THE MONTANA LAND AND WATER ALLIANCES' RESPONSE TO THE WATER POLICY INTERIM COMMITTEE'S LEGAL ANALYSIS OF THE QUESTIONS PRESENTED BY REPRESENTATIVES NANCY BALLANCE AND KEITH REGIER

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INTRODUCTION

In reviewing the basic components of the 2013 Compact, including the draft Compact, the Unitary Management Ordinance, and the Water Use Agreement, it became clear that the Montana Reserved Water Rights Compact Commission's approach to the negotiations begins with a conceptual predilection, namely that the CSKT claims are legally "colorable" and therefore that the claims should be recognized. The Interim Committee's internal attempt to answer the questions presented to the Committee does not provide an independent, balanced legal analysis of the related legal issues, but rather presents an argumentative defense to justify the draft Compact as written.

The legal issues related to the Tribes' claims of aboriginal, off-reservation instream flows go to the validity of the claims, whether they arise out of Art. III of the Treaty of Hellgate notwithstanding the explicit language to the contrary in Art. I and Art. II of the Treaty, whether the rights, if they ever existed, were abrogated, the quantity of the claimed rights, whether the claimed rights can be transferred to other uses, and the priority of the claimed rights. Without addressing some of

these issues, the Staff's analysis states that Tribal claims are colorable and concludes that the Water Court could therefore adjudicate them that way.

With respect to the United States' claims for federal reserved water rights in trust for the Tribes, the legal issues include the purposes of the Flathead Reservation, whether there was sufficient unappropriated water in existence in 1859 out of which a Winters right based on practicably irrigable acres could have been reserved given the Tribes' adverse aboriginal claims, whether non-Indian reserved rights decisions apply to the United States' claims, the measure or quantification of the claims, and the priority of the claims. The Staff's analysis reaches the same conclusion with respect to each issue. The analysis stops with the determination that it's possible the Water Court might agree with the Tribal claims.

POINT I

THE SETTLEMENT DOCUMENTS EFFECTUATE THE UNLAWFUL CONVERSION OF THE NON-TRIBAL IRRIGATORS'WATER RIGHTS, TURNING THEM INTO PART OF THE TRIBAL RIGHT

Pursuant to the provisions of the General Allotment Act, 25 U.S.C. §§ 331 *et seq.*, Article VI of the Treaty of Hellgate provides for the survey and allotment in severalty of tracts of Flathead Reservation lands ranging in size from 80 acres to more than 640 acres, depending on family size. Ultimately, the allotments would be conveyed by patent. Article VI also places certain restrictions on the sale or lease of the individual allotments "until a State constitution, embracing such lands

within its boundaries shall have been formed." Pursuant to the terms of the General Allotment Act and the Flathead Allotment Act of 1904, both the Flathead Reservation and the Tribal government therein were to be dissolved eventually.

In the Flathead Allotment Act of 1904, allotments were to be made in severalty to Tribal members and other qualifying Indians, which started in 1904 and concluded shortly thereafter, and the surplus lands after allotment were opened to settlement by non-Tribal members under the homestead and mining laws of the United States.

In the Act of May 29, 1908, which authorized the development of the Flathead Irrigation and Power Project, Congress recognized that water rights would vest in individual landowners once a majority of the costs of the Project were repaid. The Act also provided that Project operations and management were to be turned over to the landowners. Beginning in 1948, the remaining construction costs were to be paid from power revenues from the Flathead Irrigation and Power Project, resulting in vested ownership of the irrigation water rights before the Project was paid off entirely.

The Indian Reorganization Act of 1934, which authorized the restoration of surplus lands within the Flathead Reservation to the Tribes, signaled an about-face from the policies of the General Allotment Act and the Flathead Allotment Act. The Reorganization Act, however, did not repeal the General Allotment Act, the Flathead Allotment Act, or the Act of May 29, 1908, authorizing the Flathead

Irrigation and Power Project. Perhaps more importantly, the Reorganization Act exempted from the application of the Act all lands within any reclamation irrigation project located on an Indian reservation. Congress explicitly stated in 25 U.S.C. § 463(a), the section of the Indian Reorganization Act that authorizes the restoration of surplus lands previously opened to settlement, that "this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation." Justice Stewart summed it up in reference to the Crow Reservation, "[t]here is simply no suggestion in the legislative history [of allotment legislation] that Congress intended that the non-Indians who settled upon alienated allotted lands would be subject to tribal regulatory authority." *Montana v. United States*, 450 U.S. 544 (1981).

Instead of protecting the real property water rights of both the Tribal and non-Tribal irrigators in the Flathead Irrigation and Power Project, both the 2013 Compact and the Tribes' rewritten compact place the ownership of the water rights in the Tribes, unconditionally. Both of the compacts, if ratified, would take the property rights of the irrigators without compensation, in violation of the Fifth Amendment of the Constitution of the United States. Instead of recognizing that the non-Tribal irrigators have water rights, which can be handed down in perpetuity, both compacts would turn the non-Tribal water right into a diminished life-estate that would be subject to the onerous and burdensome provisions of the Tribes' Law of Administration.

Everything we've said above about the conversion of the non-Tribal water rights is set forth in considerably more detail in the Flathead Joint Board of Control's proposals of October 8, 2014, which we would encourage you to consider. You should also consider what would happen in practical terms if either settlement is ratified. Section 1-1-101(4) of the Unitary Management Ordinance, now referred to as the Law of Administration, states:

> Upon the Effective Date of the Compact, this Ordinance 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. Any provision of Title 85, MCA, that is inconsistent with this Law of Administration in not applicable within the Reservation.

The Flathead Reservation would become an island unto itself in Montana, an island where the water rights of the non-Tribal members are converted to Tribal ownership and the Tribes are free to transfer them to instream uses and exercise plenary administrative control for the sole benefit of the Tribes.

In this regard, the initial Flathead Irrigation Project was explicitly designed by Reclamation engineers to make it possible to irrigate all of the practicably irrigable acreage on the Flathead Reservation. When the Project lands were opened to allotments and settlement, more Tribal members were irrigating Project lands than non-Tribal irrigators. Over time, the Tribes effectively walked away from the Project, leaving 90% of the Project acreage in non-Tribal hands.

Ironically, based on an interest in fisheries that was in its nascent stages in the 1970s, the Tribes now want to subordinate roughly 80% of what arguably might have been their entire Winters right – past, present, and future – to an unadjudicated aboriginal fisheries claim that would upend their Winters claim.

The history, law, and facts are ignored and in the draft Compact, everything is given to the Tribes on the rather meaningless theory that the Tribes' claims are "colorable," which means that they have a modicum of precedential support, while no benefit of the doubt is given to the non-Tribal water users with respect to any of the unresolved Winters or aboriginal claims. Indeed, given the historical development of the Flathead Irrigation Project, the General Allotment Act, the enactment of the Flathead Allotment Act in 1904, and its amendment in the Act of May 28, 1908, the body of applicable federal law weighs heavily in favor of the non-Indian citizens of Montana who reside on the Flathead Reservation, a fact the Compact Commission has simply ignored.

POINT II

BOTH SETTLEMENT PROPOSALS ARE INCONCLUSIVE AND LACK THE FINALITY REQUISITE TO WATER RIGHTS DECREES

The Settlement Agreement is being negotiated in the context of an *inter sese* adjudication of all of the interrelated water rights in Basins 76L & 76LJ, a lawsuit in which all of the parties are adverse to one another. Pursuant to the terms of the

adjudication statutes, all of the parties are indispensable, their rights must be included in the preliminary decree, and each water right is then subject to *inter sese* objection by other water right owners. Pursuant to one of the statutes that lays out the parameters of the Compact Commission's responsibilities in compact negotiations, the terms of any negotiated compact must also be included in the preliminary decree, thus making each settlement subject to the same *inter sese* process. The United States' waiver of sovereign immunity in state court adjudications complements Montana law in that the waiver extends only to *inter sese* adjudications predicated upon the entry of a final decree wherein each water right is set forth in conclusive and final terms so that administration of the rights is thus made possible.

Both the settlement document that was not ratified by the legislature last year and the Tribes' rewritten compact that was presented to the Compact Commission in October, 2014, are not only neither conclusive nor final, each contains explicit provisions that contravene finality in different ways. In other words, each of the settlements documents, as a decree, is explicitly open-ended and inconclusive. While the settlement that is ultimately adopted must set forth the Tribes' and the United States' rights on behalf of the Tribes in terms definitive enough to make *inter sese* administration possible, both of the proposed settlement documents set forth numerical descriptions of certain rights that do not concretely delineate the rights, and both settlement proposals are predicated on an "adaptive

management" process that makes the extent of the rights continually subject to change based on the proposition the state-based irrigation rights, which have been rolled into the Tribal water right, can continue to be quantitatively reduced in order to transfer the water thus "conserved" to ever-increasing instream flow rights.

Ordinarily, water right decrees are required to include the priority, amount, purpose, and place of use, the tracts of land to which the right is appurtenant, and any other conditions necessary to define the right and its priority. Instream flow rights must specify the purpose of the right, the location of the right, and the flow rates that provide the basis for calling out diversionary rights on a daily basis. Water rights decrees must also be final and conclusive. To comport with the procedural due process requirements incorporated in the Montana adjudication statutes, federal reserved water rights must also be final and conclusive, whether in the form of a decree resulting from litigation or in a compact.

To make the point that many of the numerical descriptions of the CSKT rights in both proposed compacts are not conclusive enough to be uniformly administered or understood by adverse parties, we have selected two examples. In the abstract describing the "Flathead River below Kerr," it is stated that the right has two "administration points," also called "points of diversion." The abstract lists a maximum diversion at each point in cubic feet per second, with no minimum diversion, and the flow values appear to be a simple percentage of the hydrograph as opposed to being predicated on fisheries science. In priority administration,

everything above the two diversion points, including large capacity wells, could be regulated.

The other instream flow we selected as an example of how the numerical descriptions of the Tribal rights are inconclusive is the "Flathead System Compact Water." The right totals 229,000 acre feet per year, consisting of 90,000 acre feet per year from Hungry Horse Reservoir, off-reservation on the South Fork of the Flathead River, and 128,000 acre feet per year originally quantified by Dowl-HKM as the quantitative extent of the Tribes' practicably irrigable acreage. *See* Clark Fork Basin Task Force, 2010. The "point of diversion" can be anywhere – Hungry Horse, the South Fork, Flathead Lake, or the Flathead River. The water which would be precluded from new appropriation by this "instream flow right" is the water the Tribes plan "to sell" as part of their so-called sharing shortages plan. The reason for the forever transient point of diversion is simply to increase marketability. It has nothing to do with fishery science. Contrary to settled federal reserved rights law, if the Tribes have extra water to sell they obviously don't need the water to establish their "permanent homeland," assuming that's a legitimate purpose of a federal reservation of land for an Indian reservation. As a matter of historical and legal fact, the Flathead Reservation was never intended to be a permanent homeland.

Adaptive management is also incorporated in both the old and new settlement proposals. In the Tribes' rewritten compact – the "Adaptive

Management Version," the "Adaptive Management planning process" becomes the Water Use Agreement. First, the Flathead Joint Board of Control is eliminated from the new proposal. The "parties" in the new proposal are the Tribes, the United States, and the State of Montana. Because the State of Montana has not represented the interests of the 23,000 non-Tribal citizens of Montana living within the Flathead Reservation, about 3,000 of whom irrigate roughly 90% of the lands within the Flathead Irrigation Project, the non-Tribal irrigators have no representation. In the 2013 Compact, Art. III(C)(1) folds the non-Tribal water rights into Tribal ownership, taking the irrigators' real property rights. The new proposal swallows the water rights of the non-Tribal citizens of Montana in the text of the proposed compact as opposed to the Water Use Agreement. This is apparently based on the Compact Commission's characterization of the Tribes' claim that they own all of the water on the Reservation as "colorable." The Tribes' claim of absolute ownership of all of the water on the Reservation, however, is most certainly not colorable; it is patently outrageous. With respect to both the old and the new compact proposals, the Montana state legislature does not have the authority to take property without compensation in violation of the Fifth Amendment of the United States Constitution in the guise of ratifying either compact.

The Adaptive Management process that would complement the Water Use Agreement is defined as a "planning process [that] implements several of the

provisions found in the Compact that are specific to FIIP Instream Flows, reservoir storage, and irrigation water management on natural water watercourses influenced by, and infrastructure associated with, the Flathead Indian Irrigation Project." In reality, the process is a form of operations administration designed to continually reduce the amount of water delivered for irrigation purposes, to substantially increase power production, and to facilitate off-reservation marketing. Because the Flathead Joint Board of Control is eliminated in the new proposal, the non-Tribal irrigators have no representation on the "Adaptive Management Technical Team" which will advise the Project Operator. The object of this arrangement is to further reduce the initial reduction of the farm turnout allowance from 4.7 acre feet per acre per year to 1.4 acre feet per acre per year in order to pursue a continuing increase in the quantity of water to be reallocated to instream flow uses.

POINT III

BOTH SETTLEMENT PROPOSALS USURP THE APPLICATION OF ART. IX OF THE MONTANA CONSTITUTION TO LANDS WITHIN THE FLATHEAD RESERVATION

The changes made under the Tribe's revised compact highlight the way the Settlement Agreement usurps Art. IX of the Montana Constitution within the Flathead Reservation and negates many provisions of Montana law governing the adjudication and administration of water rights. Art. IX and the adjudication statutes outline the procedural due process that is requisite to the United States'

waiver of sovereign immunity under the McCarran Amendment. The old unratified Compact expressly negates Montana law in §1-1-101(4) of the Unitary Management Ordinance, which reads:

> Upon the Effective Date of the Compact, this Ordinance 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. Any provision of Title 85, MCA, that is inconsistent with this Law of Administration is not applicable within the Reservation.

The Tribes' revised compact no longer refers to the UMO as the "UMO," but as "the Law of Administration." Nevertheless, the UMO remains in the new proposal as Appendix 4 of the Compact, and §1-1-101(4) is explicitly made a substantive part of the new proposal in the Compact itself. Accordingly, both proposed compacts would render nugatory Art. IX of the Montana Constitution within the Flathead Reservation, the adjudication statutes that are prerequisite to the administration of water rights in Montana, and essentially all of the provisions of the water code regarding water rights administration. All of the protection afforded some 28,000 non-Indian citizens living within the boundaries of the Flathead Reservation pursuant to the mandate of Art. IX of the Montana Constitution would be taken away through the Unitary Management Ordinance and the new Law of Administration if either of the compact proposals is ratified.

The basic structure of Montana's Water Use Act of July 1, 1973, was modeled after the Model Code drafted in 1905 by Morris Bien, then the Supervising Engineer of the Reclamation Service. At the second conference of the engineers of the Reclamation Service, Mr. Bien explained:

> A State code of water laws should provide for the appropriation, adjudication, and apportionment of the waters of the State, and divides itself naturally into four branches: First, a declaration of the fundamental principles on which the right to use water shall be based. Second, the adjudication of rights to the use of water claimed under the laws previously in force, thus determining unappropriated public waters. Third, the regulation, control, and determination of the rights to water to be subsequently acquired. Fourth, the regulation and control of the distribution of the water rights the use of which have been established.

Montana is a Bien Code state. At the Montana Constitutional Convention in 1972, the new Constitution and the statutes were drafted simultaneously. Art. IX of the Constitution confirmed and recognized the pre-1973 water rights and mandated that the Montana legislature "shall provide for the administration, control, and regulation of the water rights and shall establish a system of centralized records, in addition to the present system of local records." Accordingly, the legislature created a system of statewide adjudication of all of the pre-1973 rights, recognizing that they had been developed simply by diversion and application to beneficial use pursuant to the territorial and the pre-1973 common law doctrine of prior appropriation. The Montana Water Act of July 1, 1973, also established a new

permit system for initiating and perfecting new appropriations of water and for making changes in the purpose or place of use of existing water rights.

Both of the settlement proposals take the property rights of the non-Tribal users of Flathead Irrigation Project water without compensation in violation of the Fifth Amendment of the United States Constitution. Both proposals make the purpose of the Flathead Reservation a "permanent homeland dedicated to the exclusive use and benefit of said [Tribes] as an Indian Reservation," flatly contrary to the legal and factual creation and development of the Reservation. Both take away the prosecution of all non-Tribal claims for water rights, thus eliminating the possibility of *inter sese* objections on their part. The list goes on and on, but perhaps the worst thing that either proposal would do is give over the administration of water rights on the Reservation to the new Law of Administration, which is contrary to virtually every aspect of prior appropriation law in Montana.

In conclusion, it would certainly not be "a rational exercise of legislative authority" to ratify a settlement that would take real property rights and vaporize the application of Art. IX of the Montana Constitution and all of the adjudication and water rights administration provisions of the Montana Water Use Act within the Flathead Reservation.

CONCLUSION

Instead of recommending to the legislature that a Settlement should be ratified in the 2015 legislative session, the Water Policy Interim Committee should first: 1) ensure the ownership and protection of the existing state/federal reclamation-based water rights of the Tribal and non-Tribal irrigators in the Flathead Irrigation Project; 2) ensure that there was sufficient unappropriated water in existence in 1859 out of which a Winters right based on practicably irrigable acreage could have emerged in light of the Tribes' adverse aboriginal claims; 3) ensure that the aboriginal right claims are predicated on sound fishery science; 4) ensure that the water rights set forth in the Compact are sufficiently final and conclusive to serve as a final decree susceptible of administration; and 5) ensure that the water rights of the Tribal and non-Tribal irrigators in the Flathead Irrigation Project are administered by the Water Court pursuant to Art. IX of the Montana Constitution and Montana's adjudication statutes. The object should be the protection of both the Tribal members and the 28,000 non-Tribal members residing on the Flathead Reservation.