THE SECRETARY OF THE INTERIOR
WASHINGTON

NOV 18 2019

The Honorable Steve Daines
United States Senate
Washington, DC 20510

Dear Senator Daines:

I have received your correspondence regarding the proposed settlement of the reserved water right claims of the Confederated Salish and Kootenai Tribes (CSKT or Tribes). Although I did not participate in the negotiation of this proposed settlement, I have evaluated the matter. In sharing my perspective, it may be useful to know that I have been involved with the negotiation and approval of other water rights settlements over the last two and a half decades.

I understand that following nearly a decade of negotiations, negotiators for the Tribes, the State of Montana (State), and the United States submitted to their respective principals a proposed settlement of the Tribes' reserved water right claims known as the CSKT Water Rights Compact or CSKT Compact. The Compact, approved by the Montana legislature in 2015, is currently proceeding through the appropriate Federal review and approval processes.

As a general policy matter, for more than 30 years, the United States has supported resolving Indian reserved water right claims through negotiations rather than protracted and divisive litigation. I am informed that during the course of negotiating and reviewing the CSKT Compact, concerns and objections were raised about whether proposed Compact terms appropriately resolved the Tribes' claims and about the perceived impacts that the Compact could have on non-Indian water right holders. These concerns are important, and it is my understanding that these concerns were considered and evaluated during the negotiations, in the context of potential risks and liabilities resulting from non-settlement.

Given your commitment to resolving longstanding issues and avoiding needless litigation, you have asked for the Department of the Interior's (Department) views on these concerns. I would like to provide our perspective at this time on how I understand that these concerns have been addressed.

A. Background on the CSKT Reserved Water Right Claims

Historically, the Federal Government, when called upon to file reserved water right claims as trustee for a Tribe and its members, files claims that it determines are legally justified under Federal law, including under the Tribe's treaty or other documents creating the Tribe's reservation, and that are consistent with State and Federal court decisions interpreting the *Winters* reserved water rights doctrine. These initial filings by the United States tend to be broad in scope, based on credible claims that can be supported with competent expert testimony.

In 2015, using this framework, the United States and CSKT filed in the Montana Water Court several categories of reserved right claims, including these that relate to the concerns discussed below:

- Instream flows to support the fisheries, both on- and off-Reservation, based on language in the CSKT Hellgate Treaty expressly reserving Tribal fishing rights.
- The irrigation water supply for the Bureau of Indian Affairs (BIA) Flathead Indian Irrigation Project (FIIP or Project) to serve all lands within the Project, both Indian and non-Indian.
- Future irrigation water for the CSKT, consistent with U.S. Supreme Court precedent.

When parties propose settlement of a Tribe's reserved claims, the United States traditionally evaluates the agreement from various perspectives, including:

- Does the proposed settlement secure adequate Tribal water resources to meet the purposes of the reservation?
- Are the Tribe's water rights legally protected and enforceable?
- Would the settlement resolve all of the Tribe's reserved water right claims?
- If a BIA irrigation project is involved, are the water rights for the project properly resolved?
- Are proposals to address how water rights on the reservation would be administered and enforced acceptable?

B. Discussion of CSKT Compact Concerns

It is my understanding that the primary concerns about the Compact raised to date tend to fall into three main themes:

- Objections to the inclusion of reserved rights for off-Reservation instream flows.
- Objections to how the Compact resolves the water rights for FIIP in conjunction with the CSKT reserved rights for on-Reservation instream flows.
- Assertions that the Compact's approach to administering and enforcing water rights on the Reservation is unconstitutional, primarily under Montana law.

I address each of these three themes below.

1. Reserved Rights for Off-Reservation Instream Flows

Concerns have been raised about whether there is a legal basis for the off-Reservation flow rights CSKT would obtain under the Compact. These concerns are understandable. Although there is extensive experience with reserved off-reservation flow claims elsewhere in the Northwest, fewer such claims have been addressed in Montana. That said, similar claims were confirmed in the legislation approving the Blackfeet Water Rights Compact. The CSKT Compact, however, is the first time that claims based on a treaty reserving off-Reservation fishing rights have been addressed in Montana.

The United States and CSKT filed off-Reservation reserved instream flow claims premised on the Hellgate Treaty and its promise in article III that Tribal members may fish off the Reservation at "all usual and accustomed places, in common with citizens of the Territory." These claims are intended to protect Tribal members' ability to fish in the rivers and streams where Tribal members fished at the time of the Treaty in order to provide a meaningful fishery. This language is virtually the same as clauses found in several Indian treaties in the Pacific Northwest known as "Stevens Treaties," which were negotiated in 1854-55 with Washington Territory Governor Isaac Stevens. Generally, the legal premise is that in the Stevens Treaties, when Tribes expressly reserved off-Reservation fishing rights, they impliedly reserved the water rights necessary to support the fishing purpose. This theory follows the holdings in *Winters* and *Winans* that Tribes may reserve aboriginal rights when entering into treaties establishing reservations. (*See Winters v. United States*, 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371 (1905).)

To illustrate, Federal and State courts have considered the water rights of the Yakama Nation, a Stevens Treaty Tribe with treaty language equivalent to the Hellgate Treaty language. Federal courts have ordered that water be released from a Federal reservoir to protect spawning flows needed to support the Yakama Nation's off-Reservation fishing right more than 50 miles upstream of the Yakama Reservation. (*Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033-35 (9th Cir. 1985).) Washington trial and appellate State courts also have made extensive rulings finding and clarifying the Nation's rights to off-Reservation flows for fisheries throughout the Yakima River basin. The Yakama Nation's adjudicated water rights extend throughout the Yakima basin, even though the Reservation only occupies the southwestern portion of the basin. Further, courts have found that these rights have a priority date of time immemorial.

Another illustrative case is *United States v. Adair,* where the Federal courts concluded that the Klamath Tribes' treaty recognized the Tribes' aboriginal title in the reservation lands and natural resources and confirmed to the Tribes "a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation." (723 F.2d. 1394, 1413-14 (9th Cir. 1984).) These courts held that the Klamath Tribes therefore enjoyed water rights sufficient to support their treaty fishing, hunting, and gathering rights with a "time immemorial" priority. The *Adair* decision also defined how to quantify the Klamath Tribes' instream rights, recognizing the Tribes' water right included the right to prevent other appropriators from depleting the streams' waters below a protected level in any area where the non-consumptive right applies. Subsequently, Phase I of the State of Oregon's Klamath Basin Adjudication resulted in a Final Order of Determination issued in 2013 that quantified the Tribes' instream flow right.

The Department determined that the case law, the history of the Tribes, and the Hellgate Treaty supported off-Reservation flow claims for CSKT in the Montana adjudication. It found that it was appropriate to address these claims as part of the Compact. These reserved rights are Tribal property rights, but they do not provide for Tribal jurisdiction off the Reservation. Resolution of the Nez Perce Tribe's reserved water right claims for flows in the Snake River Basin Adjudication in Idaho does not change our conclusion. In that case, a State trial judge found the Nez Perce Tribe (which has a Stevens Treaty) was not entitled to off-Reservation instream flows. However, the State trial court's decision is not binding, and, in any event, the Tribe agreed in

that litigation to settle its off-Reservation flow claims for extensive instream flow protections under State law that they can enforce. As with the CSKT claims, the Federal Government found these settlement proposals to be an appropriate resolution to the Indian reserved claims at issue.

2. Resolution of the Water Rights for FIIP in Conjunction with the CSKT Reserved Rights for On-Reservation Instream Flows

I understand that a central concern is that the Compact may deprive water users served by FIIP of their entitlements to Project water. In fact, it appears that one of the most contentious issues during the negotiation was how to address the FIIP irrigation water right claims. Further, because the FIIP water rights and the Tribes' on-Reservation reserved flow rights often compete for the same water supply, addressing in tandem these two rights was critical for reaching a successful settlement.

The United States filed comprehensive water right claims for the entire FIIP irrigation water supply to serve all lands in the project, both Indian and non-Indian. It appears that one of the Department's primary goals during the negotiations was to preserve the historical irrigation water use on lands served by FIIP. This position comports with the Federal Government's past practice in general stream adjudications to claim the entire water supply of Federal irrigation projects. Also, as detailed below, Federal courts have confirmed the Tribes' entitlement to on-Reservation reserved instream flow right and these rights have a priority date of time immemorial and thus are senior to the FIIP water rights. (*See Joint Board of Control v. United States*, 832 F.2d 1127 (9th Cir. 1987); *Joint Bd. of Control of the Flathead, Mission & Jocko Irrigation Dists. v. United States*, 862 F.2d 195 (9th Cir. 1988).) The Federal courts left to the Montana Water Court the job of quantifying the amount of flow required to satisfy these rights; if these claims cannot be settled, the Water Court will proceed with that task.

Concerns remain that the Compact would permanently reduce the FIIP water supply. I understand that this concern was a central one in the negotiations, and the Compact protects the net FIIP water supplies needed to irrigate crops. Tribal, State and Federal negotiators employed technical studies to determine that historical net irrigation supplies could be maintained and protected while project improvements were made to save water for instream flows. To this end, diversions under the Compact initially remain the same as historical amounts. As FIIP improvements and water conservation measures are implemented, the saved water is left instream to help meet flow rights. In turn, FIIP diversions would be reduced by a commensurate amount while ensuring that net crop demands continue to be met. As a safeguard, the Compact provides that, during implementation, irrigation diversions "shall be evaluated to ensure their adequacy to meet Historic Farm Deliveries." (Compact, Article IV.D.1.e.) If water in excess of those deliveries is needed, it will be provided by increasing water pumped from Flathead Lake. (Compact, Article IV.D.1.e.ii.)

There are additional terms that would further safeguard FIIP water use. The CSKT and the State committed in the Compact to seek Federal legislation to provide funds from power revenues on the Reservation to improve FIIP operations and water supplies. (Compact, Article IV.H.3.) They also agreed to several provisions in the Compact that protect the FIIP water supply in times of shortage, including sharing between instream flows and irrigation diversions. In dry years

when "water supplies are inadequate to simultaneously satisfy" instream flows and irrigation diversions, the Compact sets out several measures that can be taken to augment irrigation water. (Compact, Article IV.E.1.3.)

The negotiators also addressed assertions that the Compact takes legal title to the FIIP water rights away from landowners served by FIIP and places it with CSKT. There is little precedent, however, supporting third-party party claims to legal title to BIA project water rights held in trust for Tribes. In contrast, Indian settlements in Montana and Idaho placed title to BIA irrigation project water rights in the name of the United States in trust for the Tribe, even for BIA projects that serve both Indian and non-Indian irrigators on a reservation. We also note that Washington State courts adjudicated the water rights for the BIA irrigation project on the Yakama Reservation, which serves extensive non-Indian lands, to be properly held by the United States in trust for the Yakama Nation.

However, the Department also recognizes that all landowners served by a BIA irrigation project, whether Indian or non-Indian, are entitled to continue to receive project irrigation water to the extent the water is physically and legally available and assessments have been paid. The CSKT Compact includes protections for FIIP water users' entitlements to Project water. (*See* Compact, Article III.C.1.a (expansive definition of FIIP service area); Compact, Article IV.D.2 (recognition of entitlement through a "delivery entitlement statement").)

Finally, I note the obvious risks that FIIP water users would face if the quantification of CSKT's on-Reservation instream flow rights cannot be settled. As noted above, Federal courts in the 1980s recognized CSKT's entitlement to on-Reservation instream flow rights throughout the Reservation with a time-immemorial priority date that is senior to FIIP. Under this legal precedent, water would not be shared between FIIP and the instream flows; rather, instream flows would be met first to the full extent of their legal entitlement. The one question that the Federal courts left for the Montana courts was the quantification of CSKT's on-Reservation flow rights. Currently, Federal claims seek instream flow rights for the majority of water even in wetter years; if the courts were to confirm this claim, water for FIIP diversions would be available only in the wetter years and only to the extent not needed to meet the instream flow right. Even if the Water Court were to quantify the right at a lower median range, the Department's assessments show a likelihood that insufficient water will remain for viable FIIP irrigation diversions. Some objectors to the Compact argue that the "interim instream flows" established by BIA in the late 1980s should be the permanent quantification of the Tribes' flow rights. In my view, this position faces significant risk because the interim flows are not quantified and they do not appear biologically sufficient. The Compact, in contrast, ensures water for FIIP that otherwise might not be available if these claims were litigated.

For these reasons, the Department concluded that the Compact would appropriately resolve both the FIIP irrigation and the CSKT flow rights.

3. Administration of Water Rights on the Flathead Reservation under the Compact

Concerns have been raised about the Compact's terms for on-Reservation administration and enforcement of water rights after entry of a decree. This is set forth in the "Unitary

Administration and Management Ordinance" (UMO), and administered by the joint State-Tribal "Flathead Reservation Water Management Board" (Board) of water rights post-decree. Montana State government entities are best positioned to respond to assertions that these terms violate the Montana Constitution. The State—under the auspices of the Montana Reserved Rights Commission, the Attorney General's Office, and legal counsel for the Montana legislature—has analyzed the matter and concluded that the UMO is constitutional. The Montana Supreme Court has also confirmed that the legislature's approval of the Compact, including the UMO, complied with State law.

As noted above, it is my experience that, during the entirety of my professional career, the Federal Government has consistently supported efforts in Tribal water right negotiations to address how water rights on the reservation will be administered and enforced once a settlement is reached. In this negotiation, given the vast number of commingled Tribal and non-Tribal water uses on the Reservation, the parties explored proposals to create a single Tribal-State administrative body to administer on-Reservation rights, rather than a system of dual administration by the State and the Tribes. The single administrative body, the Board, consists of five voting members. CSKT and Montana would each appoint two board members. A fifth board member is then to be selected by the four appointees, or, if they cannot agree, alternative provisions exist for the appointment of the fifth board member. There are also provisions for local county commissioners' involvement in the selection of the State representatives. (Compact, Article IV.I.1.2.) The jurisdiction of the Board is limited to approving new rights, authorizing changes in use, and enforcing existing rights as set forth by the Compact. (Compact, Article IV.I.4.)

The Department did an extensive review of the UMO and concluded that, while the administration of on-Reservation rights through a single management board is novel, the terms of the Compact establish a workable and appropriate administration regime, provided that the Board and UMO are authorized by the State legislature, the Tribes, and Congress.

The Department's review of the UMO focused on whether the UMO properly recognized and protected the water entitlements of the Tribes and Indian allottees on the Flathead Reservation; improperly placed the management and administration of the water rights of non-Indian residents on the Reservation under Tribal jurisdiction; and provided basic due process protections to all water rights holders. First, with respect to the Federal reserved water rights of the Tribes and Indian allottees, which fall within Congress' restrictions against alienation and the unique protections for allottee water rights, the Department concluded that the Board, as governed by the UMO and the Compact, provided ample protections. Second, the State concluded that the UMO did not place non-Indian residents on the Reservation under Tribal jurisdiction. The Department concurs in that conclusion. The Board has been approved by the Montana legislature (as well as by the Tribes and the United States). Therefore, the Board's activities with regard to non-Indians constitute an exercise of State jurisdiction.

Finally, the UMO accords those appearing before the Board the same substantive standards and procedures available to others in the State. The Compact makes clear that the Board lacks the authority to amend the UMO, preventing changes to these procedures. (Compact, Article IV.J.) ("No amendment by the Tribes or the State of the Law of Administration shall be effective

unless and until the other makes an analogous amendment.") The Compact further provides the opportunity for judicial review of decisions made by the Board in a court of competent jurisdiction. (Compact, Article IV.I.6.) Although parties may argue whether that review lies in State or Federal court, nothing in the Compact extends Tribal court jurisdiction over non-Indian water rights holders. The Department ultimately agreed with the State's conclusion that the UMO procedures that govern the Board in conjunction with the opportunity to seek judicial review of the Board's decision protect the due process rights of both non-Indian and Indian water rights holders.

C. Conclusion

Through its negotiation team, the Federal Government actively participated in the CSKT reserved water right negotiations. Once negotiations were completed, the Federal team brought the proposed CSKT Compact to the Interior and Justice Departments for review and consideration whether to support the Compact. The Department of the Interior has evaluated the core concerns and criticisms that have been raised with respect to the Compact and found that these concerns were addressed in the negotiations.

I look forward to working with you as you work to resolve this important issue in Congress.

Sincerely,

Secretary of the Interior