determine who gets water during a growing season, pending possible appeals. (Tr. November 13-14, 1985 pp. 84-86; 106-107, 112; Tr. January 8-9, 1985, pp. 140-143.

[66]Tr. Feb. 27, 1985, pp. 94-96. As noted elsewhere in this Report, the term "court of competent jurisdiction" is defined in Article II(6).

The court enforcing the order can impose conditions as to bond or otherwise for the security of rights of the enjoined party. However, the United States, the State and the Tribes shall not be required to post any bond. The Court may also appoint a water commissioner or master to monitor compliance with this relief.

Paragraph 5 of Article E authorizes the Board to employ or seek assistance of clerical and other personnel and to establish necessary offices. The initial office of the Board shall be located at the Fort Peck Agency of the Bureau of Indian Affairs. (Tr. Feb. 27, 1985, pp. 45, 48-50.)

Paragraph 6 provides that the annual budget of the Board shall be subject to approval of the Tribes and the State and to the availability of funds appropriated by each party. The Tribes and State agree in Section B to share equally in the expenses of the Board -- other than in the obligation of each party to pay the salary and expenses of the member appointed by it. (Tr. Feb. 27, 1985, pp. 29-30, 46-47.)

Paragraphs 1 and 2 of Section F provide that the decisions of the Board shall be effective immediately, but allow for modification or reconsideration of Board decisions within fixed time periods.

Paragraph 3 provides for appeals of final decisions of the Board to a "court of competent jurisdiction"[67] within 30 days after the decision is made. Paragraph 4 establishes that the Board's decision shall be presumed to be valid. Board decisions can only be vacated on one of six grounds, essentially the grounds contained in the Uniform Arbitration Act.

Paragraph 5 provides that unless an appeal is timely filed the decision of the Board shall be confirmed or enforced by any court of competent jurisdiction. Paragraph 8 provides that the Board shall file with the court the record of proceedings before the Board.

Section G of Article VI waives the immunity of both the Tribes and the State to permit appeal or judicial enforcement of Board decisions as provided in the Compact. However, this waiver does not extend to any action for money damages, including costs or attorneys fees. The State specifically waives any immunity it has under the Eleventh Amendment to the United States Constitution.

(2) Background

The powers and duties of the Board and its jurisdiction to resolve disputes between private water users (the one claiming to use the Tribal Water Right and the other

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[67]Paragraph 6 provides that on appeal or on a petition to enforce, the court may order temporary or permanent relief.
(Footnote Continued)

claiming a right to use water arising under state law) are an expansion of the Board authority from the 1983 Compact, and a vital linchpin of the current Compact.

The 1983 Compact had provided for resolution of disputes only between the State and the Tribes by a joint board, and by unanimous vote only. Appeal of any decisions (or in the event of inability of the Board to make a unanimous decision) was to federal court.

After the Supreme Court decision in Arizona v. San Carlos Tribe, ____ U.S.____, 103 S.Ct. 3201 (1983), the State asserted that its courts had exclusive jurisdiction to resolve all disputes, including those involving the Tribal Water Right. The State presented that concept to the Tribes in its 1984 proposal. It proposed that the Tribes would "allocate" water among users of the Tribal Water Right, but that any disputes between those users and other persons would be resolved in state court. (Tr. November 13-14, 1984, pp. 14-15, 36 (state court enforcement); Tr. November 13-14,1984, pp. 63, 81.)[68] The State was agreeable to federal court review only on interpretations of the Compact (Tr. Nov. 13-14, 1984, pp. 81, 107).

At the January 8, 1985 meeting in Helena, the Tribes presented a position paper on administration and dispute resolution. (Tr. p. 81, attached as Appendix F to this Report.) That paper set forth the system of administration ultimately embodied in the 1985 Compact. The paper also proposed reciprocal reporting between the Tribes and the State on uses of water rights presently authorized and as authorized and developed in the future. With some modifications (because the state system does not provide for reporting of actual diversions on an annual basis, Tr. Feb. 27, 1985, pp. 12-20), this proposal was included in the final Compact. As part of the proposal the Tribes agreed to abandon the unanimity requirement so as to allow the Board to decide who gets

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(Footnote Continued)
Paragraph 7 provides that the decision by a court of competent jurisdiction may be appealed as in any civil action.

[68]The State agreed in November 1984 that the Tribes could resolve disputes among tribal members (Tr. Nov. 13, 1984, p. 36). The following January, the State agreed that the Tribes could also resolve disputes between tribal members and non-Indian successors-in-interest to Indian allottees. (E.g., Tr. Jan. 28-29, 1985, p. 144).

immediate wet water. The Tribes proposed, however, that the federal court review any decision by the Board.[69]

The State made a counter proposal on January 9, 1985 (Tr. p. 140-141). Rather than appointment of a Joint Board, they proposed that the state court would appoint a water master to arbitrate disputes. The Tribes rejected this proposal, and stated that they would never agree that a state court actually had jurisdiction over disputes involving the Tribal Water Right. (Tr. 146-147).

By the end of the January 29, 1985 meeting, the concept of a joint Board having essentially the power of a binding arbitrator was accepted by both parties as the only way to avoid the impasse over federal or state court resolution of disputes. The parties agreed that the Board, operating like a binding arbitrator, should resolve the disputes, thus virtually eliminating court processes. (Tr. Jan. 29, 1985, pp. 145, 174-175). The concept was to provide for appeals into court, but only under the same limited scope of review as in the Uniform Arbitration Act and Federal Arbitration Act (Tr. Jan. 29, 1985, p. 132).[70]

During February 1985, the attorneys for the Tribes and the State cooperatively drafted Compact provisions which closely parallel the Uniform Arbitration Act and the Federal Arbitration Act for review and enforcement of the Board decisions and as to Board procedures. These are included in Section F. It is generally the intention of the parties that the Board will serve as a binding arbitrator to the maximum extent permitted by law, and that judicial review shall be limited to the scope established under the Federal Arbitration Act and Uniform Arbitration Act, as provided in paragraph 4 of Section F. It is recognized that the Uniform Arbitration Act has not been adopted in the State of Montana. However, the tribal negotiating team would not agree to any broader judicial review unless the State agreed that this review would be exclusively in the federal court system. (E.g., Tr. Feb. 27, 1985, pp. 35-36, 38, 95-96). The State would not agree to provide in the Compact expressly for exclusive federal court

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[69] See n. 70, infra.

[70] There was still some dispute at the January 29, 1985 meeting as to whether the court that would take the appeal would be a state court (Tr. pp. 36, 132) (state position), or a "court of competent jurisdiction" (Tr. pp. 36, 145) (tribal position). Ultimately, the tribal position prevailed on this point.

review. The Compact thus leaves open the question of what court has jurisdiction to review Board decisions. The Tribes made it clear that they do not concede that the state courts have this jurisdiction.[71] Therefore, a determination was made to avoid resolution of disputes in any court to the maximum extent permissible by law.[72] Settlement could be produced only by establishing broad and expansive jurisdiction in the Joint Board created by this Compact.

(3) Benefits to the Tribes

Articles V and VI provide the Tribes with important benefits concerning the control and administration of the Tribal Water Right. The Tribes alone are empowered to administer the Tribal Water Right without interference from any agency of the state government. The Tribes have final and exclusive jurisdiction to resolve disputes between users of the Tribal Water Right. The State is prohibited from authorizing use of water within the Reservation except by non-Indians claiming water under state law.

Additionally, as noted, the Joint Tribal-State Board created by the Compact is of the greatest importance to the Tribes, for it provides for resolution of the Compact-related disputes in a neutral and objective forum, with a very limited scope of review in whatever court has jurisdiction to hear appeals.

E. GROUND WATER USES

(1) Summary of Compact Provisions

The Tribal Water Right, as stated earlier, is specifically applicable to ground water. There are relatively few limits on its use by the Tribes.

Paragraph 1 of Article V provides that, with the exception of uses protected in Article IV,[73] neither the State

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[71] E.g., Tr. Jan. 8-9, 1985, pp. 146-147.

[72] All state statutory and common law rules which restrict this form of dispute resolution are superseded by the Compact. Article X B. See discussion, pp. 50-51, infra.

[73] These uses are both tribal and state uses. See pp 28-31, supra.

nor the Tribes shall authorize or continue the use of ground water without the consent of the other if the use will either:

(1) Result in degradation of the instream flows established by the Tribes,[74] or

(2) contribute to permanent depletion of a ground water source which in whole or in part underlies the Reservation, or contribute to the significant degradation of quality of that source.

Existing and proposed tribal uses are of course absolutely protected in Article IV, and have priority over all state uses. In addition, paragraph 2 of Article V D provides that the State shall not authorize a new use of ground water which unreasonably interferes with a new or existing ground water use authorized by the Tribes, unless the Tribes consent. Correspondingly, the Tribes agree not to authorize a new use of ground water which interferes with the use of ground water authorized by the State that is protected by Article IV of the Compact, unless the State consents. This means that new tribal uses have priority over all state uses, except those existing uses protected in Article IV. The State, on the other hand, cannot authorize a new ground water use that interferes with any use of ground water in the future authorized by the Tribes, even if the State use is authorized prior to the tribal use.

Disputes between the State and the Tribes, or between users of ground water authorized by the Tribes and users authorized by the State, are to be resolved by the Joint Board.[75]

(2) Background

The Tribes and the State agreed, both in 1983 and in the present Compact, that tribal reserved water rights extend to ground water.[76] In fact, the Tribes finally agreed to limit

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[74]Article III L. See pp. 47-48, infra.

[75]Article VI D.

[76]From our earliest discussions, it was agreed that the Compact should cover ground water uses. The State was not seriously concerned with tribal uses of ground water because the Tribes are relatively downstream users and their uses are

(Footnote Continued)

surface water uses to 950,000 acre-feet of diversions (or 475,000.00 acres feet of consumptive use) with the remainder to be made up of ground water.

Article V, Section D of the Compact which sets conditions for ground water regulation, is very similar to the comparable provision in the 1983 Compact. Although the State at one time advanced a proposal which could be construed as setting up a prior appropriation system for all ground water withdrawals, they specifically retreated from that proposal. (Tr. February 27, 1985, pp. 21-22).

(3) Benefits to the Tribes

The Compact confirms that the Tribes' rights extend to ground water. The Compact also provides that the Tribes divert ground water from any source on the Reservation. These benefits are important, for although the Tribal negotiating team believes that Indian reserved rights legally extend to ground water, the state district court in Wyoming rejected that position in the Wind River case. Some ground water use is likely if the Tribes are to develop acreage in the northern part of the Reservation.

Article V prevents the State from authorizing or continuing to use ground water which will harm instream flows established by the Tribes or which will contribute to a permanent depletion of a ground water source or the quality degradation of that source, or from initiating any new use of ground water that interferes with any new or existing tribal use.

We emphasize, however, that very little is known concerning ground water sources on the Reservation. Without years of study, it simply cannot be determined whether ground water can be safely pumped from aquifers below the Reservation without depleting those aquifers. The quality of ground water is questionable as well. Less is known about ground water 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 ground water resources will be available in practice to the Tribes. Legally, however, ground

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(Footnote Continued)
unlikely to impact on surface flows, particularly on the Missouri River. E.g., Tr. Sept. 24, 1981, pp. 38-39.

The term ground water is defined in Article II (12) to mean "any water under the surface of the land or the bed of any stream, lake, reservoir or other body of surface water."

water is available to the Tribes, and ground water diversions authorized by the Tribes take priority over new state law uses.

F. INSTREAM FLOWS

(1) Summary of Compact Provisions

The Tribes have the right to establish instream flows in Article III L. This Article provides that within five years after the date of the Compact, the Tribes can establish instream flows to protect fish and wildlife resources on any of the Missouri River tributaries on the Reservation (other than the mainstem of the Milk River).

These instream flow rights will have all the characteristics of the Tribes' water right -- for example, they will have an 1888 priority date -- but will be subordinate to existing uses under state law protected by Article IV of the Compact. (Discussed at pp. 28-35.) The Tribes' instream flow therefore would preclude the State from establishing any new use that would interfere with fish and wildlife resources protected by the tribal instream flow schedule.

The instream flow rights established by the Tribes will count as a consumptive use of the Tribes' water rights.[77] The Tribes could not shift the instream flow right to some other use unless the State consents to that change in use. This means, for example, that the Tribes could not tie up water as an instream flow for a period of years and then move it to another use except with consent of the State Department of Natural Resources.

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[77] There was discussion between the parties as to how these instream flows would be counted (e.g., February 27, 1985, pp. 98, 101-106). The Compact provides that only water actually remaining in a stream to maintain instream flows pursuant to a schedule established by the Tribes shall be counted as a consumptive use.

To illustrate: if a schedule is established by the Tribes providing that 1,000 acre-feet should remain in a particular stream in a constant amount in September, but no water is in the stream in a particular year during September, no use is counted for September that year. Correspondingly, if 1,000 acre-feet does remain in the stream for September in a year, that amount would be charged to the Tribes as a consumptive use for the year, even if no state water users were actually curtailed in September of that year.

(2) Background

The 1983 agreement provided that instream flows would not count as a consumptive use. This was because the water stays in the Missouri River system. However, when water is reserved for instream flows it is not available for use on the upstream portion of that tributary. (E.g., Tr. November 13, 1984, pp. 75-77.) The parties discussed doing a study and setting some limit on instream flows, (id, pp. 88-91, 116) but since the Compact was ready for presentation to the 1985 Legislature, time and the lack of federal funding precluded that. (Tr. Jan. 8-9, 1985, pp. 30-36). Finally, the Tribes agreed to count the instream flows as a consumptive use, since they would deprive an upstream user of that quantity of water. (Tr. Jan. 29, 1985, p. 142).

(3) Benefits to the Tribes

Although we believe that the Winters Doctrine includes a right to establish instream flows, this has not been absolutely resolved by the case law. The Compact affords to instream flows the same protection as other Tribal water rights. This makes it possible for the Tribes to incorporate wildlife or sports fishing values into a water use program that will not be threatened by future usurpation, since the State is prevented from establishing any new use which would cause harm to tribal fish and wildlife resources protected by the instream flows.

G. RATIFICATION, BINDING EFFECT, AND FINALITY OF THE COMPACT

(Articles VII and X)

(1) Summary of Compact provisions

Article VII establishes that the Compact shall become effective, final and binding as to both the Tribes and the State when ratified by the State legislature and by the Tribal Executive Board and approved by the Justice and Interior Departments. Ratification is irrevocable, and the Compact cannot be modified except with the joint legislative consent of the Tribes and the State.

Importantly, and in contrast to the 1983 Compact, congressional action is not required to make the Compact effective. [However, the Compact does provide that Congress must authorize the Tribes to market water. Otherwise, any transfer of this trust resource might be considered void under the Indian Trade and Intercourse Act. Thus, in Article XII Section B, the state legislature petitions Congress for this water marketing legislation. We have no assurance, of course,

that Congress will enact this legislation. But the State and the federal executive agencies have agreed to support it.]

Section B of Article VII provides that the Compact will be immediately incorporated into the state water court decrees in any proceedings to adjudicate any right to the use of water to which the Compact pertains. The state courts may not modify the Compact in any manner. As noted, that can be done only by the joint consent of the State Legislature and the Tribal Executive Board.

Since Congress is not required to ratify the Compact, paragraph 1 of Section B provides that the United States shall only be bound by the Compact when it is incorporated into a final state court water decree. The United States is a party to all state court cases, so those decrees will then be final as to the United States. Also, the Attorney General as well as the Secretary of the Interior will approve the Compact. The Attorney General's action binds all federal executive agencies, since he is their attorney.

Paragraph 2 of Section B provides that the Compact will be filed as a proposed consent decree in the two federal court cases which the United States and the Tribes began in 1979 if the state courts are held to be inadequate or to lack jurisdiction over any of the water rights asserted in the federal cases. If, on the other hand, the state water courts are determined to have jurisdiction and be adequate in all respects to adjudicate all rights asserted in the federal cases, the Tribes agree to dismiss their claims in those cases.

The jurisdiction and adequacy of the state proceedings is now being considered by the Montana Supreme Court. If that court or the United States Supreme Court on review holds the state proceedings inadequate or lacking in jurisdiction in any respect, the Tribes can then file the Compact in federal court as a proposed consent decree to ensure finality of the Compact. Otherwise, the Compact could not be filed in the federal court cases.

Article X provides that the Compact shall be binding upon the State and all persons claiming water under the laws of the State, and upon the Tribes and all persons claiming water by virtue of tribal or federal law on the Reservation. Article X provides expressly that the Compact will bind all successors in interest to Indian allottees claiming a water right under federal law. These rights, as noted pp. 10-11, 36, supra, are counted as part of the Tribal Water Right and administered and determined by the Tribes. Paragraph 2 of Section A provides that the state courts shall not have jurisdiction to adjudicate or decree these rights.

Section B of Article X provides that the provisions of the Compact supersede all inconsistent provisions of Montana statutory or common law, now or in the future. This is as broad a preemption as possible, to be sure the Compact cannot be modified by the legislature, even inadvertently. A specific provision in the Montana Code is superseded to be certain it does not interfere with operation of the Joint Board provided in Article VI.

(2) Background of particular provisions

Most of the above provisions were not controversial. From the start, for example, both the Tribes and the State agreed that the Compact should be irrevocable, binding on both parties and all water users claiming under them, and not subject to modification except by joint legislative consent of the parties. (E.g., Tr. Dec. 12, 1980, pp. 71, 77.) We discuss below the provisions which did involve some discussion in the negotiations.

Removal of congressional ratification requirement: The Tribes urged in 1982 that since the Compact would be incorporated into court decrees, the parties and all persons claiming through them would be bound and congressional ratification would be unnecessary.[78] Chairman Loble believed, however, that the state statute required the Commission to insist on congressional ratification.

In 1985, however, Montana Senate Bill 28 removed this state law restriction. The Interior and Justice Departments agreed that the Compact did not require ratification by Congress in order for the consent decree, after being submitted to the court, to be binding and implemented. (Tr. January 8, 1985, pp. 42-45, 51-52, 70-73). This reasoning satisfied the State Commission, and the requirement for congressional ratification was dropped. (Tr. January 28, 1985, pp. 7-9.)

Incorporation of Compact into court decrees: The Tribes' proposal was that the Compact be filed as a decree in both the state and federal courts in which the water litigation is pending. (Tr. Jan. 8-9, 1985, pp. 147; Tr. Jan. 28-29, 1985, pp. 49-55.) The State insisted that the Supreme Court decision in Arizona v. San Carlos Apache Tribe, ____ U.S. ____, 103 S.Ct. 3201 (1983) had settled this question in favor of allowing the state court to proceed exclusively of any federal jurisdiction. The Tribes finally agreed that the

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[78] See, e.g., Hinderlider v. LaPlata & Cherry Creek Ditch Co., 304 U.S. 92 (1938); Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123 (9th Cir. 1978).

Compact would immediately be filed just in state court, on the condition that if the Montana Supreme Court, or the United States Supreme Court, should find the state proceedings inadequate or that the state courts lack jurisdiction in any respect over any rights asserted in the federal cases, the Compact will then be filed as a proposed court decree in federal court to ensure its finality.

Compact supersedes inconsistent state law: The parties wanted to be sure the Compact overrides any present or future provision of state statutory or common law that could be inconsistent with it. With this consideration in mind, Article X B was drafted, which establishes the Compact's procedures over any inconsistent law. The parties intend this provision to be applied broadly. Since the Compact can only be modified by joint action of both legislatures, it supersedes any inconsistent provision in law now or in the future.

One particular present statutory provision was of concern to the Tribes. Montana has never adopted the Uniform Arbitration Act, and the State Supreme Court has interpreted this provision as rendering void certain arbitration agreements.[79] The Tribal negotiators pointed out the need to make clear that statutes and case law must not be applied so as to invalidate the Joint Board provisions of the Compact. (Tr. Feb. 27, 1985, pp. 37-38.)

Binding non-Indian successors to Indian allottees. It was always agreed that these persons' federal law rights would be included in the Compact, treated as part of the Tribal Water Right and subjected to tribal administration. The parties discussed precluding any further state court consideration of their federal law claims in 1982. This matter was not resolved, and was raised again by the Tribes in 1984. (Tr. Nov. 13, 1984, pp. 72-75.) The State agreed to precluding state court jurisdiction over these claims.[80]

(3) Benefits to the Tribes

The removal of congressional ratification avoids delay. The Compact becomes binding and effective when filed in state court after ratification by both parties. This should be accomplished in 1985. Also possible controversy in Congress is avoided.

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[79] M.C.A. 28-2-708. See Palmer Steel Structures v. Westech, Inc., 584 P.2d 152 (Mont. 1978).

[80] Letter of Assistant Attorney General Clay Smith to Compact Commission Chairman McOmber, January 23, 1985.

The Tribes are, of course, benefitted by the provisions requiring approval of the Tribal Executive Board to any Compact modification, and superseding as broadly as possible any present or future inconsistent provisions of state law.

The preclusion of any further possible state court jurisdiction over federal law claims of non-Indian successors in interest to Indian allottees confirms tribal jurisdiction to determine those claims and removes possible uncertainty in the state court litigation.

H. EXPLANATION OF OTHER PROVISIONS

Article VIII provides that the Compact will not be construed or interpreted to:

(1) establish the rights of any other Indian tribe; (2) preclude the Tribes or any Indian from acquiring or exercising water rights under state law by purchase of a right or of land outside the Reservation[81] or by application to the State under state law; (3) preclude the Tribes or any Indian from acquiring or exercising water rights under state law on the Reservation by purchase of an existing water right or land to which it is appurtenant,[82] or by application to the State if the Tribal water right is fully utilized,[83] (4) determine the relative rights of users within the State or of tribal users; (5) preclude the parties from litigating matters not resolved by the Compact; (6) authorize any taking of vested water rights; (7) create or deny substantive rights through headings

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[81]This provision means the Tribes have the same right as any person outside the Reservation to use water under state law. That is, of course, the law; the State could not discriminate against the Tribes.

[82]Like the immediately prior provision, this clause means that the Tribes, like any other person, may purchase water rights (with or without buying land) within the Reservation. Uses of water so acquired within the Reservation shall count as part of the Tribal Water Right. Importantly, under this and the previous provision the Tribes could buy up and either use or retire water rights protected under Article IV.

[83]This provision correlates with Article V C (3), discussed supra p. 37.

or captions used in the Compact;[84] or (8) prejudge how the Tribes' rights will be counted in any interstate apportionment of the Missouri River Basin.[85] In Section B of Article VIII, both the Tribes and the State reserve all other rights.

Article IX specifically provides that the Tribal Water Right confirmed in Article III is final and conclusive. In Article IX, the Tribes also relinquish any claims to the use of water under federal law and all aboriginal water rights other than the rights confirmed in Article III.

Article XI provides that if any part of Article III (the Tribal Water Right), IV (Protection of Uses Under State Law), VII (Finality and Effectiveness) and IX (Tribal Relinquishment of Other Water Claims) is held invalid, either the Tribes or the State may withdraw from the Compact by action of their legislature within one year of the invalidation. But if any other provision is invalidated, that provision shall be "severed," or simply eliminated, from the Compact so that the rest of the Compact will remain in full force.

Article XII deals with legislation necessary to give the Compact full effect. In Section A, the Tribes and State agree to enact any future legislation necessary to effectuate the provisions and purposes of the Compact, and to protect it from challenge and attack. Section B provides that the state legislature shall petition Congress to enact a federal water marketing authorization for the Tribes.

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[84]This provision means that if a heading or caption of the Compact conflicts with language in the body of the Compact, the language in the body controls as if the heading or caption did not exist. The headings and captions are for convenience only, and do not create substantive rights.

[85]Waters of interstate streams can be apportioned among the various states of a Basin by Act of Congress, by compacts between the states ratified by Congress, or by the courts. The Tribal Water Right as quantified by the Compact will be incorporated into court decrees and is thus of course as binding in any interstate apportionment as any other court decree. The early priority date of the Tribes' right ensures its satisfaction if shortages occur.

The United States insisted on this provision because it wished to leave open whether or not the Tribes' rights should be counted as part of the State's share in any interstate apportionment, or separately from the State's share.

III. CONCLUSION AND RECOMMENDATION

The tribal negotiating team recommends that the Compact be ratified by the Tribal Executive Board.

The proposed Compact is not changed in substance from the essential components of the 1983 agreement. It emphasizes the use of the Missouri River for exercise of the Tribes' reserved water rights. The Missouri River is of course the largest source of water on the Reservation. It is by far the best quality water. And -- unlike streams such as the Milk, Poplar and Big Muddy -- it is always available throughout the summer months in dependable quantities, even in water short years.

The overall amount of the Tribes' rights is by far the largest amount of water ever determined to be reserved to any Indian tribe. The Tribes' authority to administer the use of this water is protected by the Compact, and the Joint Board will initially resolve any disputes between the Tribes and the State, or between tribal water users and the state users. The Tribes' right to transfer water rights -- to market water -- is also confirmed in the Compact. It is not certain whether courts would recognize that marketing power, but the Compact provides it. If significant water shortages ever develop in the upper Missouri River, either of a physical nature or because of a legal apportionment among the states, this could become a very valuable right.

By emphasizing the Missouri River, the proposed Compact does allow existing uses under state law to continue on the Reservation tributaries and ground water sources. This means that unless expensive water storage projects are constructed on the tributaries like the Poplar and Big Muddy, or ground water is economically and legally available, irrigation of Indian lands will probably center on the southern part of the Reservation.

If the Compact were not adopted, and the cases were litigated, it is more likely than not that the Tribes would prevail over most if not all existing users on the Poplar, Big Muddy, and other tributaries. With its prior rights under the Winters Doctrine, the Tribes could cut these uses off whenever it has a feasible use for the water. But as noted above, the total acreages and amounts of water that could be gained to the Tribes are small relative to the amounts provided the Tribes in the Compact. The total consumptive uses protected on all the tributaries for persons claiming under state law are about 45,000 acre-feet. This water serves about 19,000 acres regularly and another 13,000 acres with supplemental water spreading. By contrast, the Compact provides the Tribes with a consumptive use of over 500,000 acre-feet, and a diversion of over 1,000,000 acre-feet per year. In our view, then, the

Tribes clearly gain so much more overall under the Compact than would be produced by litigation that protecting existing uses on the tributaries and to ground water is justified to secure these gains.

The tribal attorneys, Sonosky, Chambers & Sachse, have recommended acceptance of the Compact. They have stated as follows:

> We emphasize, as we did when the 1983 agreement was before you, that we would never urge acceptance of this Compact if we were not absolutely confident that the Tribes will, overall, achieve at least as much under the Compact as by litigation. There are cases where lawyers might recommend a settlement that achieves less than continued litigation would produce. But these are not that sort of case. These cases, or this Compact if accepted and ratified, will establish forever the water rights of the Tribes and this Reservation. Water is probably in the long run your most valuable resource. It is essential to your long-term economic development. Because of the vital importance of your water rights, we would not support this Compact -- as we do -- unless we were certain that the entire agreement confirms at least as much for the Tribes as could be achieved by litigation. We are confident that it does.

The Compact is of course different from what could be achieved in litigation. Overall, the tribal negotiating team believes it is much better for the Tribes than any plausible result in court. We therefore recommend that it be ratified.

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EXHIBIT 2

COUNTY OF Los Angeles)
) ss
STATE OF CALIFORNIA)

AFFIDAVIT OF THOMAS M. STETSON

Thomas M. Stetson, being duly sworn deposes and states:

1. I am the Chairman of the Board and Senior Consultant and founder in 1957 of Stetson Engineers Inc., a firm that specializes in Water Resources engineering. Beginning in 1981, I was engaged as the principal engineering expert to represent the Fort Peck Tribes in their negotiations with the State of Montana concerning a water compact. I served in that capacity until the compact was ratified by the Montana legislature and the Fort Peck Tribal Executive Board in April of 1985. Since 1985, I have served as the Tribes' representative on the Fort Peck-Montana Compact Board.

2. I prepared all the necessary hydrological and engineering studies requested by the Tribes to assist them in the negotiation that led to the compact. I also attended all the negotiating sessions from September 1981 forward.

3. Beginning in September 1981, I undertook a number of technical studies at the direction of the Tribes. These studies concerned land classification, the available water supply in each watershed on the Reservation and existing water uses. I was very familiar with these types of studies since I had been an expert witness for the United Stated in the recent Indian water rights adjudication involving the Wind River Reservation

Exhibit 2

in Wyoming, and had prepared many of the necessary studies in that case. I was also an expert for the State of California in the Arizona v. California case, which involved many Indian Reservations in Arizona, California, Nevada, New Mexico and Utah. The overriding purpose of studies in an Indian water adjudication is to determine the practicably irrigable acreage on the Reservation.

4. In 1981 and early 1982, I and my firm reviewed the data from the Soil Conversation Service and Bureau of Indian Affairs for lands on the Reservation. We obtained aerial photographs of the Reservation land, and interpreted them by classifying the lands. Irrigable lands were classified in Classes II, III and IV. There were no Class I lands and only 19,870 acres were Class IV. We also carefully analyzed climate and obtained all available surface water measurements and reviewed all data on quality and quantity of ground water on the Reservation. After several months of study, we determined that 501,755 acres of reservation land could feasibly be irrigated out of the Missouri River.

5. We developed a series of 27 maps showing the lands by classification, and exchanged these with the state negotiating team. The State's experts reviewed our analysis, and completed their own review of Reservation lands. The State used the "prime and important" land classification of the Soil Conservation Service and agreed that 487,863 acres on the Reservation were irrigable from the Missouri River, less than a three percent difference from our determination. Both we and the State experts considered that a 300-foot lift above the Missouri River would be an economically feasible service area.

Therefore, the lands that were analyzed were those below the 2,300 foot elevation contour. That covers about half the lands on the Reservation, including almost all reservation lands in the Poplar and Big Muddy watersheds. The State decided that their studies verified the irrigable acreage determined by us, and accepted our acreage determination.

6. Some of these irrigable acres on the Reservation are owned today by non-Indians. 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 Indians or are within the Fort Peck Irrigation Project. The Tribes' water right in the compact was calculated by considering only those acres that are in Indian ownership or in the Project.

7. The parties subsequently agreed to an average water duty of 3.6 acre-feet per acre. This resulted in the annual diversion figure of 1,050,472 acre-feet. Consumptive use for irrigation was calculated to be 1.8 acre-feet per acre for full service irrigation, because a 50 percent average efficiency was agreed to. The Tribal Water Right in Article III Section A of the compact is thus stated alternatively in terms of diversions and consumptive uses, whichever is less.

8. After the State agreed in principle in March of 1982 to the practicably irrigable acreages we had determined, the negotiating teams considered an apportionment of the annual flow of the various tributaries between the State and the Tribes. We

explored apportioning each watershed on a percentage basis. We also considered the protection of a certain number of acre-feet per year of existing uses on each tributary. The State supplied me with estimates of existing uses by watershed, and in September of 1982, I and various experts from the State traveled along the tributaries to verify generally the actual uses of water on each tributary system. In October of 1982, the tribal negotiating team finally agreed to protect all existing uses on those tributaries in return for certain reciprocal concessions from the State. The Tribal team also ultimately agreed to protect, in addition to existing uses, permits issued by the State as of 1982 on the tributaries that had not yet become an actual use of water at the time the compact was concluded.

Thomas M. Stetson

Notary Public

My Commission Expires: 11/13/98

FEHMIDA F. KUMAR
COMM. #1045083
Notary Public — California
LOS ANGELES COUNTY
My Comm. Expires NOV 13,1998