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TO: Water Policy Interim Committee
FROM: Helen Thigpen, Staff Attorney
DATE: August 22, 2014
RE: Responses to legal questions submitted by Representatives Ballance and Regier regarding the proposed water compact with the Confederated Salish & Kootenai Tribes.

During its May 2014 meeting, the Water Policy Interim Committee (WPIC) directed committee staff to analyze legal questions submitted to the committee regarding the proposed water compact with the Confederated Salish and Kootenai Tribe (CSKT). The questions were presented to the committee for consideration by Representatives Nancy Ballance and Keith Regier. The legal questions submitted fell within four primary topic areas: (1) the purpose of the Flathead Indian Reservation; (2) the proposed Unitary Administration and Management Ordinance (UMO); (3) the proposed off-reservation instream flow rights; and (4) compact ratification and administration. Committee staff carefully analyzed each of the questions and submits this memorandum to the WPIC for its consideration.

As the committee is aware, Legislative Services Division staff members are nonpartisan and provide legal, policy, and research-related support to legislative committees to assist the committees in carrying out their legislative functions. The responses and analysis provided below are for informational purposes only and do not bind any entity that is a negotiating party to the proposed compact. Ultimately, a court of law is the only forum that may issue a binding determination on the legality of any particular issue that may arise in a specific case or controversy.

1. "What is the purpose of the Flathead Indian Reservation?"

Short Answer:

To determine the purpose of the Flathead Indian Reservation, a court would likely investigate the Hellgate Treaty, legislative history associated with the creation of the reservation, and any other events the court considers relevant. Based on this review a court could conclude that there is more than one purpose of the Flathead Indian Reservation and that one of those purposes was to provide the CSKT with a permanent homeland. However, this is a legal determination that would be made by a court in a proceeding to adjudicate and quantify Indian reserved water rights. Negotiated settlements of water rights are another method of quantifying Indian reserved water rights, although potential reasons for the creation of the reservation and applicable quantification methods may inform the terms of the compact.

Analysis:

When the federal government sets aside land for the creation of Indian reservations and other federally reserved lands, the government also impliedly reserves a sufficient amount of water to fulfill the purposes of the reservation. This rule was established by the U.S. Supreme Court in the seminal decision *Winters v. U.S.*, which arose out of a dispute over water to the Fort Belknap Reservation in Montana. In *Winters*, the Supreme Court determined that the federal government's objective of

encouraging agrarian lifestyles for the Indians would have been defeated without a sufficient amount of water to support agriculture and other activities.

By establishing the reserved water rights doctrine, the Supreme Court carved out an exception to the prior appropriation doctrine, which affords water rights to the first person to apply water to a beneficial use. According to the court, "The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."[1] The priority date for the water right established in *Winters* was the date the reservation was created. Winters rights are unique to state-based appropriative rights in several other respects. For example, these rights cannot be lost or forfeited through non-use and they are not constrained by existing use. In addition, the U.S. Supreme Court has affirmed that the quantity of water reserved is intended to satisfy both the present *and* future needs of the reservation.[2]

Winters did not establish a method for quantifying the amount of water necessary to fulfill the purposes of the reservation, but later cases have made clear that the quantity of water reserved is the amount of water sufficient to fulfill the purpose of the reservation.[3] In cases that did not involve Indian reservations, the U.S. Supreme Court has concluded that the "implied-reservation-of-water-doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more" and that the quantity of water reserved is limited to the primary purpose for which the reservation was established.

To determine the purpose of an Indian reservation, courts will carefully examine the documents establishing the reservation and may also investigate legislative history, surrounding circumstances, and subsequent historical events.[4] When interpreting treaties, courts will apply well-established principles of treaty interpretation, including that a treaty is not a grant of rights to the Indians, but a grant of rights from the Indians.[5] As such, all rights not expressly ceded to the government are retained by the Indians.[6] According to these principles, treaties with the Indians are construed as the Indians would have understood them at the time the treaty was negotiated. Any ambiguity or uncertainty is resolved in favor of the Indians.[7]

Courts have reached varying conclusions when asked to determine the purpose of Indian reservations, but with some significant exceptions, most appear to have concluded that reservations were established primarily for agricultural pursuits.[8] Determining the primary purpose of an Indian reservation can be difficult, in part because in many cases it appears that the specific purpose of the Indian reservation was not clearly articulated.[9] Some courts have narrowly interpreted a reservation's

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[1] *Winters v. U.S.*, 207 U.S. 564, 600-601 (1908).
[2] *Arizona v. California*, 373 U.S. 546, (1963).
[3] *See Cappaert v. U.S.*, 426 U.S. 128 (1976), *U.S. v. New Mexico,* 438 U.S. 696 (1978), and *Arizona v. California*, 373 U.S. 564 (1963).
[4] *See Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981) (stating that "to identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances").
[5] *See U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied* 104 U.S. 3536 (1984).
[6] *Id*. at 1413.
[7] *Id.*
[8] Nathan Brooks, *Indian Reserved Water Rights: An Overview*, CRS Report for Congress, January 24, 2005.
[9] *Walton*, 647 F.2d at 47.

purpose. For example, in the adjudication of the Big Horn River system, the Wyoming Supreme Court held that agriculture was the sole purpose of the Wind River Reservation.[10] Other courts have interpreted a reservation's purpose more broadly and have concluded that by establishing a reservation, the government intended to provide the Indians with a permanent homeland. For example, in 1981 the Ninth Circuit Court of Appeals held that a reservation can have more than one primary purpose and that one of the purposes of the Colville Reservation was to "provide a homeland for the Indians to maintain their agrarian society."[11] The court also recognized the historical importance of fishing to the Indians and concluded that "preservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Indian Reservation."[12] Similarly, the Arizona Supreme Court concluded that the "essential purpose of Indian reservations is to provide Native American people with a 'permanent home and abiding place.'"[13] In recognizing a permanent homeland purpose, the Arizona Supreme Court declined to apply the primary and secondary test announced in *U.S. v. New Mexico* and, among other things, emphasized tribal values and the cultural significance of water for tribal uses.[14]

In 1963, the United States Supreme Court upheld one measure for determining how to quantify reserved rights when a primary purpose of a reservation is determined to be agriculture. This measure is based on the amount a particular tribe would need to irrigate all of its practically irrigable acreage. The PIA standard, as it is known, has been described as involving a "complex, cost-benefit analysis which weighs the arability and engineering practicability of growing crops on particular land with the economics of such irrigation."[15] The U.S. Supreme Court has described the standard as the only feasible and fair way by which Indian reserved water rights for agricultural purposes can be measured.[16]

While courts have continued to use the PIA standard as a method for calculating reserved water rights for agriculture purposes, the standard itself has been heavily criticized, in part because it fails to consider other values or pursuits that would be deemed significant to a tribe in present times. This is one of the reasons the Arizona Supreme Court specifically rejected the PIA standard in the Gila River adjudication.[17] However, the PIA standard has been affirmed by the Montana Water Court. As stated in the Water Court's opinion regarding the compact with the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, despite criticism of the PIA method, "no court has yet rejected the PIA standard and the Montana Supreme Court has expressly approved it."[18] According to the Water Court, "The PIA standard remains the principle method of quantifying Indian reserved water rights for agricultural purposes."[19]

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[10] *In re General Adjudication of All Rights to Use Water in Big Horn River Sys*., 753 P.2d 76, 96 (Wyo. 1988).
[11] *Walton*, 647 F.2d at 48.
[12] *Id.*
[13] *In re General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 201 Ariz. 307, 313 (Ariz. 2001).
[14] *Id.* at 318-319.
[15] *In re Adjudication of the Rocky Boy's Reservation*, No. WC-2000-01, slip op at 54-56 (June 12, 2002).
[16] *Arizona v. California*, 373 U.S. 546, 600-601 (1963).
[17] *In re General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 201 Ariz. at ¶ 37 (stating, "For the foregoing reasons, we decline to approve the use of PIA as the exclusive quantification measure for determining water rights on Indian lands").
[18] *In re the Adjudication of Fort Peck Indian Reservation*, No. WC-92-1, slip op. at 18 (MT Water Ct. Aug. 10 2001); *see also Greely v. Confederated Salish and Kootenai Tribes*, 219 Mont. 76, 93-94, 712 P.2d 765 (1985).
[19] *Id*.

To determine the purpose of the Flathead Indian Reservation, a court would likely investigate the Hellgate Treaty, legislative history associated with the creation of the Flathead reservation, and any other events the court considers relevant. Based on precedent established by the Ninth Circuit Court of Appeals, which includes the state of Montana, a court could conclude that there is more than one purpose of the Flathead Indian Reservation and that one of those purposes was to establish a permanent homeland for the CSKT. It is important to note that determinations regarding the purpose of Indian reservations, as discussed above, have historically been made during court proceedings to adjudicate reserved water rights. Negotiated settlements of water rights are another method of quantifying Indian reserved water rights, although potential reasons for the creation of the reservation and applicable quantification methods may inform the terms of the compact.[20]

2. Unitary Management Ordinance

2.a. "Is there a compelling legal reason for the State of Montana to delegate its constitutional responsibilities for water administration of its citizens on the Flathead Reservation to a foreign/sovereign government (Tribes, US)?"

Short Answer:

A court is unlikely to conclude that the State of Montana, through passage of the proposed Unitary Administration and Management Ordinance ("UMO"), is unlawfully delegating water administration responsibilities to the CSKT. The UMO establishes a joint state-tribal board to administer and manage water rights on the Flathead Indian Reservation. The Montana Constitution requires the Legislature to "provide for the administration, control, and regulation of water rights" in Montana, but does not expressly limit the state's authority to develop other mechanisms for water right administration. The Legislature retains all the lawmaking powers of a sovereign entity and is limited only by the U.S. and Montana constitutions. Nothing in law appears to prohibit the formation of a dual state-tribal board to administer or manage water rights on an Indian reservation; the decision to establish a unitary management system is a policy question for the Legislature.

Analysis:

Article IX, sec. 3 of the Montana Constitution requires the Legislature to "provide for the administration, control, and regulation of water rights" and to "establish a system of centralized records . . . " As a result, the Montana Legislature passed the Water Use Act in 1973 to administer, control, and regulate water rights within the state of Montana. The purpose of the Water Use Act was, in part, to "encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems . . . "[21] In general, the Water Use Act confirmed water uses that existed prior to July 1, 1973, created a process for obtaining water rights and changing existing water rights, and

[20] David H. Getches, *Water Law in a Nutshell* 364 (West 2009).
[21] 85-2-101(3), MCA.

established a centralized record-keeping system for water rights in Montana. The Water Use Act was amended in 1979 to address federal and Indian reserved water rights.[22] These provisions recognize that "water and water rights within each water division are interrelated" and provide that federal and Indian reserved water rights are included in the general stream adjudication process through settlement or adjudication.[23]

The Legislature vested the Department of Natural Resources and Conservation (DNRC) with the responsibility to enforce and administer the Water Use Act.[24] By law the DNRC must prescribe the procedures, forms, and requirements for permits and proceedings under the Water Use Act and determine what information must be provided to the DNRC so it may carry out its administrative functions.[25] The DNRC must also "establish and keep in its Helena office a centralized record system of all existing rights and a public record of permits, certificates, claims of existing rights, applications, and other documents filed in its office under this chapter."[26] At its most basic level, the DNRC is charged with analyzing proposed new water uses or proposed changes to existing water uses to ensure that existing users are not harmed. Because Montana operates under the rule of "first in time, first in right," the DNRC administrative framework rests heavily on ensuring that new uses or changes in uses do not harm existing users.

The UMO contained within the proposed CSKT compact spans 72 pages and, among other things, creates a reservation water rights database, establishes standards for new appropriation rights and changes to appropriation rights, establishes a Water Management Board, sets forth requirements for public meetings and record-keeping, describes the powers and duties of the board, and establishes a process for resolving water use disputes on the reservation. The Water Management Board would be the "exclusive regulatory body on the Reservation for the issuance of Appropriation Rights and authorizations for Changes in Use of Appropriation Rights and Existing Use, and for the administration and enforcement of all Appropriation Rights and Existing Use."[27] The board is composed of five voting member with two members selected by the Governor, two members selected by the CSKT Tribal Council, and one member selected by the other four appointed members. If the appointed members cannot agree on the fifth member of the Board, the decision is ultimately made by the chief judge of the U.S. District Court for the District of Montana.

Other tribal water compacts allow for state administration of state-based rights and tribal administration of tribal reserved rights as opposed to the unified system of administration that is proposed through the UMO. This is generally referred to as a dual water rights administration system. However, in each of the six Indian compacts that have been approved by the Legislature, the law requires establishment of a board composed of tribal and non-tribal members that can resolve disputes between tribal water right holders and those who hold state-based rights. If the proposed Water Management Board and the UMO are established in state law, the state would have the authority, though not exclusive authority, over administration of all rights on the Flathead Reservation whether derived from tribal, federal, or state law. This is not the case for the other tribal water compacts. Unlike the other compacts, the proposed compact gives the Water Management Board authority to combine

[22] *See* Title 85, chapter 2, part 7, MCA.
[23] *Greely v. Water Court*, 214 Mont. 143, 146, 691 P.2d 833, 835 (1984).
[24] 85-2-112(1), MCA.
[25] 85-2-112(2), MCA.
[26] 85-2-112(3), MCA.
[27] Art. IV.C.1, Proposed CSKT Water Compact.

and assume the roles of the DNRC and a tribal entity to issue rights for new uses and changes to existing uses on the reservation.

Although not expressly related to water rights or administration, Montana law currently provides for state-tribal cooperative agreements. The intent of the State-Tribal Cooperative Agreements Act is to promote cooperation and prevent the dual taxation of citizens.[28] The Flathead Indian Irrigation Project Cooperative Management Entity, which at one time managed the Flathead Indian Irrigation Project (FIIP), was formed pursuant to this law. The law provides that "Any one or more public agencies may enter into an agreement with any one or more tribal governments to: (a) perform any administrative service, activity, or undertaking that a public agency or a tribal government entering into the contract is authorized by law to perform; and (b) assess and collect or refund any tax or license or permit fee lawfully imposed by the state or a public agency and a tribal government and to share or refund the revenue from the assessment and collection."[29] There are other examples of overlapping state-tribal administrative mechanisms within Montana Indian reservations. For example, state law establishes an agreement between Montana Fish, Wildlife and Parks and the CSKT on hunting and fishing regulation on the Flathead Indian Reservation. The law authorizes "individuals to serve on a state-tribal cooperative board to develop hunting and fishing regulations" and the state and tribe to jointly issue hunting fishing licenses, permits, and stamps. The joint licensing permit requirements supersede the general licensing and permit requirements in Title 87, MCA, and must comply with the provisions of requirements of Title 18, chapter 11, MCA.[30]

While it is true that the UMO is unique in that it sets up a unified system of management on the Flathead Indian Reservation, a court is unlikely to conclude that the State of Montana, through passage of the UMO, is unlawfully delegating water administration responsibilities to the CSKT. As noted above, the UMO sets up a joint state-tribal water management board that oversees water management and administration on the reservation. Through negotiation, both the state and the CSKT appear to have agreed upon a framework to address certain jurisdictional issues for water management on the reservation. On one hand, the state has agreed to set up a separate law to address water use on the Flathead Indian Reservation and on the other hand, the CSKT have agreed to allow the state to play a role in water management on the reservation such as permitting new uses. The constitutional provision requiring the Legislature to "provide for the administration, control, and regulation of water rights" in Montana does not expressly limit the state's authority to develop other mechanisms for administering water rights. As noted by the Water Court in its order approving the water compact with the Chippewa Cree Tribe, "The Montana Legislature possesses all the powers of lawmaking inherent in any independent sovereign and is limited only by the United States and Montana Constitutions."[31] The Water Court also noted that "As long as the state acts within the parameters of the United States and Montana Constitutions, Montana has broad authority over the administration, control and regulation of water within its boundaries."[32] Because neither the U.S. nor Montana constitutions appear to limit the state's ability to enact the UMO, a court is not likely to conclude that the UMO is an unlawful delegation of authority to a tribal entity.

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[28] *See* Title 18, chapter 11, part 1, MCA.
[29] 18-11-103(1), MCA.
[30] 87-1-228, MCA.
[31] *In re Adjudication of the Rocky Boy's Reservation*, No. WC-2000-01, slip op at 9 (June 12, 2002).
[32] *Id.* at 9-10.

2.b. "Does the State of Montana have the authority and is there a compelling legal reason to remove its citizens out from under the protection of the laws and Constitution of Montana?"

Short Answer:

The state of Montana does not have authority to remove its citizens from protections provided by law. If passed, the UMO would become state law and would apply to water administration and management on the Flathead Indian Reservation. Aggrieved parties may seek legal redress in a court that has jurisdiction over the parties and the cause of action.

Analysis:

For further information, see the response to question 2.a. above.

2.c. "Does the Unitary Management Ordinance violate the equal protection clauses of the Montana and United States Constitutions?"

Short Answer:

Most likely no. The basic rule of equal protection is that similarly situated persons must receive like treatment under the law. As currently drafted, the UMO is facially neutral and does not distinguish between different classes of people or impose different burdens on different groups. Rather, the UMO applies equally to all water users living within the exterior boundaries of the Flathead Indian Reservation. A claim based on unequal treatment of non-tribal members and other state-based water users would likely be subject to rational basis review. Because the state would need only to demonstrate that the law is rationally related to legitimate governmental purpose, a court would likely conclude that the UMO does not offend equal protection guarantees.

Analysis:

The 5th and 14th Amendments of the United States Constitution and Article II, section 4, of the Montana Constitution prohibit the federal government and states from denying any person the equal protection of laws. The basic rule of equal protection is that similarly situated persons must receive like treatment under the law.[33] The equal protection clauses are designed to promote fundamental fairness in the law, but they do not prohibit the government from drawing distinctions among different classes of people so long as the distinction is justified by a sufficient purpose.

The first step in an equal protection analysis is to identify the classes involved and determine whether the classes are similarly situated.[34] A classification may be obvious if it clearly distinguishes between certain groups of people. However, an apparently neutral law may nonetheless violate equal protection guarantees if it is designed to impose different burdens on different classes of people.[35] The

[33] *Satterlee v. Lumberman's Mut. Cas. Co*., 2009 MT 368, ¶ 15, 353 Mont. 265, 222 P.3d 566.
[34] *Id*. at ¶ 16.
[35] *Id*.

goal of identifying a similarly situated class is so a court can identify the factor that is allegedly subject to discrimination.

If there is a relevant classification, the second step is a determination of what level of review to apply to the particular governmental action that is at issue: (1) strict scrutiny; (2) intermediate scrutiny; or (3) rational basis. Strict scrutiny applies if there is a suspect class involved or if a fundamental right is at issue.[36] Strict scrutiny review requires the government to demonstrate that the law is necessary to achieve a compelling governmental purpose and that the law is narrowly tailored to serve a compelling governmental interest.[37] In Montana, courts apply an intermediate review if the law affects a right conferred by the Montana Constitution, but is not found in Article II of the Constitution (Declaration of Rights).[38] Intermediate scrutiny requires the government to demonstrate that the "law or policy in question is reasonable and the need for the resulting classification outweighs the value of the right to an individual."[39] Rational basis review applies in all other instances and asks whether the law is rationally related to a legitimate governmental purpose. The government's burden is easiest when a rational basis review is applied, and any law that receives this level of review is likely to be upheld.[40] The Montana Water Court has previously applied a rational basis level of review to equal protection claims raised against a water compact to settle Indian reserved water rights.[41]

If passed by the Montana Legislature, a plaintiff challenging the UMO would be required to demonstrate in a court of law that the UMO unconstitutionally discriminates between similarly situated classes of people. As currently drafted, the UMO is facially neutral and does not expressly distinguish between different classes of people or impose different burdens on different groups. Rather, the UMO applies equally to all water users living within the exterior boundaries of the Flathead Indian Reservation. In addition, the UMO is contingent upon parallel tribal legislation passed by the CSKT. According to the proposed compact, the UMO "and the parallel tribal legislation are contingently effective; neither operates with the force and effect of law without the other."[42] After the state and the Tribes pass the parallel legislation, water rights on the reservation would be administered equally among all water users.

If the basis of a potential equal protection claim was alleged discrimination between non-tribal members living on the Flathead Indian Reservation and state-based water users living off the reservation, a court would first assess whether the classes are similarly situated. If the court found the classes were similarly situated and determined that the classes were being treated differently, it would then assess what level of review to apply. Because the UMO is facially neutral, a court may also have to assess whether the UMO has a discriminatory impact and purpose. Assuming for illustrative purposes only that a court determined the classes were similarly situated, the court would then determine what level of review to apply. In 1992, the Montana Supreme Court addressed whether the provisions of the Water Use Act requiring property owners to file water right claims violated equal protection guarantees. The Court stated that:

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[36] *Snetsinger*, at ¶ 17.
[37] *Rohlfs v. Klemenhagen*, LLC, 2009 MT 440, ¶ 26, 354 Mont. 133, 227 P.3d 42.
[38] *Id*.
[39] *Id*.
[40] *Id*..
[41] *In re the Adjudication of Fort Peck Indian Reservation*, at 37.
[42] 1-1-101(2), UMO, proposed CSKT water compact.

> . . . the Montana Constitution does not establish that pre-1973 water rights are immune from sovereign powers. These rights, like other property rights, are protected against unreasonable state action; however, they have not been granted indefeasible status. Furthermore, we conclude that consistent with Article IX, Section 3(1), of the Montana Constitution, the State Legislature may enact constitutionally sound regulations including the requirement for property owners to take affirmative actions to maintain their water rights.[43]

The court, however, did not address what level of review to apply to the challenged action, instead reasoning that the law did not create different classes.[44] However, the Montana Water Court has previously applied a rational basis review when assessing equal protection claims to Indian water rights compacts. Other courts have also applied a rational basis of review in the context of interstate water compacts.[45] Furthermore, in the context of fishing and hunting restrictions, the Montana Supreme Court has held that the state's closure of big game hunting to non-tribal members on Indian reservations did not violate equal protection guarantees. The court determined that the regulation was "rationally related to the federal, and consequent state, obligation to recognize tribal hunting privileges."[46] The lawsuit arose out of a challenge by a non-member to a state Fish and Game Commission regulation that reserved big game hunting on Indian reservations to tribal members. Off the reservation, the individual would have been allowed to hunt big game as any other citizen.

Based on the foregoing, if presented with a challenge to the UMO, it appears likely that a court would apply a rational basis level of review to assess whether the UMO unlawfully discriminates between non-Indians on the reservation and water users off the reservation. Therefore, the state would only need to demonstrate that the law was rationally related to a legitimate governmental purpose. The state would likely point to the reasons it has previously articulated for the creation of the UMO. Some of these reasons are articulated in the preamble to the proposed compact. For example, the compact states that "there is a clear hydrological interrelationship between the surface and groundwater of the Reservation, and each use of water on the Reservation may affect water use by all water users on the Reservation". The proposed compact also states that water resources "are essential to the health and welfare of all residents of the Reservation" and that the proposed UMO "would provide a single system for the appropriation and administration of the waters of the Reservation and for the establishment and maintenance of a single system of central records for all water uses of the Reservation regardless of whether the use is based on State or Federal law."[47] The Montana Reserved Water Rights Compact Commission has further stated that:

> The Unitary Management Ordinance (UMO) would apply only on the Reservation, and is a joint State-Tribal system for water management that provides for a single set of rules and less duplication of effort and potential for delay and error. It also ensures that all new water rights and changes of use, regardless of whether they occur on Tribal or non-Tribal land, would be processed consistently with the DNRC's record keeping system. There is a large amount of non-Tribal land within the Reservation, and a relatively large amount of available water supply, which makes joint State-Tribal management of the water resources on the Reservation the most

[43] *In re Adjudication of Existing Yellowstone River Water Rights*, 253 Mont. 167, 174, 832 P.2d 1210, 1214 (1992).
[44] *Id*.
[45] *See Intake Water Co. v. Yellowstone River Compact Comm'n*, 590 F. Supp. 293, 297-298 (D. Mont. 1983).
[46] *State v. Shook*, 2002 MT 347, ¶ 17, 313 Mont. 347, 67 P.3d.
[47] Art. I, proposed CSKT water compact.

> practical and efficient approach. The alternative is dual administration, where an applicant for a new water right would likely need to comply with two different sets of rules for each piece of Tribal or non-Tribal land likely to be impacted by their application.[48]

In addition, the state could point to several decisions from the Montana Supreme Court that have resulted in state water management issues on the Flathead Indian Reservation that the UMO would presumably address. For example, the Compact Commission stated that:

> Unitary management addresses the unique challenges posted by the complex land ownership and water use patterns resulting from the Flathead Allotment Act of 1904 and its 1908 amendments that opened the Reservation to homesteading. These patterns make a dual administration system like those used in the other six tribal compacts difficult to implement. The Montana Supreme Court's decisions divesting the State of regulatory jurisdiction to permit uses or process change applications on the Reservation until the Tribes' rights are quantified highlights the difficulties that arise from dual administration.[49]

Based on these reasons and because a law is presumed to be constitutional unless the party challenging the law can prove beyond a reasonable doubt that it is unconstitutional,[50] a court would likely conclude that the UMO is rationally related to the legitimate governmental purpose of settling Indian reserved water rights and providing for the administration, control, and regulation of water rights in the state.[51] Under this approach, the state is not required to demonstrate that it had a compelling legal reason for the creation of the UMO or that no another approach would achieve the same result.

2.d. "Does the Unitary Management Ordinance, and to-be developed regulations for its implementation, comply with the Legislature's intent to protect the constitutional rights of its citizens?"

See responses to 2.a. regarding the state's obligation to administer water rights and 2.c. regarding equal protection.

2.e. "Does the Unitary Management Ordinance enable the taxation of Montana citizens by a Tribal government? Is such taxation legal?"

Short Answer:

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[48] *Report on the Proposed Water Rights Compact between the State of Montana and the Confederated Salish and Kootenai Tribes of the Flathead Reservation*, Montana Reserved Water Rights Compact Commission, 11-12 (Jan. 2014).

[49] *Id*. at 17.

[50] *See Bean v. State*, 2008 MT 67, ¶ 12, 342 Mont. 85, 179 P.3d 524 (stating that, "We start with the presumption that all legislative enactments comply with Montana's Constitution. The party challenging a statute bears the burden of establishing the statute's unconstitutionality beyond a reasonable doubt. We construe statutes narrowly to avoid a finding of unconstitutionality, and we resolve any questions of constitutionality in favor of the statute"). (Internal citations omitted).

[51] 85-2-701(1), MCA.

The UMO does not provide for "the taxation of Montana citizens by a Tribal government."

Analysis:

Upon review, neither the proposed compact nor the UMO provide for a tax of non-members living within the Flathead Indian Reservation. Article V, section B.21 of the proposed compact provides that the compact does not authorize the Water Management Board to assess a fee for the use of water. Additionally, the UMO does not contain any reference to "tax" or "taxes," nor does there appear to be any mechanism for new assessments. However, the UMO does provide for various filings fees. These fees are not collected by a tribal entity; rather, the fees are collected by the Water Management Board, which would be a joint state-tribal entity established by state and tribal law. The fees apply to:

- Previously unrecorded existing uses
- Permits or change applications
- Redundant or substitute wells
- Stock water allowance
- Domestic allowances
- New use of Flathead System Compact Water
- Non-consumptive geothermal heating or cooling exchange wells
- Wetland protective appropriation rights
- Wetland quantified appropriation rights

There is a legal distinction between whether a charge is considered a fee or a tax. Not all charges from a governmental entity constitute a tax. As described by the Montana Supreme Court, "A tax is levied for the general public good, and without special regard to the benefit conferred upon the individual or property subject thereto . . ."[52] A fee, on the other hand, is usually not considered a tax if it is used primarily as a tool of regulation and not to raise revenue for the governmental entity itself. In a decision addressing system development fees used to fund the cost of the expansion of water and sewer systems, the Montana Supreme Court noted that fees are not taxes if: "(1) they are not placed in a general revenue fund; and (2) there is a reasonable relationship between the fees and the uses to which they are put."[53] In that decision, the court upheld the system development fees in part because the fees were imposed to benefit new sewer and water users and were earmarked for expanding those water and sewer systems for future needs.[54] In this case, it is very unlikely that the filing fees provided for in the UMO would be considered a tax.

2.f. "Is there a compelling legal reason for the land use ownership pattern on and demographics of the Flathead Indian Reservation to convey the need for the CSKT to have jurisdiction over state-based (and taxed) land and water rights"?

The proposed compact with the CSKT establishes a joint state-tribal Water Management Board for water management and administration on the Flathead Indian Reservation. The UMO itself does not provide the CSKT with sole jurisdiction over water use on the reservation, nor does it provide the board with any control or administrative authority over land. Rather, as noted more extensively in the response to question 2.a., the UMO establishes a joint state-tribal board for water administration and dispute resolution and affords aggrieved parties with the ability to seek legal redress in court.

[52] *Lechner v. City of Billings*, 244 Mont. 195, 207, 797 P.2d 191, 199 (1990).
[53] *Id.* at 208, 797 P.2d at 199.
[54] *Id*.

Nevertheless, demographics and land ownership patterns on a reservation may play a role in informing negotiating positions for water compacts and may influence specific terms of a compact. For example, as noted in 2.c. above, the effect of the Flathead Allotment Act and the checkerboard land ownership pattern on the Flathead Indian Reservation appear to have played a role in the formation of the UMO. As stated by the Compact Commission, "Unitary management addresses the unique challenges posed by the complex land ownership and water use patterns resulting from the Flathead Allotment Act of 1904 and its 1908 amendments that opened the Reservation to homesteading. These patterns make a dual administration system like those used in the other six tribal compacts difficult to implement."[55]

2.g. "Are there any judicial proceedings in which the construction or interpretation of the UMO is or could be at issue?"

Staff is not aware of any pending judicial proceeding in which the construction or interpretation of the UMO is at issue. Any provision of the finalized compact could be subject to judicial review if and when an actual case is presented to a court and other procedural and prudential requirements are sufficiently satisfied for a court to review the case.

2.h. "What are the "consensual agreements" in the Unitary Management Ordinance?"

2.h.i. "How will they be implemented?"

The term "consensual agreement" does not appear in the UMO, but does appear in the proposed compact and refers to the "call protection" provided for in Article III.G.3 for rights that arise under state law within the FIIP influence area. As stated in the compact:

> The Tribes, the United States, and, pursuant to the FIIP Water Use Agreement, the Project Operator and the Flathead Joint Board of Control, agree to relinquish their right to exercise the Tribal Water Right to make a Call against that portion of any Water Right Arising Under State Law identified in Article III.G.3.b that is equal to the quantity of water established as the Farm Turnout Allowance, or the quantity of that owner's historic beneficial use, whichever is less, whose owner enters into a consensual agreement as described in this Article III.G.3.

As further described in the compact:

> The Tribes, the United States, and, pursuant to the FIIP Water Use Agreement, the Project Operator and the Flathead Joint Board of Control, agree to enter into the consensual agreement described in this Article III.G.3 with every owner of a Water Right Arising Under State Law described in Article III.G.3.b who wishes to enter into such an agreement with them.[56]

The decision of an irrigator who holds a state-based right to enter into a consensual agreement is voluntary.[57] Not entering into the agreement does not change the nature or extent of a water right,

[55] *Supra* n. 48 at 17.
[56] Art. III.G.3.c., proposed CSKT water compact.
[57] *Id*. at Art. III.G.3.c.i.

but does potentially subject an irrigator to a call from a senior water right holder. The compact describes which irrigators may enter into the consensual agreements for call protection: (1) the water right must arise under state law; (2) the purpose of the water right must be irrigation; (3) the point of diversion or place of use must be within the FIIP influence area as described in the compact; and (4) the source of supply must be surface water or groundwater whose flow rate is greater than 100 gallons per minute.[58]

The compact provides that the amount of water protected from call for an irrigator is the amount that is equal to the quantity of water established as the Farm Turnout Allowance, or the quantity of that owner's historic beneficial use, whichever is less.[59] A consensual agreement requires the irrigator to measure the amount diverted and report that amount to the project operator. The compact provides that the "owner of the Water Right Arising Under State Law shall measure all diversions, report the measured amount of those diversions to the Project Operator, and agree to divert no more water each year than the quantity established as the FTA for each irrigation season or the quantity of that owner's historic beneficial use as decreed by the Montana Water Court, whichever is less, and shall not expand water use beyond the terms of the agreement."[60] Any portion of a water right not protected under the consensual agreement is subject to call, but if that amount is not used, that nonuse does not represent intent to abandon the right.[61]

2.h.ii "How are they transparent?"

If pursued by an irrigator, a consensual agreement would be entered into by the irrigator and the CSKT, the United States, the project operator, and the Flathead Joint Board of Control (FJBC). The project operator is defined under the compact as the "entity with the legal authority and responsibility to operate the Flathead Indian Irrigation Project."[62] The project operator is currently the Bureau of Indian Affairs (BIA), which is a federal entity, although the project was at one time operated by the Flathead Indian Irrigation Project Cooperative Management Entity Cooperative (CME). The FJBC is a subdivision of local government under Montana law. Because a consensual agreement would be entered into between an irrigator and a public entity, the agreements would likely be subject to public inspection under state and federal public records laws. In addition, the terms of the compact require those who enter into the consensual agreements to measure diversions and report the amount diverted to the project operator, which will presumably be operated by the BIA or another entity subject to public records laws. Further, the UMO provides that the Water Management Board is a public agency for purposes of state and tribal right to know laws. If there is a conflict between state and tribal law, the more stringent law or the law that provides for greater openness will apply. The board is required by the compact to maintain all documents filed with the board.[63] Because the UMO governs "all water rights, whether derived from tribal, state or federal law" and controls "all aspects of enforcement within

[58] *Id*. at Art. III.G.3.b.
[59] *Id*. at Art. III.G.3.a.
[60] *Id*. at Art. III.G.3.c.i.
[61] *Id*. at Art. III.G.3.g.i.
[62] 1-1-104(48), UMO, proposed CSKT water compact.
[63] 1-2-104, UMO, proposed CSKT water compact.

the exterior boundaries of the Flathead Indian Reservation," the public record provisions of the UMO may also apply to the consensual agreements.[64]

2.h.iii "Do they create an 'xtra-legal' avenue to avoid the provisions of the Unitary Management Ordinance?"

Based on the language of the proposed compact and the terms described more fully in the responses above, it appears that a consensual agreement is merely a voluntary mechanism whereby irrigators can protect their water rights from being called by more senior water right holders. The language does not include provisions that exempt a water right holder from the UMO.

2.i. "What is the court of competent jurisdiction, how will it be determined, are there standards?"

The UMO affords any party who is aggrieved by a final decision of the Water Management Board with the right to appeal the decision to a "court of competent jurisdiction." The term "court of competent jurisdiction" is not defined in the proposed compact. The term, however, refers to any court that would have the authority to adjudicate a case. To exercise jurisdiction, a court must have jurisdiction over both the subject matter and the parties involved. Courts have established specific rules for determining jurisdiction. For purposes of the proposed compact, aggrieved parties would decide where to appeal a final decision of the board. The court in which the appeal was filed would ultimately then determine whether it had the authority to exercise jurisdiction over the subject matter and the parties. Jurisdictional determinations would be made on a case-by-case basis as actual controversies are presented to a court for review.

2.j. "Does the mutual defense clause constrain the right to or otherwise prevent the citizen to file suit or seek remedy or redress?"

Short Answer:

No.

Analysis:

It is unclear what is meant by the term "mutual defense clause." The UMO does not use the phrase "mutual defense," but it is possible the question is referring to the provisions in 1-1-113 of the UMO titled "Codification, Severability, and Defense". This section states that:

> The Tribes adopt this code and the State adopts its parallel legislation only after concluding its provisions are lawful. Should the legality of the Ordinance, or parallel State legislation, or any provision thereof be challenged in any court, the parties shall use their best effort ***jointly to defend*** the enforceability of the Ordinance, the parallel State legislation and each of the respective provisions. (Emphasis added).

[64] 1-1-101(3), UMO, proposed CSKT water compact.

This section does not appear to "constrain the right to or otherwise prevent" a citizen from filing suit in a court of law, but requires the parties to the compact to "use their best effort" to mutually defend suits involving the enforceability of either the tribal or state version of the UMO and its various provisions. "Parties" is defined in the compact as the "Tribes, the State, and the United States." For example, if a suit was filed against the CSKT challenging the enforceability of the UMO, the state would presumably be required to use its "best effort" to assist the CSKT in defending against the suit. This could require the state to devote various legal resources to assist in the defense of the claims. Similarly, the language would also require the CSKT to devote legal resources to state efforts to defend the UMO. Outside of this context, other legal rules may constrain a citizen from having a case decided by a court. Courts may only evaluate and address actual controversies, including a past, present, or threatened injury to a property or civil right. A person's displeasure with a particular law is not sufficient to confer legal standing for purposes of having a court decide the merits of a case. Generalized grievances will not be addressed in most cases. A person challenging a law must demonstrate a sufficient stake or interest in the case. In general, to establish standing in Montana to bring a suit a party must: (1) clearly allege past, present, or threatened injury to a property right or a civil right; and (2) allege an injury that is distinguishable from the injury to the public generally, though the injury need not be exclusive to the complaining party."[65] Standing is a threshold question and is especially significant is cases where a statutory or constitutional violation is alleged. Similar rules apply in the Water Court where objectors are required to establish "good cause" to object to a compact.[66]

2.j.i. "Under what conditions would the mutual defense clause be exercised?"

See response to question 2.j.

2.k. "Can other tribes whose compacts have been ratified by the state or are not ratified yet re-open their Compacts to seek jurisdiction over non-members if this compact is passed?"

Short Answer:

The proposed CSKT compact establishes a joint state-tribal Water Management Board for water administration and management on the Flathead Indian Reservation; it does not appear to confer a tribal entity with sole water management authority over non-members. The six other compacts with Indian reservations in the state only allow the compacts to be modified through the consent of the parties, and any potential modification must comply with existing law.

Analysis:

As described in more detail to the responses above, the proposed CSKT compact does not confer the CSKT or a tribal entity with sole water management authority over non-members. Through

[65] *Fleenor v. Darby Sch. Dist.*, 2006 MT 31, ¶ 9, 331 Mont. 124, 128 P.3d. 1048.
[66] *In re Adjudication of the Rocky Boy's Reservation*, at 9; *see also* 85-2-233, MCA.

passage of the UMO by the Legislature, the compact would establish a joint state-tribal board to govern water management and administration within the exterior boundaries of the Flathead Indian Reservation. The Water Management Board is composed of both state and tribal members and decisions of the water management board are appealable to a court for judicial review as described in the response to question 2.i. Like any law, the legality of the UMO is subject to judicial review.

Nevertheless, it is very unlikely that any other tribe in Montana would be able to reopen and modify a compact when the compact is a final, binding, legal settlement of water claims on the reservation. Compacts may, however, be modified if all the parties to the compact agree to the modification. The Montana Legislature has approved compacts for six of the seven Indian reservations in the state:

- The Blackfeet Tribe compact was approved by the Legislature in 2009 and is awaiting congressional approval. This compact provides that, "Following the first ratification by any Party, the terms of this Compact may not be modified without the consent of the Parties."[67]
- The Rocky Boys Indian Reservation compact with the Chippewa Cree Tribe was approved by the Legislature in 1997 and received congressional approval in 1999. The Water Court approved the compact in 2002. The compact provides that it "may not be altered, voided, or modified in any respect without the consent of both the Tribe and the State."[68]
- The Northern Cheyenne Indian Reservation compact was approved by the Legislature in 1991 and received Congressional approval in 1992. The Water Court approved the compact in 1995. The compact provides that it "may not be altered, voided, or modified in any respect without the consent of the parties."[69]
- The Fort Peck Indian Reservation compact with the Assiniboine and Sioux Tribe was approved by the Legislature in 1985 and was subsequently approved by the necessary federal agencies. The Water Court approved the compact in 2001. This compact provides that it "may not be modified in any manner whatsoever except with the joint consent of the legislative body of both parties."[70]
- The Crow Indian Reservation Compact was passed by the Legislature in 1999 and received congressional approval in 2010. The Water Court issued a preliminary decree in 2013. This compact states that upon ratification, the compact cannot "be modified without the consent of the Tribe, the State, and the United States."[71]
- The Fort Belknap Indian Reservation compact with the Gros Ventre and Assiniboine Tribes was approved by the Legislature in 2001 and is awaiting congressional approval. This compact provides that "Following the first ratification by any party, the terms of this Compact may not be modified without the consent of the Parties."[72]

Each of these compacts includes language that only allow for the reopening of the compacts if agreed to by each of the parties to the compact. This would require the state as well as the federal government to approve any modifications. In addition, even though certain tribal compacts are awaiting final tribal or congressional approval, each of these compacts provides that, following the first

[67] 85-20-1501, MCA.
[68] 85-20-601, MCA.
[69] 85-20-301, MCA.
[70] 85-20-201, MCA.
[71] 85-20-901, MCA.
[72] 85-20-1001, MCA.

ratification by any one of the parties, the compact may not be modified without the consent of the parties.

Some of the compacts include terms that allow for the parties to opt out of the compacts if certain conditions are not satisfied. For example, the compact with the Blackfeet Tribe provides that the tribe may withdraw from the compact if Congress has not ratified it within four years of approval by the Legislature. As noted above, the Legislature approved the compact in 2009; a bill to approve the compact was introduced in Congress in 2013, but has not yet passed. Conversely, the state may withdraw from the compact if the tribe or Congress has not acted within four years. The Fort Belknap Indian Reservation compact allows the tribe to withdraw from its compact if Congress has not passed it and has not appropriated money within five years of approval by the Montana Legislature. The Montana Legislature approved the compact in 2001. The Fort Belknap compact illustrates that certain technical provisions of a compact may be modified without the consent of all of the parties. For example, the Fort Belknap compact allows for coordination of storage and release from certain reservoirs on the Milk River, for which the operating criteria may be modified "as necessary and such modification shall not be considered a modification of the Compact."

The proposed CSKT compact states that "no provision of the Compact shall be modified as to substance except as may be provided in the Compact, or by agreement among the Parties."[73] It also states that "The terms of the Compact may not be modified without the consent of all the Parties following the first ratification by any Party."[74] It also addresses certain circumstances that will not be deemed modifications for purposes of requiring the approval of all of the parties. Several other provisions state that the proposed CSKT compact cannot serve as precedent for any other compact. This includes the following statements:

- *Except as otherwise provided herein, the relationship between the Tribal Water Right described herein and any water rights of any other Indian tribe or its members, or of any federally-derived water right of an individual outside the boundaries of the Flathead Indian Reservation, or of the United States in its own right or on behalf of such other tribes or individuals, shall be determined by the rule of priority.*
- *Nothing in this Compact shall be construed or interpreted as a precedent to establish the nature, extent, or manner of administration of the rights to water of any other Indian tribe, its members or Indian owners of trust land outside of the Flathead Indian Reservation.*
- *Nothing in this Compact is intended, nor shall it be used, to affect or abrogate a right or claim of an Indian tribe other than the Confederated Salish and Kootenai Tribes.*
- *Except as provided herein and authorized by Congress, nothing in this Compact shall be construed or interpreted to establish the nature, extent, or manner of administration of rights to water of the United States on Federal lands outside of the Flathead Indian Reservation.*

Language in the proposed compact further states that nothing in the compact may be construed or interpreted "As precedent for interpretation or administration of future compacts between the United States and the State, or between the United States and any other state, or between the State and any other state" or "As precedent for negotiation, interpretation or administration of any existing or future

[73] Art. VIII, proposed CSKT water compact.
[74] Art. VII.A.1, proposed CSKT water compact.

Compact, negotiated settlement, judicial settlement or other form of accommodation of water rights involving Indian tribes or individual Indians."[75]

Finally, any modification to a compact is potentially subject to challenge in court and would be required to comply with existing law regarding the limits of tribal jurisdiction over non-members, as well as the limits of state regulatory jurisdiction within the exterior boundaries of an Indian reservation. These limits are described in several court decisions, including the U.S. Supreme Court's decision in *Montana v. U.S*., 450 U.S. 544 (1981). There may also be other inherent challenges to any efforts to modify compacts that have been ratified by all the parties and finally approved by the Water Court. Because compacts are binding legal documents similar to contracts, certain vested rights and obligations may accrue that may be protectable interests under the law. Any entity attempting to modify a compact would need to be mindful of any changes that would interfere with vested legal rights that have been created.

2.l. "What regulatory authority does the state have in decisions of the Unitary Management Board, especially where those decisions conflict with state law?"

If passed and approved by the Legislature, the proposed compact and UMO would become state law. As provided in the proposed compact, the UMO – as state law – "shall govern all water rights, whether derived from tribal, state or federal law, and shall control all aspects of water use, including all permitting of new uses, changes of existing uses, enforcement of water right calls and all aspects of enforcement within the exterior boundaries of the Flathead Indian Reservation."[76] In addition, "Any provision of Title 85, MCA, that is inconsistent with this Law of Administration is not applicable within the Reservation."[77] Furthermore, the proposed compact as introduced during the 2013 legislative session (H.B. 629) specifically amended sections of the Montana Code Annotated to avoid conflicts between the proposed compact and existing law. Therefore, decisions of the Water Management Board could not conflict with state law since they would have to be consistent with the terms of the compact and the UMO, *i.e.* state laws. Any conflicting provisions found within the Water Use Act would not be effective on the Flathead Reservation upon adoption of the UMO. In terms of regulatory authority, the state has two appointed members on the board. The power and duties of board are described in further detail in the proposed UMO.

3. Off-reservation instream flow claims on ceded aboriginal lands

3.a. "Are off-reservation claims to water federal reserved water rights within the context of [the] Winters Doctrine and McCarran Amendment?"

Short Answer:

Off-reservation water rights derive from treaty language providing certain tribes with the right to take fish at all usual and accustomed places. These rights, as a form of aboriginal water rights, stem from tribal uses that existed prior to the creation of the reservations. Off-reservation rights were

[75] Art. V.B, proposed CSKT water compact.
[76] 1-1-101, UMO, proposed CSKT compact.
[77] *Id*.

initially recognized by the U.S. Supreme Court in *U.S. v. Winans*, 198 U.S. 371 (1905), not the Court's decision in *Winters v. U.S.*, 207 U.S. 564 (1908). Based on an assessment of state and federal law and the policy of the McCarran Amendment itself, off-reservation claims appear to fall within the context of the McCarran Amendment.

Analysis:

The "winters doctrine" or "winters rights" refers to waters rights that are impliedly created when the federal government sets aside land for the creation of Indian reservations and other federally reserved lands. The *Winters* decision did not involve treaty-reserved water rights, also known as aboriginal rights. These rights stem from "tribal uses that existed before the creation of the reservation" and are confirmed by the treaties between the federal government and the Indian tribes.[78] Off-reservation rights are a form of aboriginal rights that arise from language contained in various treaties that were negotiated in the mid-1800s by General Isaac Stevens who was the territorial governor of Washington. These treaties, which are similar in nature and scope between all the tribes that posses them, generally include language that reserves to the tribes the "exclusive right of taking fish in all the streams running through or bordering said reservation . . . and also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory." It is the language providing the tribe's with the "right of taking fish at usual and accustomed places" that forms the basis for off-reservation rights. These rights were initially recognized by the U.S. Supreme Court in a decision known as *U.S. v. Winans*,[79] not the U.S. Supreme Court's decision in *Winters*.

The *Winans* decision addressed whether the Yakima Indians had the right to access their traditional fishing grounds that were outside the exterior boundaries of the reservation. The Supreme court ruled that the tribes could not be excluded from their aboriginal fishing grounds and that the treaty language that secured to the Indians the right to take fish at all usual and accustomed places in common with the citizens of the territory placed "a servitude" upon the lands that "was intended to be continuing against the United States and its grantees as well as against the state and its grantees."[80] The court concluded that the treaty with the Indians was not a grant of rights to the Indians, but a grant of rights from the Indians and that the Indians retained all elements of their original Indian title until they affirmatively acted to give them up.[81] Because the Yakima Indians had not affirmatively given up the right to access their traditional fishing grounds, they retained all rights to access those grounds pursuant to the terms of treaty that created the reservation.

Unlike *Winters* rights which date to the creation of the reservation, courts have concluded that pre-existing treaty rights carry a "time immemorial" priority date.[82] In a 1985 decision, the Montana Supreme Court recognized the distinction between rights that were reserved at the time the reservation was created and those that existed prior to its creation:

> If the use for which the water was reserved is a use that did not exist prior to creation of the Indian reservation, the priority date is the date the reservation was created. [citation omitted]. A

[78] *Greeley*, 219 Mont. at 92, 712 P.2d at 764.
[79] *Winans*, 198 U.S. 371.
[80] *Id.* at 381.
[81] *Id.* at 382.
[82] *Adair*, 723 F.2d at 1414.

> different rule applies to tribal uses that existed before creation of the reservation. Where the existence of a preexisting tribal use is confirmed by treaty, the courts characterize the priority date as 'time immemorial.'"[83]

As explained further by the Montana Supreme Court, "More than one priority date may apply to water rights reserved by the same tribe."[84] As such, a tribe may possess rights that were reserved at the time the reservation was created (*Winters* rights), as well as pre-existing treaty rights that derive from language contained in the treaties that were negotiated between the tribes and the federal government (Stevens Treaty or aboriginal rights).

McCarran Amendment

The McCarran Amendment, found in Title 43, Section 666, of the United States Code, is a federal law that waives sovereign immunity for the joinder of the United States as a defendant in comprehensive state-based stream adjudication proceedings. The McCarran Amendment relates to the legal forum in which federal reserved water rights may be adjudicated; it is not a substantive law that dictates whether certain rights do or do not exist. Prior to the passage of the McCarran Amendment, federal water rights could only be adjudicated in federal court unless the federal government consented to being sued in a state-court proceeding. Following its passage, federal water rights may be adjudicated in state court, so long as all the rights in the basin are included in the adjudication.

The McCarran Amendment provides, in pertinent part, that the United States may be joined as a defendant in any suit: "(1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."[85]

Since its enactment in 1953, the United States Supreme Court has clarified the scope of the McCarran Amendment on several occasions. For example, in 1976 the U.S. Supreme Court extended the application of the McCarran Amendment to Indian water rights held in trust by the United States and dismissed a water rights suit brought by the United States in federal court when a concurrent comprehensive adjudication addressing the same issues had already been initiated in a state court proceeding.[86]

In 1983, the U.S. Supreme Court again addressed the scope of the McCarran Amendment in states whose constitutions reserved jurisdiction and control over Indian affairs in the federal government. The court held that while Montana and Arizona's constitutions reserved exclusive jurisdiction over Indian affairs in the federal government, neither the state constitutions nor federal policy limited state court jurisdiction over Indian water rights following passage of the McCarran

[83] *Greely*, 219 Mont. at 92, 712 P.2d at 764.
[84] *Id*.
[85] 43 U.S.C. § 666(a).
[86] *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 809, 811 (U.S. 1976) (providing that state courts have jurisdiction over Indian water rights under the McCarran Amendment and stating that the "legislative history demonstrates that the McCarran Amendment is to be construed as reaching federal water rights reserved on behalf of Indians").

Amendment.[87] The court also held that when states have concurrent jurisdiction to adjudicate Indian water rights, concurrent suits brought by Indian tribes in federal court are subject to dismissal under the court's holding in *Colorado River Water Conservation Dist. v. U.S*. In the *San Carlos* decision, the court emphasized that the "clear federal policy" of the McCarran Amendment was to avoid "piecemeal adjudication of water rights in a river system".[88]

Despite statements in *San Carlos* favoring dismissal of concurrent federal proceedings in favor of comprehensive state court proceedings, the U.S. Supreme court reiterated that its decision did not "require that a federal water suit must always be dismissed or stayed in deference to a concurrent and adequate comprehensive state adjudication."[89] The court in *San Carlos* also emphasized that its decisions did not change in any way substantive law as it relates to Indian rights in state water adjudication proceedings. The court stated unequivocally that "State courts, as much as federal courts, have a solemn obligation to follow federal law" and that "any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment."[90]

After the *San Carlos* decision, the Montana Supreme Court concluded that Montana's constitution did not bar the Montana Water Court "from exercising jurisdiction over Indian reserved water rights" and further, that the Water Use Act was facially adequate to adjudicate the rights.[91] The Montana Supreme Court specifically directed the Water Court "to proceed . . . with the adjudication of water rights, including Indian and federal reserved water rights."[92]

In sum, the United States Supreme Court extended the application of the McCarran Amendment to Indian water rights held in trust by the United States and has further held that Indian suits involving only Indian claims are subject to dismissal in favor of comprehensive state-based adjudication proceedings. Further, the Montana Supreme Court has recognized the existence of Indian reserved water rights and has confirmed the Montana Water Court's authority to adjudicate both federal and Indian reserved water rights under the Montana Water Use Act. Additionally, no other court appears to have held that off-reservation water right claims cannot be adjudicated or otherwise included in a comprehensive stat-based proceeding where the McCarran Amendment is otherwise satisfied. Rather, both federal and state law appear to favor processes that resolve all potential water claims.

3.a.i. "Do federal reserved water rights exist absent a reservation of land by the federal government?"

As described more fully above, traditional *Winters* rights that are created when the land is withdrawn from the public domain are satisfied from sources of water that are physically present on the reservation. However, courts do not appear to have limited these rights to water that is appurtenant to

[87] *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564 (1983)
[88] *Id*. at 552.
[89] *Id*. at 569.
[90] *Id*.at 571.
[91] *Greely*, 219 Mont. at 89, 712 P.2d at 762.
[92] *Greely*, 219 Mont. at 100, 712 P.2d at 768-769.

the reservation.[93] For example, the U.S. Supreme Court upheld an award of water rights to the Cocopah Reservation from the Colorado River that was over two miles away.[94]

Treaty-based rights may also exist absent a reservation of land.[95] In a case that arose in Oregon, the Ninth Circuit Court of Appeals addressed whether the Klamath Tribe's treaty rights to hunt, fish, and gather on former reservation lands survived the termination of the Klamath Indian Reservation.[96] Congress terminated federal supervision of the Klamath Tribe in 1954 and terminated the Klamath Reservation in 1973 through the Klamath Termination Act.[97] The State of Oregon argued that the Klamath Termination Act abolished any water rights reserved by the 1864 treaty between the federal government and the Klamath Indians.[98] The Ninth Circuit concluded instead that the tribe's treaty rights could only be expressly terminated by an act of Congress and that nowhere did Congress evidence intent to abrogate any property rights conferred by the treaty to the Tribe.[99] As such, the Ninth Circuit held that the Klamath Tribe's treaty rights to hunt, fish, and gather on reservation lands survived congressional termination of the Klamath Indian Reservation.[100] By their very nature, off-reservation water rights also exist absent a reservation of land. For a more detailed discussion of these rights, see the response to question 3.c. below. Based on the foregoing, it appears that Indian federal reserved water rights and treaty-based rights may exist absent an existing reservation of land.[101]

3.a.ii. "Does the Montana Water Court have jurisdiction under the McCarran Amendment to hear any other federal water claim except reserved water rights?"

Short Answer:

Most likely yes. The Montana Water Court has concurrent jurisdiction to adjudicate federal reserved water rights as well as Indian reserved water rights. Non-reserved federal water rights that are held by the federal government under state law may also be adjudicated by the Montana Water Court.

Analysis:

As noted more fully in the analysis of question 3.a. above, federal courts have held that federal and Indian reserved water rights may be addressed in comprehensive state-based

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[93] David H. Getches, *Water Law in a Nutshell* 348 (West 2009); see also *A Primer on Indian Water Rights: More Questions than Answers*, Judith V. Royster, 30 Tulsa L.J. 61 (1994).
[94] *Arizona v. California*, 373 U.S. at 595 (1963).
[95] Art. III, Treaty of Hellgate, July 16, 1855, 12 Stat. 975 (providing CSKT with "The exclusive right of taking fish in all the streams running through or bordering" the reservation, as well as "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory").
[96] *Adair*, 723 F.2d 1394.
[97] *Id*. at 1398.
[98] *Id*. at 1411.
[99] *Id*. at 1412.
[100] *Id*.
[101] The Ninth Circuit Court of Appeals encompasses the State of Montana.

proceedings. The Montana Supreme Court has addressed the McCarran Amendment and held that the Montana Water Use Act is facially valid to adjudicate both federal and Indian reserved water rights.[102] The Montana Water Court also has jurisdiction to address non-reserved federal water rights that are held by the federal government under state law. In some cases, the federal government may choose to apply for state-based appropriative water rights. These water rights are applied for and granted under existing Montana law and are not dependent on the *Winters* doctrine. Based on the foregoing, the Montana Water Court has concurrent jurisdiction to hear federal reserved water rights as well as Indian reserved water rights, including claims that derive from language contained in treaties entered into by the Indians and the federal government.

3.a.iii. "Are aboriginal claims to water off-reservation a federal reserved water right?"

As described above, off-reservation water rights are a form of treaty-based rights that are often more generally classified as Indian reserved water rights, not federal reserved water rights. Treaty-based or aboriginal rights stem from "tribal uses that existed before the creation of the reservation" and are confirmed by the treaties between the federal government and the Indian tribes.[103] Water rights do not need be classified as "federal reserved water rights" in order to be legally cognizable. As described throughout the responses to these questions, treaty-based rights may also exist for certain reservations. The scope and nature of the rights may differ, but such claims have been recognized and enforced in various circumstances as described herein.

3.a.iv. "Have off-reservation aboriginal claims to water ever been included in a federal reserved water right proceeding?"

Short Answer:

Off-reservation claims have been addressed on several occasions in various legal proceedings.

Analysis:

It is unclear what the question is referring to by "federal reserved water right proceeding." In the legal context, "proceeding" can refer to a lawsuit as a whole or to any step in a legal process before a court. Off-reservation claims to water based on Stevens Treaty language have been addressed by several federal courts in various court proceedings. *See, e.g.*, *U.S. v. Winans*, 198 U.S. 371 (1905) (allowing members of the Yakima Tribe to access aboriginal fishing grounds); *Seufert Bros. Co. v. U.S.,* 249 U.S. 194 (1919) (prohibiting a company from interfering with a tribe's off-reservation fishing rights); *Wash. v. Wash. St. Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (holding that the treaty fishing language entitled the Indians to an equitable share of the harvestable fish); *Kittitas Reclamation Dist. v. Sunnyside Irrigation Dist*., 763 F.2d 1032 (9th Cir. 1985) (ordering the Bureau of Reclamation to

[102] *Greely*, 219 Mont. at 99, 712 P.2d at 768.
[103] *Greely*, 219 Mont. at 92, 712 P.2d at 764.

release water from a project reservoir to sustain salmon redds); and *Nez Perce Tribe v. Idaho Power Co*., 847 F. Supp. 791 (D. Idaho 1994) (holding that the Nez Perce did not have a property ownership interest in fish runs and were not entitled to monetary damages for reductions in those fish runs).

Off-reservation claims have also been addressed in state-based adjudication proceedings in Idaho and Washington. In Idaho, the Snake River Basin Adjudication Court addressed off-reservation instream flow claims that were asserted by the Nez Perce Tribe and the United States. The claims were based on the treaty language that afforded the Indians the right to "take fish in all usual and accustomed places." The Snake River Basin Adjudication was a comprehensive state court adjudication proceeding. Although tribal claims for off-reservation instream flows were unsuccessful before the adjudication court in Idaho, the claims were addressed by the court along with all the other claims raised in the adjudication. Likewise, state courts in the Washington Acquavella adjudication also addressed off-reservation instream flow claims. The Acquavella adjudication is a general stream adjudication of water rights in the Yakima River basin. The Yakima Tribe made both on and off-reservation claims for various purposes. The state trial court concluded that the tribes possessed a diminished, time-immemorial off-reservation instream flow right in the Yakima River and its tributaries in an amount "necessary for the preservation of anadromous fish life in the river."[104] The Washington Supreme Court affirmed the decision, and the trial court issued a final order reflecting the off-reservation instream flow right to maintain fish habitat in a 1995 final order regarding the tribe's reserved treaty rights.

3.a.v. "What are the precedential implications of including off-reservation water claims in a federal reserved water rights proceeding?"

3.a.v.i. "For Montana Indian Reservations?"

Short Answer:

There are likely no precedential implications for other Montana Indian reservations as result of including off-reservation claims within the proposed CSKT compact.

Analysis:

The off-reservation rights at issue in the proposed compact with the CSKT arise from specific language contained in the Hellgate Treaty of 1855 that was entered into by the tribes and the federal government. This language provided the tribes with the "exclusive right of taking fish in all the streams running through or bordering said reservation . . . and also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory." No other Indian tribe in the state appears to possess a treaty with similar language and the legal basis of any potential claim from another tribe in Montana is unclear. In addition, Article V of the proposed compact specifically lists provisions that may not be considered precedent through passage of the compact. These provisions provide:

[104] *State v. Acquavella*, Yakima County Superior Ct. No. 77-2-01484-5, Memorandum Opinion re: Motions for Partial Summary Judgment (Oct. 22, 1990), aff'd, 121 Wn.2d 257 (1993).

- *Except as otherwise provided herein, the relationship between the Tribal Water Right described herein and any water rights of any other Indian tribe or its members, or of any federally-derived water right of an individual outside the boundaries of the Flathead Indian Reservation, or of the United States in its own right or on behalf of such other tribes or individuals, shall be determined by the rule of priority.*
- *Nothing in this Compact shall be construed or interpreted as a precedent to establish the nature, extent, or manner of administration of the rights to water of any other Indian tribe, its members or Indian owners of trust land outside of the Flathead Indian Reservation.*
- *Nothing in this Compact is intended, nor shall it be used, to affect or abrogate a right or claim of an Indian tribe other than the Confederated Salish and Kootenai Tribes.*
- *Except as provided herein and authorized by Congress, nothing in this Compact shall be construed or interpreted to establish the nature, extent, or manner of administration of rights to water of the United States on Federal lands outside of the Flathead Indian Reservation.*

Language in the proposed compact further states, that nothing in the compact shall be construed or interpreted:

- *As a precedent for litigation of aboriginal or reserved water rights;*
- *As precedent for interpretation or administration of future compacts between the United States and the State, or between the United States and any other state, or between the State and any other state; or*
- *As precedent for negotiation, interpretation or administration of any existing or future Compact, negotiated settlement, judicial settlement or other form of accommodation of water rights involving Indian tribes or individual Indians.*

Based on the foregoing, and because the express terms of the compact provide that it may not serve as precedent for the litigation of aboriginal water rights, there are likely no precedential implications for other Montana tribes as a result of including off-reservation claims in the proposed compact with the CSKT.

3.a.v.ii. "For other states?"

There appear to be 11 "Stevens treaty" tribes in the Pacific Northwest. Certain tribes in Oregon possess treaties that contain fishing right provisions that are similar to those provided for in the Stevens treaties. A negotiated settlement of water right claims for a tribe in Montana would have no binding legal effect on any Tribe in another state. See the response to 3.a.v.i for more information.

3.a.vi. "Can other Montana tribes whose Compacts have been or have not been ratified by the State reopen their Compacts to seek water for off-reservation rights granted by the treaty"?

As described in more detail in the response to question 2.k. above, there are seven Indian reservations within the boundaries of the State of Montana. Excepting the Flathead Indian Reservation, the Montana Legislature has approved compacts for six of these reservations. Federal ratification is pending for the Blackfeet and Fort Belknap compacts. No other tribe in Montana possesses a treaty with the United States that contains language similar to that of the CSKT regarding the right to take fish at usual and accustomed places. Therefore, no other tribe in Montana would appear to have any legal basis for asserting similar off-reservation claims and any attempt to reopen or seek modification of a compact on this basis would most likely be unsuccessful.

3.b. "Does the inclusion of off-reservation water claims in the proposed Compact comply with the intent and requirements of the McCarran Amendment, the Montana General Stream Adjudication, and the jurisdiction of the Montana Water Court"?

Short Answer:

Most likely yes.

Analysis:

As noted in the response to question 3.a. above, the McCarran Amendment waives federal sovereign immunity for the joinder of the United States as a defendant in comprehensive state-based stream adjudications. The McCarran Amendment has been addressed in several decisions as described more fully in the response to question 3.a. In each case referenced above, the courts investigated the congressional intent behind the passage of the McCarran Amendment to some degree. For example, in a 1971 decision wherein the U.S. Supreme Court held that federal reserved water rights were subject to state adjudication, the court cited statements from Senator McCarran that the intent of the bill was to "allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream" and that a final decree would be of "little value" unless "all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties. . ."[105]

Likewise, in the *Colorado River* decision, the U.S. Supreme Court looked to the legislative history of the McCarran Amendment to determine that it reached federal reserved water rights held in trust for the Indian tribes. To evidence congressional intent, the court cited a U.S. Senate report, which provided:

> In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State

[105] *U.S. v. Dist. Court for Eagle County*, 401 U.S. 520, 252 (1971).

> court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts.[106]

In a case issued a few years later, the U.S. Supreme Court reiterated that the "clear federal policy" behind the McCarran Amendment was to avoid the "piecemeal" adjudication of a river system.[107] As noted by the court, the policy reasons behind the McCarran Amendment are similar to other rules that are intended to promote judicial efficiency and economy.[108]

The general stream adjudication in Montana was initially triggered by the adoption of a new state constitution in 1972, which confirmed "All existing rights to the use of any water for any useful or beneficial purpose" and required the Legislature to "provide for the administration, control, and regulation of water rights" in Montana. Pursuant to that directive, the Legislature adopted the Montana Water Use Act in 1973. The purposes of the Water Use Act are described in 85-2-101, MCA, which provides in part that "It is the intent of the Legislature that the state, to fulfill its constitutional duties and to exercise its historic powers and responsibilities to its citizens living on and off reservations, comprehensively adjudicate existing water rights and regulate water use within the state." In 1979, the Legislature added specific provisions that address federal and Indian water rights. For example, 85-2-701(1), MCA, states:

> Because the water and water rights within each water division are interrelated, it is the intent of the Legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. It is the intent of the Legislature that the unified proceedings include all claimants of **reserved Indian water rights** as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666. However, it is further intended that the state of Montana proceed under the provisions of this part in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state. (Emphasis added).

As stated in 3.a. above, the Montana Supreme Court addressed whether both federal and Indian reserved water rights could be adjudicated pursuant to the Water Use Act in a comprehensive stream adjudication. In that decision, the Montana Supreme Court held that the Montana Water Court was not prohibited from exercising jurisdiction over Indian reserved water rights and that the Water Use Act was facially adequate to adjudicate both federal and Indian reserved water rights.[109] When discussing the rights at issue, the court specifically referenced Indian reserved water rights that date to the creation of the reservation, as well as rights that are based on "tribal uses that existed before the creation of the reservation."[110] While not characterized specifically as off-reservation rights, the court discussed the rights as "Water reserved for hunting and fishing purposes."[111]

Based on the foregoing, the inclusion of off-reservation water right claims in the proposed compact with the Confederated Salish and Kootenai Tribes most likely complies with the intent of the

[106] *Colo. River Water Conservation Dist.*, 424 U.S. at 810-811.
[107] *San Carlos Apache Tribe*, 463 U.S. at 552
[108] *Id*.
[109] *Greely*, 219 Mont. at 99, 712 P.2d at 768.
[110] *Id*. at 92, 712 P.2d at 764
[111] *Id*.

McCarran Amendment, the Montana general stream adjudication, and the jurisdiction of the Montana Water Court. The intent of the McCarran Amendment, as described above, was to promote judicial economy and to prevent the piecemeal litigation of water claims throughout different courts. The legislative history for the McCarran Amendment suggests that Congress sought to avoid the uncertainty that may result from not addressing *all* of the claims that may exist in a particular river system since absent claims "could materially interfere with the lawful and equitable use of water for beneficial use by the other water uses who are" bound by the decrees. Not including off-reservation water right claims in the compact -- to whatever extent they may exist -- may itself run counter to the intent of the McCarran Amendment and the general steam adjudication process since those claims could potentially be litigated in a separate federal proceeding, which the McCarran Amendment evidently sought to avoid. In addition, there is nothing in state or federal law that appears to prohibit off-reservation claims from being included in a negotiated settlement.

3.c. "Does a 'right to take fish...in common with the citizens of the territory' convey a water right for instream right to either the Tribe or Montana citizens?"

Short Answer:

Potentially yes. Several courts have addressed the scope of the treaty "right to take fish at usual and accustomed places." Although no court has issued binding legal precedent for courts in Montana on whether the fishing right language confers an instream water right sufficient to protect off-reservation fisheries, various courts have indicated that such claims may be valid and enforceable.

Analysis:

Several courts have addressed treaty language that provides rights to hunt and fish outside of the exterior boundaries of an Indian reservation. As noted above, the U.S. Supreme Court initially recognized off-reservation fishing rights in *U.S. v. Winans*, in which the court held that the Yakima Indians had the right to access aboriginal fishing grounds that were located outside the exterior boundaries of the reservation. In a subsequent decision, the U.S. Supreme Court ruled that a private company could not interfere with the tribe's off-reservation fishing rights and that the tribes had the right to make use of their traditional fishing grounds "in common" with the other citizens. Several years later, in 1979, the U.S. Supreme Court addressed the character of the treaty right to take fish.[112] In this decision, the court held that the "usual and accustomed" fishing right language guaranteed more than a mere right of access to aboriginal fishing grounds or an equal opportunity between Indians and non-Indians to fish. Instead, the court held that the Indians enjoyed a right to harvest a proportionate share of the harvestable fish that passed through aboriginal fishing grounds.[113]

In a 1983 decision, the Ninth Circuit Court of Appeals addressed a provision of the treaty with the Klamath Indians that reserved to the tribes the exclusive right to hunt, fish, and gather on the reservation. In addition to holding that the rights survived the subsequent termination of the Klamath

[112] *Wash. v. Wash. St. Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).
[113] *Id.* at 685.

Indian Reservation, the Court also held that the Tribe was entitled to "prevent other appropriators from depleting the steams waters below a protected level in any area where the non-consumptive right applies."[114] Although *Adair* dealt with on-reservation treaty language, the case may provide authority for off-reservation instream flow rights since the reservation had been terminated by Congress and no longer existed as tribal property.

In 1985, the Ninth Circuit of Court Appeals upheld a federal district court's order that required the Bureau of Reclamation to release water from a Yakima water project reservoir that was located off the reservation to preserve nests of salmon eggs that were threatened by low late-season flows. Although the court did not necessarily address the scope of the treaty fishing right, the decision provides some indication that courts may take action to ensure that water exists for purposes of sustaining fish habitat.[115]

Washington state courts have also addressed off-reservation instream flow rights for purposes of sustaining fish habitat. In the Acquavella adjudication, which is a general stream adjudication of water rights in the Yakima River basin, the Yakima Tribe made claims for on-reservation rights for agriculture and various other purposes, as well as claims for off-reservation rights to fulfill the tribe's treaty-based fishing rights. These claims were initially addressed by the state trial court, which concluded that the tribes possessed a diminished, time-immemorial off-reservation instream flow right in the Yakima River and its tributaries in an amount "necessary for the preservation of anadromous fish life in the river."[116] The Washington Supreme Court affirmed the decision, and the trial court issued a final order reflecting the off-reservation in-stream flow right to maintain fish habitat in a 1995 final order regarding the tribe's reserved treaty rights.

State courts in Idaho reached a different conclusion on whether the treaty fishing right language carried with it a corresponding water right to maintain instream flows. As discussed more fully during the May 2014 Water Policy Interim Committee Meeting, the Snake River Basin Adjudication Court (SRBA) concluded that the Nez Perce Tribe's treaty right to "take fish in all usual and accustomed places" did not include an instream water right to ensure the availability of fish. The SRBA court distinguished the *Adair* decision discussed above, asserting that *Adair* only applied to on-reservation claims. The SRBA also stated that the U.S. Supreme Court's decision in the *Fishing Vessel* decision precluded it from taking the additional step of implying a right to instream flows to maintain fish habitat. The decision was appealed, but was not addressed by the Idaho Supreme Court. The parties ultimately entered into a settlement agreement that provided various state-based instream flow rights to ensure the protection of fish habitat. These rights, however, were not treaty based rights and are subordinate to existing state-based irrigation rights. It must be noted that the SRBA's analysis of the off-reservation claims has been supported as well as highly criticized in various circles. As is the case for the state-court decisions in Washington, the SRBA's decision in Idaho is not binding authority on any court in the State of Montana.

Although there are no cases from the Ninth Circuit Court of Appeals or Montana federal or state courts directly addressing whether the right to fish at all usual and accustomed places definitively provides a right to off-reservation instream flows, the cases referenced above provide support for the tribes' off-reservation instream flow claims. The Ninth Circuit Court of Appeals has already recognized

[114] *Adair*, 723 F.2d at 1411.

[115] *Kittitas Reclamation Dist. v. Sunnyside Irrigation Dist*., 763 F.2d 1032 (9th Cir. 1985).

[116] *State v. Acquavella*, Yakima County Superior Ct. No. 77-2-01484-5, Memorandum Opinion re: Motions for Partial Summary Judgment (Oct. 22, 1990), aff'd, 121 Wn.2d 257 (1993).

that the tribes' on-reservation treaty rights include instream flows in all of the streams running through or bordering the reservation. If squarely presented with the question, it is certainly possible that the Ninth Circuit would apply the same rule to off-reservation streams in areas the tribe historically utilized. In addition, the Montana Supreme Court has cited the Ninth Circuit's decision in *Adair* and quoted the statement that reserved hunting and fishing rights "consists of the right to prevent other appropriators from depleting the stream water below a protected level in any area where the non-consumptive right applies."[117]

3.c.i. "Does the use of off-reservation instream flow to maintain habitat or flow change the purpose of the Treaty to 'take fish' in common with the citizens of the Territory?"

Short Answer:

Most likely no.

Answer:

Although it is somewhat unclear, the question appears to be asking whether the characterization of the off-reservation rights as instream flow rights somehow changes the purpose of the treaty to take fish at the tribes' usual and accustomed places. There is nothing in law that appears to suggest that the characterization of the fishing right as an instream flow right would change the purpose of the right to "take fish" in common with the citizens of the territory. As noted in the discussion of 3.c. above, various courts have interpreted the fishing right language as providing something more than a mere right to take fish. It is unclear how the use of the right for instream flows would change the purpose of the treaty to take fish, but ultimately, a court of law would be the proper forum for making this determination.

3.c.ii. "Does the treaty right to hunt imply a water right to maintain wildlife habitat?"

The compact would legally settle the scope of the tribes' claims for off-reservation water rights. According to Article VII.D.1 of the proposed compact, the water rights confirmed by the compact are "in full and final satisfaction" of "all claims to water or to the use of water by the Tribes, Tribal members, and Allottees and the United States . . ." In Article V.C.2. of the proposed compact, the tribes reserved any rights not "granted, recognized, or relinquished" through the compact. This included the "right to the continued exercise by members of the Tribes of Tribal off-Reservation rights to hunt, fish, trap and gather food and other materials, as reserved in Article III of the Hellgate Treaty of July 16, 1855 (12 Stat. 975)."

[117] *Greely*, 219 Mont. at 93, 712 P.2d at 764.

4. The Compact

4.a. "Does Montana have the legal and constitutional authority to review and alter a Compact after its ratification?"

Nothing prohibits the Legislature from studying and reviewing the compact after ratification and final approval by the Water Court. The Legislature may also pass legislation to modify or otherwise alter the terms of the compact after ratification. However, because the express terms of the proposed compact provide that "no provision of the Compact shall be modified as to substance except as may be provided in the Compact, or by agreement among the Parties," a unilateral modification to the compact by the Legislature would not be binding on the CSKT or the United States.[118] The term "parties" is defined as the "Tribes, the State, and the United States."[119] It is important to note that the Water Court itself has stated that water compacts are subject to "continued judicial policing." Specifically, the Water Court stated that "a compact negotiated, ratified, and approved pursuant to the authority and procedures set forth in § 85-2-702, MCA, is closely analogous to a consent decree, in that it represents a voluntary, negotiated settlement between parties that is subject to continued judicial policing."[120]

4.a.i. What provisions would be required in the Compact language to authorize such a review?"

As stated above, nothing currently prohibits the Legislature from continuing to study and review the compact after ratification. However, any legislation passed to modify the terms of the compact would not be effective without the approval of the other parties to the compact, i.e., the CKST and the United States. Provisions could be added to the compact to require continued assessment and study by the Legislature or the Compact Commission following ratification. Alternatively, the proposed compact could be amended to provide that any change to the compact, whether after first or final ratification by the parties, constitutes a modification subject to the express approval of the parties, including the Legislature. However, all the parties to the compact would have to agree to this modification and the Montana Compact Commission is statutorily vested with the authority to negotiate water rights settlements of Indian reserved water rights.[121]

4.b. Off a federal reservation, does an Indian Tribe or the federal government have any legal authority to manage, administer, "call", or develop water resources?"

A water right obtained by an Indian tribe or the federal government through a negotiated settlement, adjudication, or under state law pursuant to the Water Use Act, would be enforceable pursuant to applicable law. The off-reservation water rights for the CSKT are described in the proposed compact. These rights are the extent of the off-reservation rights that would be afforded to the tribes. The compact describes how the various off-reservation rights afforded to the tribes by the compact may

[118] Proposed CSKT water compact.
[119] Art. II(45), proposed CSKT water compact.
[120] *In re Adjudication of the Rocky Boy's Reservation*, supra n. 15, at 4.
[121] 85-2-702, MCA.

be enforced. Some of the rights cannot be enforced if certain conditions are satisfied. For example, the instream flow right on the Kootenai River cannot be enforced by the tribe through a call as long as the Libby Dam is in existence and the dam is in compliance with federal law. If it is ever enforceable, the right may only be exercised on the main stem of the Kootenai River. Outside of the compact, there are circumstances in which a tribal water right or a federal water right may be enforced beyond the exterior boundaries of the reservation. *See, e.g.*, *U.S. v. Winans*, 198 U.S. 371 (1905) (allowing members of the Yakima Tribe to access aboriginal fishing grounds); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919) (prohibiting a company from interfering with a tribe's off-reservation fishing rights); *Wash. v. Wash. St. Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (holding that the treaty fishing language entitled the Indians to an equitable share of the harvestable fish); and *Kittitas Reclamation Dist. v. Sunnyside Irrigation Dist*., 763 F.2d 1032 (9th Cir. 1985) (ordering the Bureau of Reclamation to release water from a project reservoir to sustain salmon redds).

4.b.i. "Does the DNRC have the authority to issue water rights to the federal government outside of its finalized Compact, and without an analysis of the preclusion of future growth or private property assessment act evaluation?"

Upon approval of the compact, an application of a water right within the reservation is submitted to the Water Management Board, not the DNRC. Article V of the proposed compact states:

> Nothing in this Compact shall be construed or interpreted . . . To preclude the Tribes, Tribal members, and Allottees, or the United States, from applying to the Water Management Board for an Appropriation Right under the Law of Administration on the same basis as any other Person.

Except for off-reservation rights specifically included in the proposed compact and approved by Congress, Article V of the compact states, "nothing in this Compact shall be construed or interpreted to establish the nature, extent, or manner of administration of rights to water of the United States on Federal lands outside of the Flathead Indian Reservation."[122] The proposed compact would settle water right claims for the Flathead Indian Reservation and the CSKT. The proposed compact does not bind the federal government from seeking water rights in other contexts where appropriate. In general, an agency of the federal government could obtain a water right under state law pursuant to the provisions of Title 85, chapter 2, part 3, of the MCA. Applications for water rights by the United States would be assessed in the same manner as any other application. The criteria for the issuance of a water right by the DNRC are outlined in 85-2-311, MCA. This section requires the DNRC to assess, among other things, the legal and physical availability of water, whether an existing water right would be adversely affected, and whether the water right would be used for a beneficial purpose. Additional criteria apply if the appropriation is particularly large or for an out-of-state transfer of water. Neither the criteria described in 85-2-311, MCA, nor any applicable administrative rule reference "an analysis of the preclusion of future growth or private property assessment act evaluation." The Private Property Assessment Act (2-10-101 – 2-10-112, MCA), requires an evaluation of actions with damaging or taking implications. However, state water law already protects existing water uses from being harmed by proposed new

[122] Art. V.A.4, proposed CSKT water compact.

uses or changes to existing uses through the adverse effects analysis provided in 85-2-311 and 85-2-402, MCA.

4.c. "Is there a distinction between the ownership of water and the ownership of a water right?"

Short Answer:

Yes. Water cannot be owned in the same manner as other property interests. By acquiring a water right, a person obtains a legally protected property interest to use water at a particular place in a particular quantity.

Analysis:

Once perfected, it is well-settled that water rights are legally protected property interests. Water rights are protected by both the U.S. and Montana constitutions and cannot be taken by the government without due process of law. Water rights are conceptually similar, although not identical, to other property interests. However, while there are similarities between water rights and other forms of real property interests, significant legal distinctions exist. The most significant yet commonly overlooked distinction is that a water right holder does not own the water. Rather, by acquiring a water right, the holder acquires the right to use the water at a particular place in a particular quantity. As a result, a water right is commonly described in property law as a *usufructuary right*. A usufruct is defined as "the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing."[123] The Montana Constitution recognizes the distinction between the ownership of water and the right use water. Under Article IX, section 3(3) of the Montana Constitution, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Thus, in Montana the possession of a water right cannot be characterized as absolute ownership. Instead, by acquiring a water right, an individual acquires a right to use the water at a particular place for a particular purpose.

4.c.i. "If a federal reserved water right is owned by the federal government, does Montana still own the water?"

The Montana Constitution provides that all the water in the state is the property of the state for the use of its people. As stated in Article IX, section 3(3), of the Montana Constitution:

> All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."[124]

[123] Powell on Real Property § 65.03.
[124] Art. IX(3), Mont. Const.

Pursuant to this provision, the state broadly asserts authority over the water within the state. However, as discussed in several of the responses above, the U.S. Supreme Court has carved out an exception to state-based appropriative laws for federal and Indian reserved water rights. As stated in *Winters v. U.S.*, "The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."[125] These rights are impliedly created when the federal government sets aside land for the creation of federal lands and Indian reservations. Both the Montana Supreme Court and the Montana Water Court have clarified that the United States does not "own" Indian reserved waters. Rather, these courts have said that the federal government holds the water in trust for the benefit of the Indians. As stated by the Montana Supreme Court:

> Form of ownership is another distinction between federal and Indian reserved water rights. The United States is not the owner of Indian reserved rights. It is a trustee for the benefit of the Indians. Its powers regarding Indian water rights are constrained by its fiduciary duty to the tribes and allottees, who are the beneficiaries of the land that the United States holds in trust. **Indian reserved water rights are "owned" by the Indians**.[126] (Emphasis added).

Likewise, the Water Court has stated:

> The United States is not the owner of Indian reserved rights. It is a trustee for the benefit of the Indians. Its powers regarding Indian water rights are constrained by its fiduciary duty to the tribes and allottees, who are the beneficiaries of the land that the United States holds in trust. **Indian reserved water rights are "owned" by the Indians**.[127] (Emphasis added).

Adding to the complexity is the provision in Article I of the Montana Constitution, which expressly provides that "all lands owned and held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States" until revoked by the U.S. and the people of Montana.[128] This provision was addressed by the Montana Supreme Court in 1985 when the Court held that this disclaimer language did not bar the Water Court from adjudicating Indian reserved water rights.[129] The court determined that the adoption of the Water Use Act constituted the consent of the people of Montana sufficient to allow the Water Court to exercise jurisdiction under the McCarran Amendment to adjudicate Indian reserved water rights.[130]

4.c.ii. "If Montana owns the water, who has the right to administer water rights, including federal reserved water rights?"

[125] *Winters v. U.S.*, 207 U.S. 564, 600-601 (1908).
[126] *Greely*, 219 Mont. at 97, 712 P.2d at 767.
[127] *In re Adjudication of the Rocky Boy's Reservation*, supra n. 15, at 24.
[128] Art. I, Mont. Const. (stating that "All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana").
[129] *Greely*, 219 Mont. at 89, 712 P.2d at 762.
[130] *Id*. at 88-89.

The question of what entity has the authority to administer water rights on an Indian reservation is complex, in part because water is a unitary resource and as such the actions of one user may directly affect another user and because the question involves competing interests of tribal self-government and the extent of state regulatory authority. Indian tribes have been described as semi-independent nations retaining unique "attributes of sovereignty over both their members and their territory."[131] Under existing law, states are generally prohibited from exercising authority over an Indian reservation either because it is pre-empted by federal law or, if not preempted, because it infringes on the right of tribal self-governance.[132] The Montana Supreme Court has clarified that questions regarding both adjudicatory and regulatory jurisdiction in Montana turn first on whether Congress preempted state action and, if not, whether the action infringes on tribal self-government.[133]

In general, unless Congress has divested a tribe of sovereign authority, a tribe retains jurisdiction over its members and its land. However, jurisdictional questions involving non-Indians living within the exterior boundaries of a reservation are more complex. Courts have held that tribal sovereignty is not absolute and may be diminished when there are non-Indians living on land that is not under tribal ownership.[134] In *Montana v. U.S*, 450 U.S. 544 (1981), the U.S. Supreme Court held that the Crow Tribe could not regulate hunting and fishing by non-members living on non-tribal fee lands, concluding that while "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations," that power is more limited in the context of non-Indian activity on non-Indian fee lands. The test announced by the Supreme Court for civil regulatory jurisdiction over the activities of non-Indians on non-Indian lands within the exterior boundaries of the reservation was announced as follows:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[135]

As such, a tribe may retain jurisdiction over non-Indians within the reservation when non-Indians have transacted business or entered into contracts or leases with the tribe. Jurisdiction may also exist if the conduct of non-Indians threatens of has a direct effect on the "political integrity, the economic security, or the health or welfare of the tribe." The *Montana* test has been reiterated and refined in several subsequent decisions.[136] As noted by the Montana Supreme Court, other cases have approached questions of tribal sovereignty from the perspective of the states and analyzed the extent of state power

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[131] *See United States v. Mazurie*, 419 U.S. 544, 557 (1975) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).
[132] *See Walton*, 647 F.2d at 51.
[133] *In re Big Spring*, 2011 MT 109, ¶ 46, 360 Mont. 370, 255 P.3d 121.
[134] *U.S. v. Anderson*, 736 F.2d 1358, 1364 (9th Cir. 1984).
[135] *Montana v. U.S,* 450 U.S. 544, 564-565 (1981).
[136] *See Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that a tribal court did not have jurisdiction over a suit resulting from an accident occurring on a public highway maintained by the state under a federally granted right of way on the reservation).

on Indian reservations.[137] For example, in *White Mountain Apache Tribe v. Bracker*, the United States Supreme Court assessed whether federal law preempted the State of Arizona from imposing a fuel tax on a non-Indian logging company operated on the reservation.[138]

Various other courts have addressed jurisdictional limits in the context of water administration. The Ninth Circuit Court of Appeals held in 1981 that only the Colville Confederated Tribes or the United States on behalf of the tribe could regulate water use within the exterior boundaries of the reservation. The specific rights at issue were located on a non-navigable system located entirely within the boundaries of the Colville Indian Reservation. The Ninth Circuit analyzed the rule announced in *Montana*, but determined that "in creating the Colville Reservation, the federal government pre-empted state control of the No Name system" and that tribal or federal regulation of the waters at issue would have no impact on state water rights off the reservation.[139] The court cited the unitary nature of water and the importance of water regulation on the reservation to the lifestyle of the tribe.[140] As a result, the State of Washington had no authority to regulate the water rights of a non-tribal member who owned allotted land located within the boundaries of the reservation.[141] A few years later, the Ninth Circuit reached a different conclusion, holding that the State of Washington could regulate the use of "excess" waters by non-Indians on fee land. The court found that that none of the factors announced in the *Montana* decision existed, evidently relying on the fact that the water rights at issue involved a source that bordered the Spokane Indian Reservation and did not exist solely within the boundaries of the reservation. The term "excess" water apparently refers to water that was not adjudicated as part of the tribe's federal reserved water right.

The Wyoming Supreme Court has also addressed administration of Indian reserved water rights. Following quantification of the water rights for the Wind River Reservation, the court addressed a dispute over whether the tribes or the state engineer had the authority to administer water rights on the reservation. The heavily divided court ultimately concluded that the state engineer, as opposed to the tribe, had the authority to monitor the Indian reserved water right and to seek judicial enforcement of the decree if the engineer believed the tribes were exceeding "either the nature or the extent of their decreed right."[142]

In Montana, most jurisdictional questions involving water use within the state's Indian reservations have been resolved through the water compacts described more fully in the response in 2.k. above. The water rights at issue on the Flathead Reservation, however, have not yet been quantified either through legal settlement of the claims or by court adjudication. Several courts have nevertheless addressed water administration on the Flathead Reservation. For example, in 1982, the Ninth Circuit Court of Appeals determined that the CKST had the authority to regulate the riparian activities of non-Indians owning fee land within the exterior boundaries of the reservation. The Court held that the Tribe had the authority to regulate the activities since: (1) there were no significant federal interests involved; (2) the tribes were regulating land owned by the tribes or held in trust for the tribes

[137] *Confederated Salish and Kootenai Tribes v. Clinch*, 2007 MT 63, ¶ 20, 336 Mont. 302, 158 P.3d 377.
[138] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).
[139] *Walton*, 647 F.2d at 52-53.
[140] *Id.* at 52.
[141] *Id.*
[142] *In re General Adjudication of All Rights to Use Water in Big Horn River System*, 835 P.2d 273, 282-283 (Wyo. 1992).

by the United States (*i.e*., the southern half of Flathead Lake; and (3) the conduct of the tribes sought to regulate had the "potential for significantly affecting the economy, welfare, and health of the Tribe."[143]

The Montana Supreme Court has also weighed in on the issue. Beginning in 1996, the Montana Supreme Court issued a series of decisions limiting the state's ability to regulate certain water administration activities occurring on the Flathead Indian Reservation. For example, in 1996 the Court ruled that the DNRC was prohibited from granting water use permits or changes to use permits on the reservation because the applicants could not demonstrate that the proposed use would not unreasonably interfere with the tribe's water rights.[144] In 1999, following legislative enactments, the court again held that the DNRC could not make a determination of whether water was "legally available" until the tribe's rights were quantified.[145] The rule was extended to groundwater permits in 2002.[146] The court once again addressed questions of state administrative authority on the Flathead Reservation in 2007. In this case, the court addressed whether DNRC could process applications to change a state-based water right on the reservation before the tribe's rights were quantified. After going through a lengthy analysis of the scope of the state's authority to regulate within Indian reservations, the court concluded that permit holders must be afforded the opportunity to prove that a proposed change to a water right would not adversely affect the tribe's water right. However, based on the record before it, the court concluded that it was unable to determine what water rights were at issue and whether the DNRC had the authority to conduct a change of use proceeding.

Based on the foregoing, the question of what entity has the authority to administer water on the Flathead Indian Reservation is complex and currently uncertain. Under the precedent established by the Ninth Circuit in *Walton* and *Anderson*, the tribes appear to retain broad authority over water use on the reservation, unless the water is deemed surplus "water" (*i.e.* non-reserved water) or is from a source that does not exist solely within the boundaries of the reservation. The question of regulatory authority over non-Indians residing on non-tribal fee land is more uncertain, but the Ninth Circuit has already held that the tribes may regulate the riparian activities of non-tribal fee owners.[147] Ultimately, if water administration on the reservation is not addressed by settlement, the issue will likely be determined more directly by a court. The proposed UMO in the CSKT water compact appears to have been designed to address existing jurisdictional barriers for water management on the Flathead Indian Reservation and is somewhat similar to the joint state-tribal Flathead Reservation Fish and Wildlife Board.[148] In the wildlife management agreement the parties expressly agreed "that substantial resolution of the fundamental governmental and jurisdictional differences may be achieved by mutual

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[143] *Confederated Salish and Kootenai Tribes of Flathead Reservation v. Namen*, 665 F.2d 951 (9th Cir. 1982).

[144] *In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti; 64988-G76L, Starner; and Application for Change of Appropriation Water Right No. G15152-S76L, Pope*, 278 Mont. 50, 61, 923 P.2d 1073 (1996).

[145] *Confederated Salish and Kootenai Tribes v. Clinch*, 1999 MT 342, 297 Mont. 448, 992 P.2d 244.

[146] *Confederated Salish and Kootenai Tribes v. Stults*, 2002 MT 280, 312 Mont. 420, 59 P.3d 1093.

[147] *See also* the Shoreline Protection Ordinance 64(A) of Confederated Salish and Kootenai Tribe through which the tribe regulates the issuance or denial of permits for work in navigable waters within its jurisdiction, including work on the bed and banks below the high water mark of all navigable waters within the boundaries of the reservation. The ordinance establishes a Shoreline Protection Board that is composed of tribal and non-tribal members who are appointed by the tribal council and provides parties a right to appeal to tribal court.

[148] *See* http://fwp.mt.gov/news/newsReleases/headlines/nr_3825.html (last accessed August 21, 2014).

consent of the Tribes and State."[149] The board is composed of seven members, three appointed by the tribal council, three appointed by the Governor, and a seventh member who is an employee of the U.S. Fish and Wildlife Service. Disputes are settled through arbitration and then court proceedings, if necessary.

[149] *Id.*