Introduction

A close analysis of the public comments, public testimony, video reports, legislator comments, and written information submitted as a part of the public review of the CSKT Compact reveals that public support of this CSKT Compact is dependent on the substantial revision of several key items of the current compact. This document outlines those key sections of the Compact that the public, legislators, well-informed citizens, and professionals found objectionable. In a few days a second document will be produced that proposes an alternative compact that would be more likely to secure broad support.[1]

The concerns that have been raised are objectionable for good reason. Components of the proposed CSKT Compact involve the unconstitutional taking of property rights (water); require the State to relinquish its constitutional duty and statutory authority to manage state water rights and resources, and place state citizens under the jurisdiction of a government within which they have no vote or representation.

Moreover, the CSKT Compact is unlike any of the other Tribal Compacts negotiated by the Compact Commission as illustrated in Table 1. Because of the stark differences, concerns have been raised over other components of the Compact that have serious implications for public policy, the economy, infrastructure, and growth of western Montana. Until these issues are addressed, public opposition to the existing CSKT Compact is likely to increase. It will also be increasingly more difficult for legislators on both sides of the aisle to pass the existing Compact.

The major concerns with the existing CSKT Compact fall into several categories:

- Definition of Proceedings and Reservation Land
- Quantification, Water Claims & Priority Dates
- Water Administration
- Off-reservation aboriginal claims

Information will be presented in these pages that prove the CSKT have not moved off two significant tenets of their original position articulated by Tribal leaders in 2001. Refusal to negotiate on these two points extended the negotiations at least 11 years and in the end, the State capitulated to the Tribes' position. In consideration of this fact, if revisions are presented that make the Compact acceptable to Montanans but are rejected by the Tribes, a return to the proceedings of the on-going adjudication where all water rights are protected equally is the only viable option. Montana's preference may be to negotiate but circumstances may require adjudication.

Definition of Proceedings and Reservation Land

(a) Proceedings

The troublesome definition of the legal proceedings underway and the Flathead Indian Reservation lands begins with the Recitals section of the proposed Compact wherein the Tribes claim that they, not the United States, reserved the lands known as the Flathead Indian Reservation.

> *WHEREAS, pursuant to the Hellgate Treaty of 1855, 12 Stat. 975, the Confederated Salish and Kootenai Tribes reserved the Flathead Indian Reservation;*

While this may be the Tribes' view of their own history, the fact remains that the *United States* was the principle agent setting aside, or reserving, lands for the use and benefit of Indian Tribes. The *very existence of federal reserved water rights* is derived from the *federal* withdrawal of lands from the public domain for the use of the Indian Tribes and the implied reservation of enough water to fulfill the purposes of the reserved land. The United States then holds these water rights in trust for the Tribe. However, by claiming that the Tribes reserved the land, instead of the United States, the Compact does not then represent a 'federal reserved water rights' proceeding.

Despite this fundamental error in who reserved the land for the Tribes, the Compact then goes on to admit that the McCarran Amendment, which authorized State courts to hear claims of *federal reserved water rights* on Indian or non-Indian land, is the context under which this Compact has been negotiated:

> *WHEREAS, as a result of Congressional action and subsequent judicial interpretation, state courts have been found to possess, under certain circumstances, adjudicatory jurisdiction over federal reserved water rights held in trust by the United States for the benefit of Indians; see, McCarran Amendment 43 U.S.C. 666; Colorado River Conservation District v. United States, 424U.S. 800 (1976); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983);*

But if the federal government did not reserve the land for the CSKT, then there are no federal reserved water rights and the Compact could be considered of no consequence and irrelevant to resolving the CSKT federal reserved water rights.

The use of these recitals lays the foundation for the Tribes' claiming ownership of all land and water on the Flathead Indian Reservation, and to justify the Compact as a legitimate McCarran Amendment proceeding.

(b) Reservation Lands

The Flathead Indian Reservation is unlike other reservations in Montana in that it was actually opened by Congress to settlement in 1904.[2] However, the Compact defines the Flathead Indian Reservation without reference to this and other history that has resulted in valid non-Indian ownership of fee patent lands (private property) within the reservation boundary. The definition of the Flathead Indian Reservation used in the proposed CSKT Compact is:

> *"All land within the exterior boundaries of the Indian Reservation established under the July 16, 1855 Treaty of Hellgate (12 Stat. 975), notwithstanding the issuance of any patent, and including rights-of-way running through the Reservation."*[3]

The significance of this definition is that it implies that <u>all</u> the land within the Flathead Indian Reservation *is still in 'reservation status'* and held in trust by the United States for the benefit of the CSKT, *ignoring* the existence of private property on the reservation.

However, the definition is contrary to reality where more than 40% of the lands on the reservation are in private ownership by non-Tribal individuals, businesses, and the State. In fact, throughout history, various acts of Congress have diminished the amount of federal or Indian held trust land on the Flathead Reservation. Section VI of the Treaty of Hellgate references Section VI of the Omaha Treaty as to what was to be done with land 'excess' to the Tribes' needs:

> **Hellgate Treaty of 1855: Art. VI (in part)** "The President may…cause the whole, or said portion of such reservation, to be surveyed into lots, and assign the same as such individuals of families of the said confederated tribes as are willing to avail themselves of the privilege,…on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omaha's..." as follows: **Art. VI of the Omaha Treaty 1854 (in part)** "And the residue of the land hereby reserved… after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States."

Lands not needed by the Tribes were authorized to be sold for their benefit as part of the Treaty of Hellgate. Additional acts of Congress made further allotments of lands to Indians on reservations in severally, in other words, they could be sold by the Indians in 25 year as follows:

> **Dawes Act or "General Allotment Act" 1887 "**An act to provide for the allotment of lands in severally to Indians on the various reservations,"…

The Homestead Acts of Congress were a series of acts offering surplus public land for settlement affecting the Flathead Reservation up until about 1917. The Flathead Allotment Act directly opened the reservation to settlement:

> **Flathead Indian Reservation Allotment Act of 1904** "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment."

The Flathead Irrigation Project was authorized in 1908 and constructed to meet Indian and non-Indian irrigation needs. Today 90% of the 130,000 acres of land under irrigation by this project is owned by non-Indians who purchased the land directly from the government or Indian allottee.

After decades of allotting Indian lands Congress passed the Indian Reorganization Act of 1934 which stopped allotment and provided for the consolidation of remaining Indian land. It also provided the following:

> **Indian Reorganization Act of 1934**. "BE IT ENACTED…, that hereafter no land of any Indian reservation…shall be allotted in severalty to any Indian."Section 3. The Secretary of the Interior…is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened …Provided, however, *that valid rights or claims of any persons to any lands so withdrawn…shall not be affected by this Act*. **Section 5.** Authorizes the acquisition of lands, water rights, surface rights, and interests by the U.S. government for Indians and declares that purchased lands shall be tax exempt (*emphasis* added).

The language in this Act is significant because the valid land and water rights claims established by non-Indians prior to 1934 were deemed unaffected by the Indian Reorganization Act. In other words, the previous established claims for land and water on the reservation, including in the Flathead Irrigation Project, remained valid and were 'grandfathered-in' to the land ownership pattern, carrying forth to the present day. The 'remaining Indian lands', or whatever remained of the former Flathead Indian Reservation, were consolidated into 'reservation status', or held in trust for the CSKT by the United States.

The land use pattern on the 1.2 million acre Flathead Indian Reservation is the result of land use over the last century and the valid claims of any persons to the land and water on the reservation. By law,

these rights must be recognized.[4] The Tribes claim they have approximately 600,000 acres in tribal or individual trust.[5] Many of those acres are comprised of mountainous terrain so are not irrigable.

The CSKT's definition of the reservation assumes that the land within the exterior boundaries remains in reservation status and has significant tax implications for Montana's four counties that overlap the reservation boundary. Article I of Montana's Constitution states, in part,

> "…all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress…"

If the proposed definition of the Flathead Indian Reservation in the Compact remains, are the Counties and State illegally taxing their citizens on the reservation?

The definition of the reservation and the scope of this compact must be narrowed to even win a threshold of support from landowners on the Flathead Indian Reservation. The Recitals must be modified to reflect the reality of a federal reserved water rights proceeding under the authority of the McCarran Amendment in order for the Montana legislature to even consider the Compact.

Quantification, Water Claims, and Priority Dates

The quantification of a federal reserved water right of an Indian reservation involves the determination of the purpose of the reservation and the amount of water needed to fulfill that purpose. The CSKT Compact is noticeably silent on both—the purpose of the reservation and the amount of water needed to fulfill that or those purposes. Instead, based on the expansive definition of the Flathead Indian Reservation, the *CSKT assert on-reservation ownership of all the surface and ground water that flows through or underneath the Reservation*.[6] Within this broad claim of land ownership, the 'quantification' of the CSKT federal reserved water right becomes then the claim to all the water on the reservation. The CSKT claim is markedly different than all of the other Tribal Compacts in Montana, where the Tribal claim encompassed only that amount of water necessary to fulfill the purposes of their reservations. The CSKT Compact does not quantify the federal reserved water right of the CSKT; it just claims all the water on the reservation as if the year is 1855.

Article III of the Compact and multiple appendices list the water rights claims of the CSKT.[7] These claims include water belonging to others. This is another serious drawback to the Compact: to fulfill Tribal water rights, it requires the relinquishment to the CSKT of water rights from private water users in the irrigation community. This is a clear violation of the U.S. and Montana's constitution. The CSKT Compact will not be successful unless this provision is dropped entirely from the Compact.

Article III of the Compact sets forth the following *on-reservation* water claims of the CSKT:[8]

1. All water used by the FIP Irrigation Project (1.2 million acre feet)[9]. The use of the irrigation water right is immediately changed from agriculture to instream flow in the Compact without conducting any review of the impacts to surface and ground water. A portion is given back to irrigators in a water allocation, the FIP water use agreement.
2. Right to divert an additional 229,000 AF from the Flathead River of which 90,000 AF comes from Hungry Horse Reservoir. The Tribes and the United States used a computer model to determine that the irrigation project needed only 1.4 acre feet per acre for productive agriculture. After taking the original irrigation water use of 1.2 million acre feet, this water is in effect given back to irrigators for 130,000 acres. This amount of water is what is delivered to agricultural users.

3. All of Flathead lake (on/off reservation) up to elevation 2883 ft (16.5 million acre feet)
4. All wetlands, lakes, and reservoirs on reservation (amount of water unspecified)

The first water claim is based on the theory that the Flathead Indian Reservation still retains its reservation status and claims ownership of all the water in the Flathead Irrigation Project, or 1.2 million acre feet of water. This water, however, is already allocated to water users to irrigate 130,000 acres within the federal irrigation project. Hundreds of state-based and federally-filed water rights are filed in the County Courthouse and are also held by the DNRC awaiting processing in the general stream adjudication.[10]

Another factor that weighs against the CSKT owning all the water in the irrigation project is the construction and licensing of Kerr Dam. Kerr Dam was constructed to generate power and serve the irrigation project, with the upper 9 feet of the reservoir allocated to the Flathead Irrigation project. A portion of the power revenues from Kerr Dam have been used since 1939 to finish construction of the Flathead Irrigation Project (FIP). These funds are currently used for operation and maintenance of the irrigation project, but ceased to be used for irrigation project rehabilitation in 2005[11].

That Kerr Dam was constructed after the 1934 Indian Reorganization Act, which preserved all existing rights that had been acquired by non-Tribal members on the Flathead Indian Reservation, and was dedicated to generate power and to serve the existing irrigation project, only confirms that the right to use this water also belongs to hundreds of non-Indian irrigators within the Flathead Irrigation Project. [12]

The Role of the Flathead Irrigation Project Water Use Agreement. Because the CSKT claimed all the water in the irrigation project, the CSKT and United States, with the encouragement of the state, were prompted to reach an agreement with the Flathead Joint Board of Control (FJBC) about how much water to allocate back to the irrigators from the original 1.2 million acre feet. This is where the 'protection of irrigators' comes into play in that after the CSKT and United States claimed the irrigators water, they attempted to 'give back' an amount of water per acre that was deemed to 'protect irrigation' (claim 2 above). Unfortunately for irrigators, their 'water right' was to be replaced with a 'right to receive water' out of the irrigation water now claimed by the CSKT as its own. The struggle over the volume of water per acre to be allocated to irrigators was a diversion designed to draw attention away from the Tribes' claim of ownership of all the irrigation water.

The FIP Water Use Agreement would have allocated 180,000 acre feet to the irrigators (approximately 1.4 acre feet per acre) with an 1855 priority date[13] and taken the rest of the irrigation water (1.2 million acre feet) and turned it into instream flow with an aboriginal priority date. The Compact then gave the authority to the Tribes to lease the water formerly belonging to the irrigators. There were no environmental or economic studies to evaluate the effects this transfer of water use, change of use, and change of priority date.[14]

Thus it can be seen that there is *no actual need for a FIP Water Use Agreement on these terms* in the Compact: the irrigators have valid water rights and hold private property; the Tribes do not own or have the right to use the irrigator's water; and the federal water rights quantification is about determining the CSKT federal reserved water right, not relocating the irrigators' water rights.

The rest of the CSKT claims also presume ownership of all water resources on the reservation. The claim for all of Flathead Lake was presented as the water necessary to maintain an elevation of 2,883 ft —

which is all of the water in the original Flathead Lake without Kerr Dam, or about 16.5 million acre feet. To then claim ownership of all the irrigation water as well—which comes from the top 9 feet of Flathead Lake—means that the entire lake—18 million acre feet-- is claimed by the Tribes with a priority date of time immemorial. Only the southern one third of the lake is on reservation land.[15]

Note on Tribal "Ownership" of Water[16]. The Tribes have had this position on water ownership since at least 2001 when Tribal leaders articulated their viewpoint in the local press and in meetings. In 2002, tribal leader Clayton Matt stated the CSKT position that has now persisted for years:

> "We are saying that we own the water and that is what the law says," Matt said. "What we are saying is that if the state will recognize that this is a tribal resource, then we will recognize that there are legitimate uses."[17]

The "law" does not support the theory that the Tribes own all the water; but the law through the Winters Doctrine does say the CSKT have a reserved water right sufficient to fulfill the purposes of the reservation. In early 2002 and through 2003, the State told the Tribes that this proposal would not be a basis of negotiation.

In 2003, a newsletter of the Flathead Joint Board of Control cited the 2001 CSKT statement of ownership of the water as a pre-condition to any agreement with the state of Montana. At that point the CSKT leadership also stated that as 'owners of the water, we have a right to administer all water uses'. In 2002 the state and irrigators were unanimous in their willingness to negotiate, but that the ownership of the water by the CSKT was a 'non-starter":

> Jon Metropolis, a Helena attorney who represents irrigators through the Flathead Joint Board of Control, said irrigators support a compact settlement, but cannot and will not support any agreement that concedes that the tribes own the reservation's waters. "Our contention, which I believe is supported by the law, is that the state of Montana owns the water," Metropolis said. "The claim that they own the water conflicts with water law and we expect that it will be resolved in the state's favor. Since they don't own it, they don't hold the right to manage it."[18]

Without the legal, historical, or Constitutional consensus backing up this claim, the CSKT have nevertheless held this ownership claim since at least 2001. The surprise is that since 2005, both the Compact Commission and the attorney for the Flathead Joint Board of control now accept this premise, and are working diligently to convince their clients and to justify their position. With the recent change in the leadership of the Flathead Joint Board of Control, its attorney is now back in line with his 2002 position.

Water Administration

Again, based on the definition of the reservation and the claim of ownership of all the water on the reservation, the CSKT proposed that they have full administrative authority over all water uses on the Flathead Indian Reservation. The State of Montana has consistently refused to accept this premise. In 2008, the then-director of the Division of Water Resources within the Department of Natural Resources, John Tubbs, provided guidance for the Compact Commission which stated unequivocally that the dual state/tribal administration system used in all other compacts should also prevail with the CSKT Compact.[19] The Commission refused to follow this guidance and departed from three decades of a consistent position on water administration and precedent set in previous Compacts, and endorsed the CSKT administration plan.

However, under the proposed Compact, the State of Montana is forever barred from administering the water resources of the State and rights of its citizens on the Flathead Indian Reservation. Montana's system and authority is replaced by the CSKT Unitary Management Ordinance in which a politically-appointed board and a Tribal Water Engineer manage all water uses, water use disputes, and future water development on the reservation. The CSKT take over the data collection and centralization function belonging to the State. The overall make-up of the board and the decision-making structure proposed in the UMO guarantee Tribal control. [20] Since the management function will require financial support, allowing the Tribes to administer state water rights and resources could provide the Tribes with taxing authority that is now only held by the state and federal governments.

The curious change here was wrought by the Montana Reserved Rights Compact Commission. In the mid 1990's, the CSKT successfully sued to enjoin the state from issuing any water permits until the Tribes' federal reserved water rights were quantified. In 2005, the Compact Commission chose to permanently 'extend' this ruling beyond the quantification of the Tribes' reserved water rights and delegate the State's water administration authority to the Tribes. [21] A key problem with the Compact Commission's action is that there is no law supporting the Tribes' jurisdiction over 23,000 non-Indians or private property even within a reservation.

By law and under the Montana Constitution, neither the Compact Commission nor the state legislature has the authority to remove a class of citizens from its protection just because of where they live in the state. The state cannot delegate its constitutional authority for its citizens to a Tribe. The administration of all water on the Flathead Indian Reservation by the CSKT is unauthorized; however, the Tribes' authority to manage its *own* resources is well established especially in Montana Compacts with Tribes. Since the Compact Commission conceded to give all the water to the Tribes, the CSKT then took over the management function entirely.

Off-Reservation Aboriginal Rights

Article III of the Treaty of Hellgate secured to the CSKT the 'right to take fish, hunt, and gather at usual and accustomed places in their aboriginal territory in common with the citizens of the territory'. The CSKT has interpreted this language to mean that a water right was also implied to support the fishery, and further, that this off-reservation water is equivalent to a federal reserved water right:

> *WHEREAS, the Confederated Salish & Kootenai Tribes claim aboriginal water rights and pursuant to said Treaty, reserved water rights to fulfill the purposes of the Treaty and the Reservation;*

Clearly a federal reserved water right only applies to the land that was reserved, not to off-reservation lands. And there are important distinctions here that relate to whether a 'water right' off-reservation was implied in securing a right to take fish in common with the citizens of the territory. On the reservation, the exclusive right to take fish was associated with water sufficient to support the habitat needs of the fish in one legal decision.[22]

Off the reservation, the guidance on water rights is found in the legal cases surrounding the other tribes whose treaties were signed by Governor Isaac Stevens which had identical language in their treaty on 'taking fish in their usual and accustomed places off reservation in common with the citizens of the territory.' [23] These so-called 'Stevens Treaty Tribes' spent years defining and determining this right in

court. The right to take fish was eventually legally ruled to mean a *right to harvest a certain percentage of fish in usual and accustomed areas*.[24]

Where a water right has been claimed to support habitat off reservation, it first has never been part of a reserved rights proceeding. The range of legal opinion varies considerably on whether a water right is necessary to "the right to take fish". In a few cases, the Tribes' fishery right and thus water claim was ruled to have been diminished, and in other cases the water right is subordinated to existing uses. Such water claims have also been rejected by the Courts. Where courts have ruled in favor of some off-reservation water, or a negotiation has enabled them, the water is usually managed by the State.[25] Many of the off-reservation Stevens Treaty rights have been ruled 'diminished' as a result of settlement in aboriginal areas ceded to the United States.

Despite this uncertainty off the reservation, the CSKT have asserted claims to approximately 22.4 million acre feet of instream flows affecting eleven counties and eight major river systems in western Montana, and 8.8 million acre-feet of Flathead Lake off-reservation.[26] Although the use of water for instream flow is non-consumptive, the existence of a year-round instream flow in these streams actually deprives other water users from developing the water used for instream flow. What is more troubling for Montana's future is that the volume of water claimed by the Tribes approaches the limits of 'available water' in the river course. This impinges on future growth and development in these watersheds.

There are a few threshold issues. First, whether the 'right to take fish' off the reservation automatically implies a water right: case law on the subject is unclear and more often than not denies that there is any water right off reservation to support the right to take fish. Moreover, since that right to take fish is held in common with all citizens of the territory, does this give any one citizen a superior right to *water* than another? The second threshold issue is who should be in charge of managing the fisheries, rivers, streams and other habitat to support fisheries, especially in light of the fact that all citizens share in the right to take fish off reservation in Montana?

The Tribes claim 'co-ownership' with Fish Wildlife and Parks of any instream flow off the reservation and attach a 'time immemorial' priority date to certain waters in the Kootenai drainage but maintain the FWP priority date for others. Moreover, the CSKT claim they can 'call' the river against agriculture any time the river falls below the recommended instream flow level over a certain time period. On both counts there is no law allowing or precedent for Tribes co-owning a water right off-reservation and no law that gives the Tribes a right to 'call' for water off the reservation.

The final threshold issue is whether off-reservation treaty rights can be handled at all in a McCarren Amendment[27] proceeding. The Montana General Stream Adjudication is a McCarren Amendment proceeding in that it is authorized to hear federal reserved water rights. The adjudication proceedings were stayed for Tribes and the federal government while reserved rights were negotiated with the Compact Commission. In addition, both the U.S. Supreme Court and the Montana Supreme Court have stated that state courts are sufficient on their face to hear proceedings involving federal reserved water rights. No such 'sufficiency' exists for determining aboriginal treaty rights especially those that do not directly imply a water right in the Montana state courts.

The legislature's charge to the Compact Commission's was to negotiate a fair and equitable settlement of the federal reserved water rights of the Tribes and United States. Federal reserved water rights are derived from the Winters Doctrine. The Compact Commission's charge does not include the resolution

of off-reservation Treaty Rights. The CSKT rights to take fish are federally-derived treaty rights, but are not federal reserved water rights.

Summary

For the reasons outlined above, the CSKT Compact failed to win public and legislative approval during the 2012-2013 period when it was rolled out to the public and submitted before the legislature. The Compact Commission asked the state legislature to approve a 'forever document'—as it could not be revised after its approval—without answers to the fundamental questions discussed in this document. By the time the Compact bill was introduced to the legislature, there was less than one month left in the session with hundreds of other bills already in discussion.

Even with more time for legislative review, however the Compact had failed to gather support because of the issues discussed in this paper, namely:

- Definition of Proceedings and Reservation Land
- Quantification, Water Claims & Priority Dates
- Water Administration
- Off-reservation aboriginal claims

Substantive, fundamental change is needed in each of these areas to achieve both a fair and equitable settlement and a viable Compact that can pass legislative muster. Somehow the CSKT Compact negotiations veered away from generating such an agreement. If the goal of all of the parties is to continue negotiations in good faith going forward, then they will focus on:[28]

> "...specific, practical solutions to the share and administer water resources… If a tribe's or a state's goal is to establish a new legal principle relating to the Winters Doctrine, litigation is the process that should be used because it is capable of providing a binding legal precedent."[29]

ENDNOTES

[1] It is recognized that any revision to the existing Compact must be approved by the State, the Tribes and the United States. We welcome that review.

[2] Flathead Allotment Act of 1904, 24 Stat 388: "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and *the sale and disposal of all surplus lands after allotment.*" (*emphasis* added)

[3] This is a definition used of a reservation by some federal agencies when discussing water quality regulation and renewable energy facility citing. The definition is used in the Compact to extend "reservation status" to mean ownership of all surface and ground waters of as well as the lands of the reservation, and to extend Tribal jurisdiction over non-Tribal private property.

[4] 1934 Indian Reorganization Act, 48 Stat 984; Montana Constitution IX Section 3 (1) re: pre-1973 water rights

[5] This is an estimate only and federal and county land title records do not reflect these totals

[6] The effect of these claims is to constitute a direct taking of water and land, resulting in the diminishment of property values throughout four counties. It also violates Articles II and IX of the Montana Constitution and the Fifth Amendment of US Constitution on taking without compensation.

[7]The CSKT Compact as presented to the public ranged from 1,200- to 1,400 pages long. The length is due to the appendices detailing the multiple claims that were submitted

[8] Because this was a negotiated settlement, the Federal Government contributed water from an off-reservation federal facility. We believe the Federal government should provide most of the water to fulfill the CSKT water need from federal reservoirs. The use of 100,000 Hungry Horse water for the State of Montana is enabled by S.B. 376 , sponsored by Senator Verdell Jackson in 2007

[9] The Flathead Reservoir (1.2 million acre feet) water is earmarked for the FIP irrigation project and represents the upper 9 feet of the reservoir.

[10] During a FOIA investigation regarding the Compact Commission's files, photographs were taken of file cabinets full of water rights filings and permits both of the FJBC and by the United States filing on behalf of individual water users to whom it had sold water and land.

[11] There are on-going concerns about whether the BIA has properly expended existing funds on maintenance and rehabilitation of the FIP. Latest estimates suggest the FIP has an outstanding $80 million in deferred maintenance needs.

[12] The CSKT will become the owners of Kerr Dam in 2015, operating the facility according to the FERC license. This will have effects on local power rates and the county tax base.

[13] Most water users in the irrigation project already have an 1855 priority date as their lands were purchased from Indian allottees. These are known as 'Walton Rights'

[14] The potential environmental impacts are significant, including dewatering of shallow ground water aquifers, erosion, and water systems dependent upon irrigation return flow including wetlands. The economic impacts of removing water from agricultural lands were not investigated although significant irrigation and property value reductions are possible.

[15] Title to the banks and beds of the southern portion of Flathead Lake belong to the United States and the Tribes have the right to regulate the land use of riparian owners therein. 655 F. 2d 951 Namen case.

[16] It is abundantly clear that this premise can be challenged successfully by Montana in Court.

[17] 2002, "Liquid Assets: The Question of Who Owns the Water Continues", Missoulian 11/10/02

[18] Ibid note 16

[19] Tubbs Memo to Susan Cottingham and Jay Weiner, Compact Commission, 'Decision Points for CSKT Compact', June 2008.

[20] The Reservation Water Management Board consists of 5 members: 2 appointed by the Governor, 2 appointed by the Tribe, 1 appointed by the Tribe and Governor's selected members or a Federal judge, and a federal ex officio non-voting member. Of the five positions together, Criteria for membership include a business owner on the reservation, having a seasonal home on the reservation, and having some water related experience. Contractors, consultants, or employees of the Tribal, federal, and state governments are not excluded from membership. Based on the membership criteria, the CSKT could control at least 3 of 5 seats on the Water Management Board. Any business owner on the reservation could easily be impacted by his/her decisions.

[21] Chris Tweeten explained this in a meeting on August 2, 2012 where he stated that by the legislature approving this Compact, it would be exercising its constitutional authority over water by delegating it to the Tribes in this compact.

[22] State ex Rel Greely v. Conf. Salish &Kootenai December 1985

[23] There are 9 tribes who signed treaties with Gov. Stevens in Washington and Oregon. The territory of the Flathead was once part of Washington State.

[24] Boldt Decision and its progeny, 384 F. Supp. 312 http://www.ccrh.org/comm/river/legal/boldt.htm

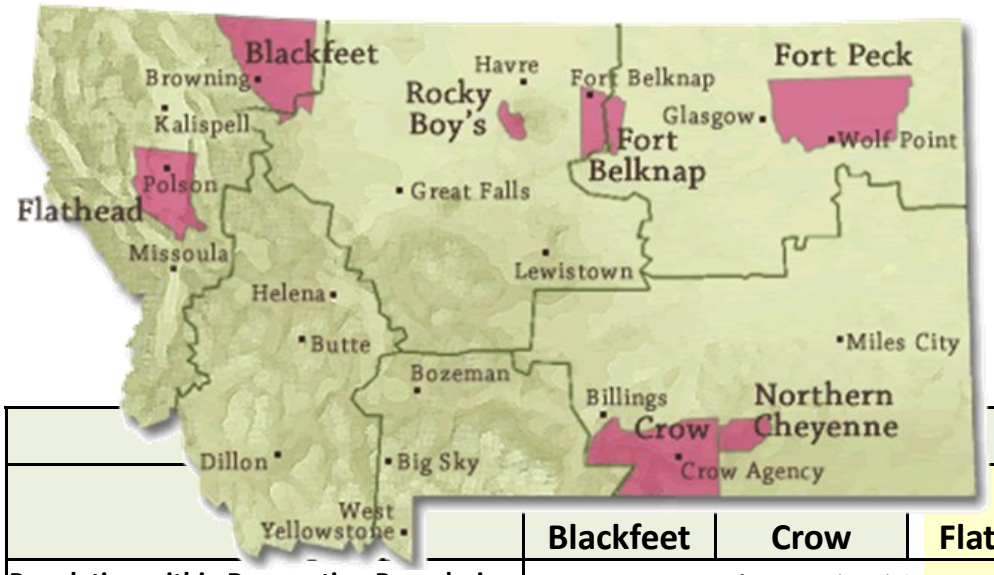
[25] Bilideau, 2012, *The Elusive Implied Instream Flow Right: Do Off-Reservation Instream Flow Rights Exist to Support Indian Treaty Fishing Rights?* 48 Idaho L. Review 515 (2012)

[26] The volume and location of these water rights were listed in hundreds of pages in the appendices to the Compact. It appears that multiple listing of the same instream flow for a single river system led to the claim for an enormous amount of water that the Commission would never admit publically. Values quoted here are taken exactly from appendices as compiled.

[27] The McCarren Amendment (43 USC 666) allowed the limited waiver of the sovereign immunity of the United States for the purpose of quantifying federal reserved water rights in state general stream adjudications where all users were involved.

[28] The Governor and legislature could still extend the Compact Commission; the question is the Tribes' willingness to negotiate.

[29] Folk-Williams, John A., *"The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Water Rights"*, Natural Resources Journal Vol. 28, Winter 1988



COMPARISON OF MONTANA INDIAN RESERVATION RESERVED WATER RIGHTS COMPACTS

	RESERVATION						
	Blackfeet	**Crow**	**Flathead**	**Fort Belknap**	**Fort Peck**	**Northern Cheyenne**	**Rocky Boy**
Population within Reservation Boundaries	Source: 2010 US Census of Housing and Population CPH-1-28						
Tribal	8,944	5,322	7,042	2,704	6,714	4,406	3,221
Non-Tribal	1,461	1,541	21,317	147	3,294	383	102
Total Population	**10,405**	**6,863**	**28,359**	**2,851**	**10,008**	**4,789**	**3,323**
Land w/in Reservation Boundaries (Acres)	Source: Indian Education for All—MT Office of Public Instruction 2009						
Tribal Trust	311,175	404,172	653,214	210,954	413,020	326,547	122,259
Tribal Allotments	701,816	1,166,406	58,729	406,533	516,092	113,277	0
Other (State/Federal/Private)	512,721	894,336	531,057	28,089	1,164,012	4,951	0
Total Land	**1,525,712**	**2,464,914**	**1,243,000**	**645,576**	**2,093,124**	**444,775**	**122,259**
Reserved Water Right Award (Acre Feet)							
On Reservation	86,880	800,000	16,300,951	500,000	1,052,472	89,530	20,000
Off Reservation	0	0	31,774,647	0	0	0	0
Total (Data Source: See Items 1 or 2 below)	(1) **86,880**	(1) **800,000**	(2) **48,075,598**	(1) **500,000**	(1) **1,052,472**	(1) **89,530**	(1) **20,000**
Compact Details							
On Reservation Water Rights Administration	U.S./MT/Tribe	U.S./MT/Tribe	Tribe/UMO	U.S./MT/Tribe	U.S./MT/Tribe	U.S./MT/Tribe	U.S./MT/Tribe
Off Reservation Aboriginal Treaty Rights	No	No	Yes	No	No	No	No
Relinquish Irrigation Water Rights to Tribe	No	No	Yes	No	No	No	No
Ratified Montana Legislature / U.S. Senate	2009 / No	1999 / 2010	No / No	2001 / No	1985 / 1994	1991 / 1992	1997 / 1999
Statistics:							
Acre Feet / Tribally Owned Acre	0.09	0.51	67.53	0.81	1.13	0.20	0.16
Acre Feet / Tribal Member	9.71	150.32	6,826.98	184.91	156.76	20.32	6.21

(1) Negotiating Tribal Water Rights: Fulfilling Promises In The Arid West, By Bonnie G. Colby, John E. Thorson, Sarah Britton

(2) Flathead Reservation based upon Concerned Citizens of Western Montana analysis of the 02/13/13 compact documents on the DNRC website. Note: the commission has not provided quantification numbers for this compact and recently revised the compact documents in Appendix 12, increasing the volume of water in the compact to nearly 52 million acre feet .