1. Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?

The process is administrative in nature. Permit decisions (initial applications for water, change applications, etc.) are reviewed and decided by the Director of the Department of Natural Resources. Once the Director makes a determination, the applicant can either request reconsideration from the Commissioner of Natural Resources or appeal the decision to superior court.

Alaska does have a general adjudication process established in statute. This statute was specifically written so that federally reserved water rights can be addressed through the adjudication process. This adjudication process is again administrative; handled by the Director of Natural Resources. Statute requires Department to give notice to everyone in the basin, landowners within the basin, public notice published and serving individuals with all current water rights in the basin.

2. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or, if these issues are still unresolved, what processes are in use).

Nature of tribal rights in Alaska is very unique. Pursuant to the Alaska Land Claims Settlement Act, no water, hunting, fishing, etc., rights were reserved for the tribes (with the exception of one tribe in South Eastern Alaska). Alaskan natives voted to become corporations and received a monetary settlement of these types of claims. Alaskan tribes now operate as corporations and businesses. As a result, they must proceed through the permit application and adjudication process to obtain any water rights. Further, given the nature of the tribal rights, there has been no litigation or negotiations as they relate to federally reserved tribal water rights.

3. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.

There are non-tribal federally reserved water rights. They are recognized but they have never been quantified. Believes there will be major adjudications in the future but not an issue now.

4. Do you have any specific process used to resolve federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? If so, please attach a copy of your statute. If the process is non-statutory, describe how it evolved and who is involved.

There have been disputes over non-tribal federally reserved water rights. These disputes typically go through the regular permit adjudication process because they are quicker and cheaper.

Alaska Administrative 46.15, Alaska, state of Alaska, Department of Natural Resources (Division of Mining, Law, & Water), OR Department of Law web sites
11 AAC 93.

5. From your experience, are there processes that have worked well in resolving federal reserved water rights questions, processes you would recommend to other states? Describe.

It works better to have the federally reserved water rights go through the regular administrative permit process. Federal government typically agrees to this (National Park Service refuses to do this and quantify their water rights).

6. Are there aspects of your process which need improvement, or which impede successful negotiations of federal reserved water right questions? Are there lessons other states might learn from your experience? Explain.

No. Never really had to deal with this process and so do not know how it will work once happens. The biggest impediment is the federal government refusing to participate in the adjudication processes because it puts the burden on the State to determine allocations without knowing the federal water needs. Eventually

7. Would you like a copy of our report when completed? If so, list below the name and address it should be mailed to.

Gary Prokosch, Alaska Department of Natural Resources, Division of Mining, Land & Water, 550 W.7thh Ave, Suite 900A, Anchorage, Alaska, 99501-3577

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL
AGENCY COUNSEL DIVISION/NATURAL RESOURCES SECTION
INTER-OFFICE MEMORANDUM

TO: James Pharris
Senior Assistant Attorney General
Washington Attorney General's Office

FROM: Thomas Shedden TS
Assistant Attorney General, Natural Resources Section

DATE: September 18, 2002

RE: *Water Dispute Task Force Survey Response*

Comments from the Arizona Attorney General's Office, in response to August 28, 2002 Memo from CWAG (Washington State Attorney General's Office.)

1. In Arizona there are two pending general stream adjudications, Gila River and Little Colorado River, which cover about two thirds of the state. Outside these adjudications disputes would be settled judicially. Also, within the geographic boundary of the adjudications, there is litigation outside the adjudication court. For example, the Federal District Court administers the Globe Equity Decree (entered in 1935) and there is active litigation in that court.

2. By statute (A.R.S. §§ 45-252(A) and 45-251(7)) all claims based on federal law are subject to Arizona's general stream adjudications. As such, Indian tribes that assert federal reserved rights are litigating in the adjudications. Several tribes have settled their claims, and other tribes are in active settlement negotiations. (These negotiations are concurrent with the general stream adjudication litigation.)

3. Non-Indian federal reserved rights claims are procedurally no different than those for Indian claims. Settlement negotiations and litigation of these claims are on-going.

4. The process to resolve federal reserved rights does not, in theory, differ from the process for state-based claims, as both are subject to resolution in the general stream adjudications. As a practical matter, there is potential for some deviation in process based on differing

substantive standards: (1) all state-based rights require existing beneficial uses, whereas federal reserved rights can extend to future uses; and (2) the Arizona Supreme Court has ruled that federal reserved rights may extent to groundwater, but state-based rights do not. *See In re General Adjudication of All Rights to Use of Water in Gila River System and Source.*, 989 P.2d 739 (Ariz. 1999)("*Gila III*"), *cert. denied*, 530 U.S. 1250 (2000).

5. No comments.

6. There are a number of litigants that assert that the process has been too slow. Further, budgetary constraints on the Arizona Department of Water Resources, which is the litigation courts' technical advisor, may become an impediment to swift resolution of outstanding issues.

7. Please send completed report to:

Thomas Shedden
Office of the Attorney General
1275 West Washington
Phoenix, Arizona 85007

Winston H. Hickox
Secretary for Environmental Protection

State Water Resources Control Board

Office of Chief Counsel
1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ www.swrcb.ca.gov

Gray Davis
Governor

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website at www.swrcb.ca.gov.

August 30, 2002

Ms. Linda Fredericks
State of Washington
Office of the Attorney General
1125 Washington Street SE
Olympia, WA 98504-0100

Dear Ms. Fredericks:

SURVEY ON RESOLUTION OF FEDERAL RESERVED WATER RIGHTS DISPUTES

Attached is the completed survey you requested regarding resolution of federal reserved water rights disputes. If you have any questions, you may call me at (916) 341-5190 or Andrew Sawyer, Assistant Chief Counsel, at (916) 341-5191.

Sincerely,

Barbara J. Leidigh

Barbara J. Leidigh
Staff Counsel IV

Attachment

cc: Ms. Mary Hackenbracht
Senior Assistant Attorney General
State of California
Office of the Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550

DRAFT

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE

SURVEY ON RESOLUTION OF FEDERAL RESERVED WATER RIGHTS DISPUTES

The Washington State Legislature has asked the Attorney General for a report on ways to resolve water rights disputes concerning Indian and federal reserved water rights. As one part of the report, we have asked to survey other states and report on how they resolve federal reserved water right issues. Although we have conducted telephone surveys of a number of state AG offices on this question, we would appreciate a written statement of the way your state handles reserved water rights disputes.

1. **Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?**

   The State Water Resources Control Board (SWRCB) is the administrative agency with regulatory authority over water rights in California, including permitting authority over appropriations of water after 1913. The SWRCB resolves disputes over water right applications and change petitions through processes ranging from facilitating negotiations among the interested parties to formal adjudicative hearings. In cases where it appears there is a violation of existing water rights, the SWRCB can impose administrative civil liability under Water Code sections 1052, et seq., or can issue cease and desist orders under Water Code sections 1831, et seq. The SWRCB also can conduct proceedings under Water Code section 275 to prevent waste and unreasonable use of water. The SWRCB conducts formal adjudicative hearings in disputed enforcement matters. SWRCB decisions can be reviewed by the state courts under petitions for writ of mandamus.

   The SWRCB is the primary forum for water right disputes, but the courts have concurrent jurisdiction over disputes between water right holders except that the courts cannot grant or amend water right permits and licenses. The SWRCB has exclusive jurisdiction to issue and revise permits and licenses. Regarding adjudications, the trend has been away from general adjudications and toward individual actions on specific claims. Adjudications can be commenced either before the SWRCB or in court, and a court can refer a dispute to the SWRCB to serve as referee.

2. **Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or, if these issues are still unresolved, what processes are in use).**

   California does not have any current or recent disputes regarding the existence or extent of federal reserved water rights for Indian reservations. In some past adjudications, the SWRCB has recognized reserved water rights for Indian reservations, and the courts have confirmed them.

3. **Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.**

   California has no current or recent negotiations or litigation regarding federal reserved water rights. California recognizes the existence of such rights, however, and disputes are unlikely to arise unless water is used in unreasonable amounts or for nonreserved purposes on the federal lands.

4. **Do you have any specific process used to resolved federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? If so, please attach a copy of your statute? If the process is nonstatutory, describe how it evolved and who is involved?**

   There is no special process that differs from other water right dispute processes for resolving federal reserved water right issues. The SWRCB can deal uniformly with a multiplicity of water right types in adjudications and individual disputes. The statutes pertaining to adjudications in California are at Water Code sections 2000, et seq., 2075, et seq., 2100, et seq., and 2500, et seq. Decrees issued after adjudications can be modified pursuant to Water Code section 2900.

5. **From your experience, are there processes which have worked well in resolving federal reserved water rights questions, processes you would recommend to other states? Describe.**

   California generally treats federal reserved water rights in the same way as other types of water rights, but takes into account the specific laws applicable to each type of rights.

   Among surface water rights, California recognizes pre-1914 water rights, post-1914 appropriations, riparian rights, pueblo rights, federal reserved rights, and spring rights.

6. **Are there aspects of your process which need improvement, or which impede successful negotiations of federal reserved water right questions? Are there lessons other states might learn from your experience? Explain.**

   Federal reserved water right questions are not a major part of the water right disputes in California.

7. **Would you like a copy of our report when completed? If so, list below the name and address it should be mailed to.**

   You can send copies of your report when completed to Andrew Sawyer, Assistant Chief Counsel, State Water Resources Control Board, P.O. Box 100, Sacramento, CA 95812 and to Mary Hackenbracht, Senior Assistant Attorney General, Office of the Attorney General, P.O. Box 70550, Oakland, CA 94612-0550.

1. Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?

In the early to mid-1970s, Colorado was involved in three Unites States Supreme Court cases with the federal government in which the Court ultimately directed the federal government to use the Colorado state water adjudication system to adjudicate the federal water rights. Colorado is divided into seven water divisions. Since 1969 general adjudications covering each division have been ongoing. The United States was served in each of the seven adjudication cases and the United States has asserted claims in each of the seven divisions. The United States asserted a claim on behalf of Indians in only one division, the San Juan division (division number 7). All other claims asserted by the United States in the six remaining division were federal claims.

2. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or, if these issues are still unresolved, what processes are in use).

Since the mid-1970s, Colorado has been involved in a lot of reserved water right issues. Since 1969 general adjudications covering each division have been ongoing. The United States was served in each of the seven adjudication cases and the United States has asserted a claim on behalf of Indians in only one division, the San Juan division (division number 7). In 1986, Colorado entered a provisional settlement of Indian claims in division 7. The provisional settlement involved a commitment by the state to develop a water project for the area and allocate a share of the project to the tribe. The project is still under consideration and construction has not begun. The settlement agreement includes provision that allows the tribe to revisit the agreement if the project does not go through. In this area, the tribe claimed rights to water on eleven (11) streams. The tribe's claims to nine (9) of the streams resulted in unconditional settlement. The tribe's claims to the remaining two (2) streams are provisional.

3. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.

In the early to mid-1970s, Colorado was involved in three Unites States Supreme Court cases with the federal government in which the Court ultimately directed the federal government to use the Colorado state water adjudication system to adjudicate the federal water rights. Colorado is divided into seven water divisions. Since 1969 general adjudications covering each division have been ongoing. The United States was served in each of the seven adjudication cases and the United States has asserted claims in each of the seven divisions. In six of the seven divisions, the United States' asserted claims were federal. The national forest claims are the most contentious. All federal claims for water in divisions 4, 5, & 6 were consolidated into one matter (resulting in a Colorado Supreme Court decision, *U.S. v. City & County of Denver*, 656 P.2d 1,). The decision somewhat resolved all of the claims in those divisions although issues of quantification of rights are still open (e.g., division 4 (Gunnison) did not quantify rights for Black Canyon Reservation. The federal claims in division 1 went to trial and the federal government lost its claim; the case was decided on the facts. The parties settled the United States Forest Service

claims in division 3 (Rio Grande) which is likely the only settlement of a USFS claim. The cases in division 2 (Arkansas) and 7 (San Juan) are still outstanding (in litigation).

4. Do you have any specific process used to resolve federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? If so, please attach a copy of your statute. If the process is non-statutory, describe how it evolved and who is involved.

Beth

BENJAMIN J. CAYETANO
GOVERNOR

EARL I. ANZAI
ATTORNEY GENERAL

THOMAS R. KELLER
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
LAND/TRANSPORTATION DIVISION
ROOM 300, KEKUANAO'A BUILDING
465 SOUTH KING STREET
HONOLULU, HAWAII 96813

September 18, 2002

Post-it® Fax Note 7671	Date 9.25.02	# of pages ▶ 4
To Mary Sue Wilson	From Jim Pharris	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 586-6760	Fax #	

Ms. Linda Fredericks
Office of the Attorney General
1125 Washington Street SE
Olympia, WA 98504-0100

Dear Ms. Fredericks:

Re: Water Dispute Task Force Survey

The following is our response to your to Survey on Resolution of Federal Reserved Water Rights Dispute.

1. Water rights in the State of Hawaii have been codified into the State Water Code, chapter 174C, Hawaii Revised Statutes, (HRS). Under the water code, a commission is appointed by the governor and approved by the state senate. The commission makes the final determination on water disputes. The decisions of the commission can be appealed to the Hawaii Supreme Court.

2, 3, 4, 5 and 6. The State of Hawaii is not involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations or any tribal issues.

7. Reports can be sent to:

Linnel Nishioka, Deputy Director, Commission on
Water Resource Management,
1151 Punchbowl Street
Honolulu, Hawaii 96813

Edsel M. Yamada, Deputy Attorney General
Department of the Attorney General
465 S. King St., Room 300
Honolulu, Hawaii 96813

If you have any questions, please feel free to call me at 808-587-2990.

Very truly yours,

Edsel M. Yamada
Deputy Attorney General

Hawaii

[§174C-41] **Designation of water management area.** (a) When it can be reasonably determined, after conducting scientific investigations and research, that the water resources in an area may be threatened by existing or proposed withdrawals or diversions of water, the commission shall designate the area for the purpose of establishing administrative control over the withdrawals and diversions of ground and surface waters in the area to ensure reasonable-beneficial use of the water resources in the public interest.

(b) The designation of a water management area by the commission may be initiated upon recommendation by the chairperson or by written petition. It shall be the duty of the chairperson to make recommendations when it is desirable or necessary to designate an area and there is factual data for a decision by the commission. The chairperson, after consultation with the appropriate county council, county mayor, and county water board, shall act upon the petition by making a recommendation for or against the proposed designation to the commission within sixty days after receipt of the petition or such additional time as may be reasonably necessary to determine that there is factual data to warrant the proposed designation.

(c) Designated ground water areas established under chapter 177, the Ground Water Use Act, and remaining in effect on July 1, 1987, shall continue as water management areas. [L 1987, c 45, pt of §2; am L 1999, c 197, §4]

Revision Note

"On July 1, 1987" substituted for "at the effective date of this chapter".

[§174C-42] **Notice; public hearing required.** When a recommendation for designation of a water management area has been accepted, the commission shall hold a public hearing at a location in the vicinity of the area proposed for designation and give public notice of the hearing setting forth:

(1) A description of the land area proposed to be designated in terms of appropriate legal subdivisions and tax map keys;
(2) The purpose of the public hearing; and
(3) The time, date, and place of the public hearing where written or oral testimony may be submitted and heard.

The notice shall be given once each week for three successive in the appropriate county and the last notice shall be not less than ten days nor more than thirty days before the date set for the hearing. The notice of public hearing shall be considered as sufficient notice to all landowners and water users who might be affected by the proposed designation. [L 1987, c 45, pt of §2; am L 1998, c 2 §43]

§174C-43 Investigations required. Before any proposed water management area is designated by the commission, the chairperson may conduct, cooperate with the appropriate federal or county water agency in conducting, or administer contracts for the conduct of, any scientific investigation or study deemed necessary for the commission to make a decision to designate a water management area. In connection with such investigation or study, the chairperson from time to time may require reports from water users as to the amount of water being withdrawn and as to the manner and extent of the beneficial use. Such reports shall be made on forms furnished by the commission. [L 1987, c 45, pt of §2; am L 1999, c 197, §5]

§174C-44 Ground water criteria for designation. In designating an area for water use regulation, the commission shall consider the following:

(1) Whether an increase in water use or authorized planned use may cause the maximum rate of withdrawal from the ground water source to reach ninety per

cent of the sustainable yield of the proposed ground water management area;

(2) There is an actual or threatened water quality degradation as determined by the department of health;

(3) Whether regulation is necessary to preserve the diminishing ground water supply for future needs, as evidenced by excessively declining ground water levels;

(4) Whether the rates, times, spatial patterns, or depths of existing withdrawals of ground water are endangering the stability or optimum development of the ground water body due to upconing or encroachment of salt water;

(5) Whether the chloride contents of existing wells are increasing to levels which materially reduce the value of their existing uses;

(6) Whether excessive preventable waste of ground water is occurring;

(7) Serious disputes respecting the use of ground water resources are occurring; or

(8) Whether water development projects that have received any federal, state, or county approval may result, in the opinion of the commission, in one of the above conditions.

Notwithstanding an imminent designation of a ground water management area conditioned on a rise in the rate of ground water withdrawal to a level of ninety per cent of the area's sustainable yield, the commission, when such level reaches the eighty per cent level of the sustainable yield, may invite the participation of water users in the affected area to an informational hearing for the purposes of assessing the ground water situation and devising mitigative measures. [L 1987, c 45, pt of §2; am L 1999, c 197 §6]

[§174C-45] Surface water criteria for designation. In designating an area for water use regulation, the commission shall consider the following:

(1) Whether regulation is necessary to preserve the diminishing surface water supply for future needs, as evidenced by excessively declining surface water levels, not related to rainfall variations, or increasing or proposed diversions of surface waters to levels which may detrimentally affect existing instream uses or prior existing off stream uses;

(2) Whether the diversions of stream waters are reducing the capacity of the stream to assimilate pollutants to an extent which adversely affects public health or existing instream uses; or

(3) Serious disputes respecting the use of surface water resources are occurring. [L 1987, c 45, pt of §2]

[§174C-46] Findings of fact; decision of commission. After public hearing and any investigations deemed necessary have been completed, the chairperson, after consultation with the appropriate county council, county mayor, and county water board, shall make a recommendation to the commission for decision. The commission shall render its decision within ninety days after the chairperson's recommendation to the commission. If the commission decides to designate a water management area, it shall cause a public notice of its decision to be given in the appropriate county and when so given, its decision shall be final unless judicially appealed. [L 1987, c 45, pt of §2; am L 1998, c 2, §44 and C 101, §3; am L 1999, c 197, §7]

[§174C-47] Modifying and rescinding designated areas. The modification of the boundaries or the rescinding of existing water management areas by the commission may be initiated by the chairperson or by a petition to the commission by any person with proper standing. The procedure for modifying the boundaries of an existing water management area or for rescinding an existing water management area shall be substantially similar to that for the designation of a water management area. [L 1987, c 45, pt of §2]

[CHAPTER 174C]
STATE WATER CODE

PART I. ADMINISTRATIVE STRUCTURE

SECTION

PART II. REPORTS OF WATER USE

PART III. HAWAII WATER PLAN

PART IV. REGULATION OF WATER USE

PART V. WATER QUALITY

Cross References

Irrigation and water utilization projects, see chapter 168.
Irrigation water development, see chapter 167.

Law Journals and Reviews

Testing the Current: The Water Code and the Regulation of Hawaii's Water Resources. 10 UH L. Rev. 205.

PART I. ADMINISTRATIVE STRUCTURE

[§174C-1] Short title. This chapter shall be known and may be cited as the State Water Code. [L 1987, c 45, pt of §2]

[§174C-2] Declaration of policy. (a) It is recognized that the waters of the State are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have the waters protected for their use.

(b) There is a need for a program of comprehensive water resources planning to address the problems of supply and conservation of water. The Hawaii water plan, with such future amendments, supplements, and additions as may be necessary, is accepted as the guide for developing and implementing this policy.

(c) The state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest.

(d) The state water code shall be liberally interpreted to protect and improve the quality of waters of the State and to provide that no substance be discharged into such waters without first receiving the necessary treatment or other corrective action. The people of Hawaii have a substantial interest in the prevention, abatement, and control of both new and existing water pollution and in the maintenance of high standards of water quality.

(e) The state water code shall be liberally interpreted and applied in a manner which conforms with intentions and plans of the counties in terms of land use planning. [L 1987, c 45, pt of §2; am L 1999, c 197, §1]

Note

Water code review commission. L 1987, c 45, §5.

[§174C-3] Definitions. As used in this chapter, unless the context otherwise requires:

"Agricultural use" means the use of water for the growing, processing, and treating of crops, livestock, aquatic plants and animals, and ornamental flowers and similar foliage.

"Authorized planned use" means the use or projected use of water by a development that has received the proper state land use designation and county development plan/community plan approvals.

"Board" means the board of land and natural resources.

"Chairperson" means the chairperson of the commission on water resource management.

"Change in use" means any modification or change in water use from or to domestic, municipal, military, agriculture (including agricultural processing), or industrial uses.

"Channel alteration" means: (1) to obstruct, diminish, destroy, modify, or relocate a stream channel; (2) to change the direction of flow of water in a stream channel; (3) to place any material or structures in a stream channel; and (4) to remove any material or structures from a stream channel.

"Commission" means the commission on water resource management.

"Continuous flowing water" means a sufficient flow of water that could provide for migration and movement of fish, and includes those reaches of streams which, in their natural state, normally go dry seasonally at the location of the proposed alteration.

"Department" means the department of land and natural resources.

"Domestic use" means any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation.

"Emergency" means the absence of a sufficient quantity and quality of water in any area whether designated or not which threatens the public health, safety, and welfare as determined by the commission.

"Existing agricultural use" means replacing or alternating the cultivation of any agricultural crop with any other agricultural crop, which shall not be construed as a change in use.

"Ground water" means any water found beneath the surface of the earth, whether in perched supply, dike-confined, flowing, or percolating in underground channels or streams, under artesian pressure or not, or otherwise.

"Hydrologic unit" means a surface drainage area or a ground water basin or a combination of the two.

"Impoundment" means any lake, reservoir, pond, or other containment of surface water occupying a bed or depression in the earth's surface and having a discernible shoreline.

"Instream flow standard" means a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream

uses.

"Instream use" means beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream. Instream uses include, but are not limited to:

(1) Maintenance of fish and wildlife habitats;
(2) Outdoor recreational activities;
(3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation;
(4) Aesthetic values such as waterfalls and scenic waterways;
(5) Navigation;
(6) Instream hydropower generation;
(7) Maintenance of water quality;
(8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and
(9) The protection of traditional and customary Hawaiian rights.

"Interim instream flow standard" means a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard.

"Municipal use" means the domestic, industrial, and commercial use of water through public services available to persons of a county for the promotion and protection of their health, comfort, and safety, for the protection of property from fire, and for the purposes listed under the term "domestic use".

"Noninstream use" means the use of stream water that is diverted or removed from its stream channel and includes the use of stream water outside of the channel for domestic, agricultural, and industrial purposes.

"Nonregulated use" means any use of water which is exempted from regulation by the provisions of this code.

"Person" means any and all persons, natural or artificial, including an individual, firm, association, organization, partnership, business trust, corporation, company, the United States of America, the State of Hawaii, and all political subdivisions, municipalities, and public agencies thereof.

"Reasonable-beneficial use" means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest.

"Stream" means any river, creek, slough, or natural watercourse in which water usually flows in a defined bed or channel. It is not essential that the flowing be uniform or uninterrupted. The fact that some parts of the bed or channel have been dredged or improved does not prevent the watercourse from being a stream.

"Stream channel" means a natural or artificial watercourse with a definite bed and banks which periodically or continuously contains flowing water. The channel referred to is that which exists at the present time, regardless of where the channel may have been located at any time in the past.

"Stream diversion" means the act of removing water from a stream into a channel, pipeline, or other conduit.

"Stream reach" means a segment of a stream channel having a defined upstream and downstream point.

"Stream system" means the aggregate of water features comprising or associated with a stream, including the stream itself and its tributaries, headwaters, ponds, wetlands, and estuary.

"Surface water" means both contained surface water--that is, water upon the surface of the earth in bounds created naturally or artificially including, but not limited to, streams, other watercourses, lakes, reservoirs, and coastal waters subject to state jurisdiction--and diffused surface water--that is, water occurring upon the surface of the ground other than in contained

waterbodies. Water from natural springs is surface water when it exits from the spring onto the earth's surface.

"Sustainable yield" means the maximum rate at which water may be withdrawn from a water source without impairing the utility or quality of the water source as determined by the commission.

"Time of withdrawal or diversion" means, in view of the nature, manner, and purposes of a reasonable and beneficial use of water, the most accurate method of describing the time when the water is withdrawn or diverted, including description in terms of hours, days, weeks, months, or physical, operational, or other conditions.

"Water" or "waters of the State" means any and all water on or beneath the surface of the ground, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground.

"Water management area" means a geographic area which has been designated pursuant to section 174C-41 as requiring management of the ground or surface water resource, or both.

"Watercourse" means a stream and any canal, ditch, or other artificial watercourse in which water usually flows in a defined bed or channel. It is not essential that the flowing be uniform or uninterrupted.

"Water source" means a place within or from which water is or may be developed, including but not limited to: (1) generally, an area such as a watershed defined by topographic boundaries, or a definitive ground water body; and (2) specifically, a particular stream, other surface water body, spring, tunnel, or well or related combination thereof.

"Well" means an artificial excavation or opening into the ground, or an artificial enlargement of a natural opening by which ground water is drawn or is or may be used or can be made to be usable to supply reasonable and beneficial uses within the State. [L 1987, c 45, pt of §2; am L 1999, c 197, §1]

[§174C-4] Scope. (a) All waters of the State are subject to regulation under the provisions of this chapter unless specifically exempted. No provision of this chapter shall apply to coastal waters. Nothing in this chapter to the contrary shall restrict the planning or zoning power of any county under chapter 46.

(b) No state or county government agency may enforce any statute, rule, or order affecting the waters of the State controlled under the provisions of this chapter, whether enacted or promulgated before or after July 1, 1987, inconsistent with the provisions of this chapter. Nothing in this chapter to the contrary shall restrict the power of any county to plan or zone as provided in chapter 46.

(c) No state or county government agency or other person having the power of eminent domain or condemnation under the laws of the State, may exercise the power with respect to condemning property if the condemnation will materially affect water resources in the State, without the written permission of the commission.

(d) No right, title, or interest in the use of any water resources of the State can be acquired by prescription. [L 1987, c 45, pt of §2]

Note

Interpretation of county function. L 1987, c 45, §6.

Revision Note

"July 1, 1987" substituted for "the effective date of this chapter".

§174C-5 General powers and duties. The general administration of the state water

code shall rest with the commission on water resource management. In addition to its other powers and duties, the commission:

(1) Shall carry out topographic surveys, research, and investigations into all aspects of water use and water quality.

(2) Shall designate water management areas for regulation under this chapter where the commission, after the research and investigations mentioned in paragraph (1), shall consult with the appropriate county council and county water agency, and after public hearing and published notice, finds that the water resources of the areas are being threatened by existing or proposed withdrawals of water.

(3) Shall establish an instream use protection program designed to protect, enhance, and reestablish, where practicable, beneficial instream uses of water in the State.

(4) May contract and cooperate with the various agencies of the federal government and with state and local administrative and governmental agencies or private persons.

(5) May enter, after obtaining the consent of the property owner, at all reasonable times upon any property other than dwelling places for the purposes of conducting investigations and studies, or enforcing any of the provisions of this code, being liable, however, for actual damage done. If consent cannot be obtained, reasonable notice shall be given prior to entry.

(6) Shall cooperate with federal agencies, other state agencies, county or other local governmental organizations, and all other public and private agencies created for the purpose of utilizing and conserving the waters of the State, and assist such organizations and agencies in coordinating the use of their facilities and participate in the exchange of ideas, knowledge, and data with such organizations and agencies. For this purpose the commission shall maintain an advisory staff of experts.

(7) Shall prepare, publish, and issue such printed pamphlets and bulletins as the commission deems necessary for the dissemination of information to the public concerning its activities.

(8) May appoint and remove agents and employees including hearings officers, specialists, and consultants necessary to carry out the purposes of this chapter and may be engaged by the commission without regard to the requirements of chapters 76 and 77 and section 78-1.

(9) May acquire, lease, and dispose of such real and personal property as may be necessary in the performance of its functions, including the acquisition of real property for the purpose of conserving and protecting water and water related resources as provided in section 174C-14.

(10) Shall identify, by continuing study, those areas of the State where salt water intrusion is a threat to fresh water resources and report its findings to the appropriate county mayor and council and the public.

(11) Shall provide such coordination, cooperation, or approval necessary to the effectuation of any plan or project of the federal government in connection with or concerning the waters of the State. The commission shall approve or disapprove such federal plans or projects on behalf of the State. No other agency or department of the State shall assume the duties delegated to the commission under this paragraph, except that the department of health shall continue to exercise such powers vested in it with respect to water quality, and except that the department of business, economic development, and tourism shall continue to carry out its duties and responsibilities under chapter 205A.

(12) Plan and coordinate programs for the development, conservation, protection, control, and regulation of water resources based upon the best available information, and in cooperation with federal agencies, other state agencies,

county or other local governmental organizations, and other public and private agencies created for the utilization and conservation of water.

(13) Shall catalog and maintain an inventory of all water uses and water resources. [L 1987, c 45, pt of §2; am L 1988, c 141, §12; am L 1990, c 293, §8; am L 1998, c 101 §2]

§174C-5.5 Water resource management fund. (a) There is established in the department a special fund to be designated as the water resource management fund. The fund shall be administered by the commission. The water resource management fund shall be used for the following:

(1) Monitoring programs and activities concerning water resource quality, protection, and management;

(2) Research programs and activities concerning water conservation and investigation of alternative sources of water;

(3) Preparation and dissemination of information to the public concerning activities authorized under this chapter;

(4) Data collection, development, and updating of long-range planning documents authorized under this chapter; and

(5) Any other protection, management, operational, or maintenance functions authorized and deemed necessary by the commission, including but not limited to funding permanent or temporary staff positions.

(b) The following shall be deposited into the water resource management fund:

(1) Appropriations by the legislature to the water resource management fund;

(2) All fees and administrative charges collected under this chapter or any rule adopted thereunder;

(3) Moneys collected as fines or penalties imposed under this chapter or any rule adopted thereunder;

(4) Moneys derived from public and private sources to benefit water resource protection and management;

(5) Any moneys collected from the sale of retail items by the department related to water resources;

(6) Any other moneys collected pursuant to chapter 174-C; and

(7) Moneys derived from interest, dividend, or other income from the above sources. [L 2000, c 204, §1]

§174C-6 Deputy to the chairperson of the commission on water resource management. (a) There shall be a first deputy to the chairperson of the commission on water resource management ("deputy for water resource management") who shall be in addition to any other first deputy to the chairperson as the chairperson of the board of land and natural resources. The deputy shall have experience in the area of water resources and shall be appointed by the chairperson with the approval of a majority of the commission.

(b) The duties of the deputy for water resource management shall be to administer and implement, under the direction of the commission, the state water code and all rules, and other directives promulgated in accordance therewith by the commission. Nothing in this provision shall be construed as limiting the authority of the commission as to matters regarding water resources.

(c) The position of deputy for water resource management is not subject to chapters 76 and 77.

(d) The salary of the deputy for water resource management shall be as provided in section 26-53 for first deputies or first assistants to the head of any department. [L 1987, c 45, pt of §2; am L 1992, c 87, §5]

IDAHO

1. Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?

Idaho has a general adjudication process much like Washington. The action is filed in Idaho district court. Idaho is currently involved in a general adjudication regarding the Snake River Basin (begun in 1987), covering approximately 87% of the water right claims and water systems in Idaho and involving approximately 200,000 claims. The adjudication includes numerous private rights, federal and tribal reserved water rights claims, and water rights previously adjudicated and/or decreed. There have been several smaller basin adjudication. However, the Snake River adjudication is the largest. There were federal reserved water right claims in the prior adjudications but not tribal claims.

Idaho has a permitting process, which became mandatory in 1963 for groundwater and 1971 for surface water. Permit process – apply for permit, appeal to an administrative agency on decisions.

2. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or, if these issues are still unresolved, what processes are in use).

Tribal reserved water right claims are treated the same as all other water right claims. There is no independent process or system for negotiating or litigating these claims outside of the general adjudication process. There are several tribal reserved water right claims at issue in the Snake River Basin adjudication and there have been several attempts to settle or negotiate these various claims:

Shoshone-Bannock tribal reserved water right claims – were settled in 1994 as part of the Fort Hall Water Rights Agreement. This agreement resolved the tribal claims, individual claims, and federal claims. No formal mediator was invovled in this negotiation process, rather it was settled by the parties and their attorneys.

Shoshone-Paiut tribal reserved water right claims – Idaho is currently involved in negotiations to resolve the tribal reserved water right claims for the Duck Valley Reservation.

Nez-Pierce tribal reserved water right claims – The Nez-Pierce tribe is the most litigious of all tribes. As a result, an independent federal mediator was involved to mediate the parties' disputes and negotiations are currently in process. A settlement would result in a global resolution of all Nez-Pierce claims in Idaho.

3. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.

Idaho has rolled the prior claims over into SRBA, they have been negotiating federal claims one-by-one and have been successful. Several claims have gone to US Supreme Court and the

decisions have primarily been in Idaho's favor. [Example is Deer Flat Case involving a claim for instream flows for a bird refuge.]

Idaho is attempting to settle the federal reserved water rights claims as much as possible due to the time and cost involved in litigation. In addition, the court in which the Snake River Basin Adjudication was filed favors mediation and settlement and offers the free serves of court appointed mediators or special masters.

4. Do you have any specific process used to resolve federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? If so, please attach a copy of your statute. If the process is non-statutory, describe how it evolved and who is involved.

No. Basically through general adjudication process.

Special Statute enacted the SRBA adjudication – Idaho Title 42, Chapter 14, 42-1406A through 42-1428 , 42-1405 (general adjudication), Chapter 14 is adjudications in general. Title 42, Chapter 2 (licensing and permits), Transfers 42-222, 42-205 219, 220 (license issuing)

5. From your experience, are there processes which have worked well in resolving federal reserved water rights questions, processes you would recommend to other states? Describe.

The process is fine, the parties are mainly the aspect that hinders resolution of these issues.

Believes Idaho has been very successful in trying to mediate claims without having a formal mediator involved but are not opposed to involving a mediator if it may prove useful (free mediation service). With respect to federal and tribal reserved water rights claims, the federal government and tribes have the burden of proving each and every element of having obtained a water right. In 1996, they started using more computerized process for tracking water claims, this has been very helpful in settling cases.

6. Are there aspects of your process which need improvement, or which impede successful negotiations of federal reserved water right questions? Are there lessons other states might learn from your experience? Explain.

No.

7. Would you like a copy of our report when completed? If so, list below the name and address it should be mailed to.

Susan Hamlin-Nygard, Department of Water Reserouces, 1301 N. Orchard, Boise, Idaho 83706

1. Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?

The Kansas State system is administrative in nature. The Chief Engineer of the Division of Water Resources makes decisions regarding applications for water rights. In the past, individuals dissatisfied with these decisions were required to appeal to superior court as there was no other appeal mechanism available to challenge these decisions. In the 1999 or 2000 Legislative session, the Kansas Legislature did provide for administrative review of these decisions. (NOTE - In 1945 Kansas passed water appropriation act, also deal with riparian rights (vested rights); this process was to get these riparian rights into appropriation system. If there is a conflict between vested rights they need to take this disputes to court.)

Kansas does not have a general adjudication system for surface water rights. However, the ground water appropriation system is separate and distinct from the surface appropriation process. This statutory scheme allows the Chief Engineer to identify Intensive Ground Water Use Control Areas. These areas are generally over-appropriated with conflicts between water rights holders. The Chief Engineer has the authority to allocate the water among users as well as among priority dates. This process is similar to a general adjudication.

2. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or, if these issues are still unresolved, what processes are in use).

Kansas has four small tribes. Water rights and/or water uses for these tribes have never risen to a level where litigation became necessary. In addition, to date no tribe has sought to have their rights quantified. None have asked for the rights to be quantified to date.

3. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.

Kansas has one military installation. Water rights and/or water uses for this base and other federal entities have never risen to a level where litigation became necessary. In addition, to date no federal entity has sought to have these rights quantified.

4. Do you have any specific process used to resolve federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? If so, please attach a copy of your statute. If the process is non-statutory, describe how it evolved and who is involved.

Not applicable.

5. From your experience, are there processes which have worked well in resolving federal reserved water rights questions, processes you would recommend to other states? Describe.

Not applicable.

6. Are there aspects of your process which need improvement, or which impede successful negotiations of federal reserved water right questions? Are there lessons other states might learn from your experience? Explain.

The sense is that the Kansas system works pretty well. Tends to undergo changes on a yearly basis and Kansas is continually revisiting its state water plan in order to continually assess all aspects of water management.

7. Would you like a copy of our report when completed? If so, list below the name and address it should be mailed to.

David Barfield, 109 Southwest 9th Street, Second Floor, Topika, Kansas 66612

To: **Linda Fredericks**
Office of the Attorney General
1125 Washington Street SE
Olympia, WA 98504-0100

From: **Candace West**
Assistant Attorney General
State of Montana
215 North Sanders
Helena, MT 59620-1401

Water Dispute Task Force Survey

1. **Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?**

Water right disputes are handled either administratively or judicially, depending upon the basis for the water right and its status in the statewide adjudication. Montana is currently proceeding through its state-wide adjudication of historic (pre-1973 Water Use Act) water rights. The adjudication is undertaken by our Water Court and addresses the uses within distinct hydrologic basins. The Water Court was established in 1979, and the state-wide adjudication is far from complete. Below is a break down of

a. Existing Water Rights—All water put to beneficial use prior to the date of the enactment of Montana's Water Use Act (July 1, 1973) was subject to a requirement to file a claim to the existing water right with the Montana Department of Natural Resources and Conservation by June 30, 1983. Disputes relative to existing rights claims, and any objections filed regarding those claims are resolved by the Water Court through the state-wide adjudication.

b. Adjudicated Water Rights—For a water right that has been adjudicated, and a final decree for that water right has issued, any dispute over the distribution of the water would be handled under the direction of the judiciary (through enforcement of the final water right decree) in the state judicial district in which the dispute arose.

c. Water Use Permits—New water uses after July 1, 1973 (with a few excepted small quantity springs, wells and stock water uses) are subject to application and administrative review by the Montana Department of Natural Resources and Conservation. In addition, any change of use (place of use, point of diversion, etc) is subject to an administrative application and review process

as well. And any final administrative determination would be subject to judicial review. Furthermore, if a question of law needs to be reviewed, the DNRC can certify the question of law to the water court for a judicial determination.

2. **Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or, if these issues are still unresolved, what processes are in use).**

All claimants of reserved Indian water rights are subject to Montana's General Adjudication requirements. However, there is a statutory suspension of adjudication while negotiations for the conclusion of a compact for reserved water rights are being pursued. There is also a suspension of the obligation to file claims for existing reserved tribal and other federal rights so long as negotiations are not terminated or until July 1, 2005. Montana has concluded tribal reserved water rights compacts with:

the Northern Cheyenne Tribe;
the Crow Tribe;
the Assiniboine and Sioux Tribes of the Fort Peck Reservation;
the Chippewa Cree Tribe of the Rocky Boy's Reservation; and
the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation.

Some of these negotiated compacts have now been incorporated into the state-wide adjudication final decrees and others are in various stages of the Congressional, Tribal, or Water Court approval process.

The entity with authority to represent the State of Montana in the negotiations of reserved water rights was a creation of the state legislature. The Reserved Water Rights Compact Commission was created by the Montana Legislature in 1979, the same year that the legislature created the Montana Water Court. The purpose for the commission is to negotiate, on behalf of the State of Montana, with Indian Tribes and federal agencies claiming federal reserved water rights in the state. After being submitted for public comment in the specific area impacted, a negotiated settlement must be ratified by the Montana Legislature and the Tribal Council or Tribal referendum and approved by Congress.

3. **Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.**

As with claimants of reserved Indian water rights, all other federal reserved water rights are subject to Montana's General Adjudication requirements with the same suspension of adjudication so long as a compact is being pursued. Montana has concluded federal reserved water rights compacts with the United States Fish and Wildlife Service for three of the six wildlife refuges with reserved water rights in the

state; the National Park Service for all five park units within the state and with the Bureau of Land Management. There are also on going negotiations with the U.S. Forest Service as well. All the negotiations are undertaken under the authority granted to the Reserved Water Rights Compact for the State of Montana.

4. **Do you have any specific process used to resolve federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? If so, please attach a copy of your statute? If the process is non-statutory, describe how it evolved and who is involved?**

Montana's resolution of federal reserved water rights compacts is undertaken by the Reserved Water Rights Compact Commission (RWWCC) under the same statutory authority as the resolution of tribal reserved water rights. The state of Montana was one of the first states to conduct negotiations of this kind and is still the only state to do so using a commission. The RWWCC is supported by an 11-member staff and the Commission itself is made up of nine members who serve for four-year terms. One member is appointed by the Attorney General's Office, four by the Governor's Office, two by the Speaker of the House and two by the President of the Senate. The statutory enactment of authority (Mont. Code Ann. § 2-15-212) is attached, along with the general powers and duties (Mont. Code Ann. § 85-2-701-708) and the authority to suspend adjudication while negotiations for the conclusion of a compact are being pursued (Mont. Code Ann. § 85-2-217.

5. **From your experience, are there processes which have worked well in resolving federal reserved water rights questions, processes you would recommend to other states? Describe.**

Perhaps the most valuable tool has been to start negotiations with the goal of protecting existing uses recognized under state law prior to the effective date the compact. This serves the interest of the citizens of the state and yet allows significant room to negotiate the water rights reserved for the particular purpose of the federal reservation. Negotiations provide the flexibility to come up with practical solutions, including dam rehabilitation and enlargement, water exchanges, water augmentation, controlled groundwater areas which can include basin closure of surface or groundwater (with specified future uses), the "reverse approach" which can link other non-water issues to maximize results, as well as some complex mitigation approaches or individual stipulations. Furthermore, a process which provides the Tribal entities with funding projects needed for water distribution and use often serves as motivation for them to negotiate. Access to money for these development purposes provides them a real benefit and not merely a paper water right which they would achieve through litigation.

In some instances the negotiations have required that certain hydrologic areas be closed to further groundwater development, but in no case has a compact prevented the use of groundwater for domestic purposes (wells no greater than 35 gpm and up to 10 acre feet per year) nor has a compact prevented anyone from the future development of water for

stock impoundments on non-perennial streams (up to 30 acre feet per year.) In many cases where the natural flow of water is the basis for the quantification of the federal reserved right, subordinating the natural flow water right to any use recognized under state law with a priority date before the effective date of the Compact, to any use considered non-consumptive, to small stock water ponds after the date of enactment and to development of small spring or groundwater uses after enactment has worked well.

In all negotiations, provision should be made to allow for future administration of the water rights confirmed in the compacts, including what administrative process will be used to make changes to water use in the future. In some cases, dispute resolution through a compact board may be a unique tool added to a compact.

In order to accomplish a process dependent upon detailed review of existing rights and future uses requires a highly qualified and dedicated staff. The scientists, the historians, the legal counsel—all are integral to reaching a compact. Furthermore, a staff which is dedicated to negotiating and compacting, one which has longevity with the program, is critical to working through historic, institutional barriers and reaching creative solutions for successful negotiations.

6. Are there any aspects of your process which need improvement, or which impede successful negotiations of federal reserved water right questions? Are there lessons other states might learn from your experience? Explain.

Perhaps the most significant impediment is the length of time that appears to be required to move proposals through the federal review process. Furthermore, federal funding for water project improvements or for development of new projects as part of the over-all long-term benefits of the compact for both federal and tribal reserved rights is crucial—and difficult to attain. Perhaps the greatest strength of the process is having a strong working relationship with the Congressional delegation from your state and with others in Congress and also persons in the Administration who have authority and influence sufficient to move the funding and decision-making forward.

7. Would you like a copy of our report when completed? If so, list below the name and address it should be mailed to.

Candace F. West
Assistant Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1401

Faye Bergan, Chief Legal Counsel
Montana Reserved Water Right
Compact Commission
P.O. Box 201601
Helena, MT 59620-1601

1. Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?

The Nevada system is very similar to Oregon. Nevada conducts general adjudications and also has a permit process. All water rights in existence prior to the general adjudication are adjudicated (including water rights existing prior to statutory permit process; called vested rights). The adjudication process in Nevada focuses on verifying and quantifying pre-statutory water rights as well as Native American Indian and federal reserved water rights. An adjudication of surface water claims, other than claims of Native American Indian or federal reserved rights, involves those rights established before the enactment of Nevada's statutory water law in 1905. An adjudication of groundwater claims involves those rights established before 1913 for artesian groundwater and 1939 for claims to percolating groundwater. The State Engineer, either upon petition of a water user of either surface water and/or underground water or his own initiative, enters an order commencing an adjudication. The State Engineer will enter a Preliminary Order of Determination regarding water rights. Objections to the Preliminary Order of Determination may be filed 30 days after the inspection opened. The State Engineer must arrange for a hearing in the event objections to the Preliminary Order of Determination are filed. The hearing date must not be less than 30 days nor more than 60 days after notification is served on the persons who are, or may be, affected thereby. As soon as practicable after the hearing on objections to the Preliminary Order of Determination, the State Engineer enters into the record an Order of Determination. The Order of Determination is filed with the county clerk and with the clerk of the district court of the county where the adjudication is located. If the adjudication encompasses two or more judicial districts, the State Engineer shall notify the district judge of each district. The judges will decide who will have jurisdiction over the determination. Exceptions to the Order of Determination may be filed with the clerk of the court at least five days prior to the date set for hearing. A hearing is held and the judge may decide whether or not further evidence is necessary and the court must make findings on each exception to resolve the issues raised. The court enters a decree affirming or modifying the Order of Determination and delivers a certified copy of the final decree. Decrees are final and conclusive. However, the State Engineer or any party or adjudicated claimant affected by such decree may within three years apply to the court for a modification.

Original permit applications and change applications are filed with the State Engineer. The State Engineer holds hearings and takes evidence regarding applications and then issues a decision. Applicants can appeal the State Engineer's decisions to district court in the county where the water system is located. Review is restricted to review of the record and the district court is prohibited from taking additional evidence. The Nevada Attorney General's Office is not involved in the State Engineer's permit decision or adjudication processes. The Attorney General's Office takes over case when appealed to district court.

2. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or, if these issues are still unresolved, what processes are in use).

There has been a tremendous amount of litigation involving federal and tribal reserved water rights. Approximately 50% of the appeals handled by the Nevada Attorney General's Office

involve federal or tribal reserved water rights. (Reserved tribal rights are set forth in treaty or in legislation that creates the reservation.) Typically, the tribes do not agree that they have to comply with the State permit system. If the tribe believes they have a reserved water right, then they take water without going through permit system. The State's position is if they do not have reserved water right, they must obtain a right through the State permit process.

Las Vegas Ground Water adjudication – Completed in 2001 and resulted in a settlement that granted a water right to the tribes after an appeal to the Nevada State Supreme Court. This adjudication was remarkable because it was completed in 3-5 years.

The most litigated tribal water rights have involved the Truckee River litigation, which was litigated for over seven years. The Carson River water rights dispute also involved tribal reserved water rights claims. The Pyramid Lake tribe has been very active in asserting tribal reserved water rights claims and are constantly attempting to increase their rights. (See Nevada v. U.S.)

Tribal rights are generally litigated, both in adjudications and in regular appeals and litigation of existing interstate decrees (entered in federal courts).

3. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.

There are typically many water rights disputes on reclamation projects.

Monitor Valley adjudication – adjudicated federal reserved water rights for forest lands. When Nevada does general stream adjudications, they handle all of the issues in front of the State Engineer. State Engineer enters a preliminary determinations and any appeals from this and then State Engineer enters final determination. Then this decision goes to district court that can hear appeals and challenges to State Engineer's final decision. This decision rejected many claims for stock water, forest, instream flow claims on forest, granted wilderness area claims, these are at final stages of district court. Public water reserves by government based upon Executive Order passed in early 1900s, theory is that within every section there is one water source, litigated these during this adjudication. Also granted private stock water rights on the national forest.

Yucka Mountain – Department of Energy came to state and asked for water rights under permit system. State Engineer reviewed permit applications and denied them because they decided it was not in the best interests of the State of Nevada for Yucka Mountain to be used as a depository. This decision was appealed to district court and ultimately 9th Circuit. The 9th Circuit remanded the case back to be handled by state permit application system. (Note – In July 2002 Congress passed a resolution that made it necessary to have Yucca Mountain the site for storage of nuclear waste which changes. The water rights decision will likely be revisited as a result.)

4. Do you have any specific process used to resolve federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? If so, please attach a copy of your statute. If the process is non-statutory, describe how it evolved and who is involved.

Appeal statute – NRS 533.450
Review of Change Application and new applications – NRS 533.370
General Adjudication Process – NRS 533.090 through .185

5. From your experience, are there processes which have worked well in resolving federal reserved water rights questions, processes you would recommend to other states? Describe.

If everyone is reasonable, then the process works and there is a potential for settling. Example is the Las Vegas settlement. But, as things get more contentious, settlement becomes more difficult. Process that does seem to work is to have federal government do a water buy out process to obtain necessary water.

6. Are there aspects of your process which need improvement, or which impede successful negotiations of federal reserved water right questions? Are there lessons other states might learn from your experience? Explain.

There is a general view that federal government is involved in a systematic attempt to control the water rights in the west rather than acknowledging that the state system should control the process. Process could be improved if federal government had to pay for the costs it takes to adjudicate or litigate the water right claims (which is not possible without a statutory amendment due to the McCarran amendment). Each adjudication typically involves more federal claims than private claims (80% federal and 20% private state claims). They spend most of their time trying to determine whether there are actually legitimate federal claims.

7. Would you like a copy of our report when completed? If so, list below the name and address it should be mailed to.

Paul Taggart, Nevada State Attorney General's Office, 100 North Carson Street, Carson City 89701

Statutory Authority: NRS § 533.090 through 533.265.
NRS § 533.135.
NRS § 533.150, 533.155 in NRS § 533.170 and 533.190.
n NRS § 533.115..

1. Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?

New Mexico law requires the adjudication of all water rights in the state in order to legally define what each person's water right is and to gain information needed to maintain a balance between water supply and demand. A water rights adjudication determines the extent and ownership of each water right in a specific geographical area, usually a river drainage basin or groundwater basin. It is similar to a quiet title suit to establish the ownership of land. Water rights have been adjudicated since the enactment of the state surface water code in 1907, and the process is still going on. There are current adjudications in progress on the Lower Rio Grande, Nutt-Hockett, Pecos, and San Juan river basins, as well as most tributaries of the upper Rio Grande.

The adjudication process involves two phases:

1. a technical one in which a hydrographic survey is performed to identify, map and report the ownership of water rights in a particular stream system or groundwater basin; and
2. a legal one in which a lawsuit is filed and court orders are issued, stating how much water each user has a right to divert and use for a specific beneficial purpose.

State law requires the State Engineer to conduct hydrographic surveys of each stream system in the state, beginning with those most used for irrigation, to gather information for adjudication suits. During a survey, data are collected to help the court decide how much water to adjudicate to each water right claimant. Before any field work takes place in a survey, State Engineer Office staff review water right records for the survey area and plan the acquisition of ortho-rectified imagery. Cropping patterns and crop irrigation requirements are computed. Municipal, industrial, stock and domestic water uses are analyzed. Land ownership is investigated. Although a hydrographic survey gathers information on land ownership, it does not establish legal ownership or property boundaries. The investigations only produce evidence on the location, amount and ownership of water rights.

Following this work, the staff conduct a field check of all water uses and draw maps depicting the areas of water use. The maps and other data are compiled into a report which lists all the known uses of water in the survey area. The complete report, available to the public upon request, is then sent to the State Engineer Office legal staff, and the legal phase of the adjudication process begins.

This phase involves a lawsuit filed either by the state of New Mexico, the federal government or an interested person. (State law requires that the adjudication be conducted as a lawsuit.) All water right owners in the stream system or groundwater basin are included, or joined, in the suit as defendants. Every water right claim is given a subfile number, and all relevant information on the water right is filed under this identifying number.

Each water right owner is sent an offer of judgment by the Office of the State Engineer. This document is a proposed agreement between the defendant and the state which defines what the state believes is the

- amount of the water right
- priority date of the right
- place and purpose of water use
- point of water diversion
- source of water

- ownership of the right

The water right owner may either accept or reject the offer. Objections are usually resolved through investigations; however, the defendant has a right to a court hearing. If a defendant fails to answer the adjudication complaint by claiming rights different from those described in the offer during the specified time in the summons, the court may enter a default judgment adjudicating the water right described in the offer.

2. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or, if these issues are still unresolved, what processes are in use).

Adjudications are currently underway in both federal and state courts in New Mexico for which the State Engineer's attorneys have the responsibility to prosecute on behalf of the State of New Mexico. The entire Pecos Stream System is the subject of a comprehensive adjudication which began in 1956. Adjudications of several tributaries to the Upper Rio Grande were started between 1966 and 1983 and involve water rights of most of New Mexico's Indian Pueblos and Tribes, the federal government, municipalities, community ditches and thousands of individual defendants. The adjudication of the lower portion of the Rio Grande began in 1985 and involves an irrigation district, a major federal reclamation project, municipal and county water rights, a state university, the City of El Paso and thousands of individual groundwater claims within Doña Ana County. Please see the end of the document for a more complete listing of adjudications in New Mexico involving tribal reserved water right claims. (NOTE - Rights to water on Indian grant lands and reservations in New Mexico fall within one or a combination of three different doctrines: Pueblo historic use water rights, federal reserved water rights, or water rights established under the laws of the State of New Mexico. The legal principles under which each of these rights is established and quantified differ. Water rights administration, litigation, and negotiation leading to a settlement of rights to water is, therefore, exceedingly complex when Indian water rights are involved.)

3. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.

Adjudications are currently underway in both federal and state courts in New Mexico for which the State Engineer's attorneys have the responsibility to prosecute on behalf of the State of New Mexico. The entire Pecos Stream System is the subject of a comprehensive adjudication which began in 1956. Adjudications of several tributaries to the Upper Rio Grande were started between 1966 and 1983 and involve water rights of most of New Mexico's Indian Pueblos and Tribes, the federal government, municipalities, community ditches and thousands of individual defendants. The adjudication of the lower portion of the Rio Grande began in 1985 and involves an irrigation district, a major federal reclamation project, municipal and county water rights, a state university, the City of El Paso and thousands of individual groundwater claims within Doña Ana County. Please see the end of the document for a more complete listing of adjudications involving federal reserved water right claims.

4. Do you have any specific process used to resolve federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? **If so, please attach a copy of your statute or give statutory citations for these sections**. If the process is non-statutory, describe how it evolved and who is involved.

5. From your experience, are there processes which have worked well in resolving federal reserved water rights questions, processes you would recommend to other states? Describe.

In the Lower Rio Grande and Nutt-Hockett basin adjudications, the court has ordered a special alternative dispute resolution process preceed any court hearings. This step is designed to encourage resolution of most disputes prior to court hearings. When an offer has been signed by both the state and the defendant, the court enters an order confirming the agreement. When all water rights have been settled between the state and the defendants, an individual defendant or group of defendants may challenge the water rights of others. This is known as an *inter se* objection. A period of discovery may follow in which information that is necessary to resolve the dispute may be exchanged between the adversary parties. Hearings on any challenges are held. When they are resolved, the court enters a final decree which defines the rights of every water right owner within the stream system or groundwater basin.

Although a water rights adjudication is a complex process which usually takes many years to complete, there are definite advantages to having an adjudicated water right. For the individual water right holders, controversies concerning title to water rights are resolved, and the final court decree removes any questions concerning the validity of water rights. The state also benefits by gaining the knowledge needed to assess the amount of water that may remain available in the stream system for future appropriation and to apportion the water according to the adjudicated priorities during times of shortage.

6. Are there aspects of your process which need improvement, or which impede successful negotiations of federal reserved water right questions? Are there lessons other states might learn from your experience? Explain.

Adjudications are currently underway in both federal and state courts in New Mexico for which the State Engineer's attorneys have the responsibility to prosecute on behalf of the State of New Mexico. The entire Pecos Stream System is the subject of a comprehensive adjudication which began in 1956. Adjudications of several tributaries to the Upper Rio Grande were started between 1966 and 1983 and involve water rights of most of New Mexico's Indian Pueblos and Tribes, the federal government, municipalities, community ditches and thousands of individual defendants. The adjudication of the lower portion of the Rio Grande began in 1985 and involves an irrigation district, a major federal reclamation project, municipal and county water rights, a state university, the City of El Paso and thousands of individual groundwater claims within Doña Ana County.

7. Would you like a copy of our report when completed? If so, list below the name and address it should be mailed to.

ADJUDICATIONS IN NEW MEXICO

Pecos River Basin

The adjudication of the Pecos River Stream System began in 1956 with the filing of the action denominated, *State of New Mexico ex rel. State Engineer v. Lewis* in the Fifth Judicial District Court. The objective at that time was to adjudicate all groundwater rights in the Roswell Artesian Basin to obtain administrative control of illegal and excessive pumping. Because a number of groundwater rights were supplemental to the Hagerman Canal surface water rights, a separate action was filed to adjudicate the Canal. After all rights had been adjudicated and subfile orders had been entered, the two cases were consolidated and a partial final decree was entered by the District Court adopting all subfile orders. In 1972, the adjudication was expanded to include the Hondo Basin because of anticipated large new diversions by the Mescalero Apache Indian Tribe. The Tribe's rights were then adjudicated, along with all non-Indian rights in the Hondo Basin. That portion of the *Lewis* case is essentially complete.

In 1976, after the Carlsbad Irrigation District asked the State Engineer to administer priorities, the *Lewis* case was expanded to the entire Pecos River Stream System. The Carlsbad Irrigation District priority call continues to be one of the two driving forces behind the *Lewis* adjudication. The other is the Supreme Court's 1988 Amended Decree in *Texas v. New Mexico*. Under the Amended Decree, New Mexico is required to meet its water delivery obligations to Texas pursuant to the Pecos River Compact within a relatively short time frame. If New Mexico under-delivers, the shortfall must be remedied within six months. The state has three current objectives in the *Lewis* adjudication: (1) perform preliminary work necessary to administer the Pecos River according to the laws of New Mexico; (2) perform work necessary to meet New Mexico's delivery obligations to Texas under the Pecos River Compact and; (3) perform preliminary work necessary to enjoin uses if New Mexico under-delivers. The state's current area of concentration in furtherance of these objectives is the Carlsbad and Roswell Basins.

Las Vegas *Inter Se* Proceedings. The City's appropriative water rights claims was held in Las Vegas, New Mexico in February 1997. The court's decision was rendered and the city appealed. All appeals have been concluded, so that the City's appropriative rights claim has been finalized. The State, the City, Storrie Project, and acequias are continuing their efforts to arrive at a negotiated solution to the City's Pueblo Water Rights Doctrine claims.

Rio Grande Basin

Rio Pojoaque System. *State of New Mexico ex rel. State Engineer v. Aamodt, U.S. District Cause No. CIV 6639-M,* was filed in 1966 and involves the Rio Pojoaque system and its tributaries. Phases of the case currently active include:

Nambe Reservation Reserved Rights Claim. After the conclusion of an evidentiary hearing lasting approximately four weeks, the Special Master prepared a draft report on these claims, recommending their denial. Further briefing and oral arguments are expected before a final report is submitted to the court.

Comprehensive Basin Administration Plan. The State and the United States have jointly proposed a plan for the metering and/or measurement of all diversions in the basin for the purpose of administration of rights. Refinement of the metering plan, development of a water-rights administration plan for the basin, and attempts to obtain funding for implementation of the plans are ongoing.

Pueblos' Domestic and Livestock Rights. The court has ordered mandatory settlement negotiations on the Pueblos' domestic and livestock rights claims, and those are continuing under the supervision of a federal Magistrate Judge.

Rio Pueblo de Taos and Rio Hondo Systems. *State of New Mexico ex rel. State Engineer v. Abeyta and State of New Mexico v. Arellano, U.S. District Court Cause Nos. CIV 7896-SC and CIV 7939-SC,* are consolidated lawsuits for the adjudication of the Rio Pueblo de Taos and Rio Hondo stream systems. Most non-Indian claims have been provisionally adjudicated. Claims on behalf of the Pueblo of Taos were originally filed on August 1, 1989, and subsequent claims were made in 1992, 1996, and 1997. A motion by the state and certain non-Indian defendants to disallow some of these claims is still pending before the Special Master. Preparation for trial of the Pueblo claims is occurring simultaneously with efforts to explore possible settlement of these claims. At the joint request of many of the parties in the Taos adjudication, including the State, the United States Congress has approved funding of approximately two million dollars for hydrologic investigations in the Taos area. The data to be obtained by this program is critical to the hydrologic foundation of any settlement.

Rio Chama. *State of New Mexico ex rel. State Engineer v. Aragon, U.S. District Court Cause No. CIV 7941 SC,* involves the adjudication of all water rights in the Rio Chama stream systems, including the claims of the United States, the Pueblo of San Juan and the Jicarilla Apache Tribe. The suit was filed in federal court in 1969, although it incorporates prior state court orders adjudicating non-federal water rights on the mainstream Rio Chama below Abiquiu Dam and the Rio Puerco, a tributary to the Rio Chama. The Rio Chama mainstream section, consisting of the mainstream of the Rio Chama from El Vado Dam to the confluence of the Rio Chama and the Rio Grande, including the waters of Abiquiu Creek, the Rio Frijoles and the Los Ojitos de Agua Salada Donosa, has been adjudicated. This area is administered by a Watermaster appointed pursuant to the 1971 Partial Final Decree. Section 6, Canones Creek area, and Section 8, Rio Puerco area, have been adjudicated. Sections without decrees are undergoing initial hydrographic surveys. The amended hydrographic survey report for Section 5, Rio Gallina, was filed with the Court in January of 2000. The water users in Section 5 identified in the report have been joined to the adjudication suit and the determination of claims in this area is ongoing. Hydrographic surveys for Section 3, Rio Nutrias, Rio Cebolla and Canjilon Creek, were also completed and filed with the Court between June and August 2000. Water rights claimants in Section 3 will be joined in the Fall of 2000 and the adjudication of these claims is scheduled to begin in 2001. The hydrographic survey for Section 7, the area above El Vado dam, is scheduled for completion in 2001.

Red River. The Red River Stream System adjudication suit, *State of New Mexico ex rel. State Engineer v. Molycorp, Inc. U.S. District Cause No. CIV 9780 SC,* was filed by the State in 1972. The scope of the adjudication incorporates all of the water rights of each water use claimant in the Red River Stream System, including the surface waters of the West Latir Creek and ground water in the Sunshine Valley and Costilla areas. The suit was filed for two reasons. First, the U.S. Bureau of Reclamation was investigating whether to construct the Cerro Unit as a tributary project under the San Juan-Chama diversion project. The construction and operation of the Cerro Unit would require a determination of all existing water rights that may be affected by it. Reclamation subsequently found that the Cerro Unit was not feasible. Second, the State disputed certain water rights claimed by Molycorp, Inc. Prior litigation over these claims was voluntarily dismissed in order to adjudicate them in the Red River case. See *State of New Mexico ex rel. Reynolds v. Molybdenum Corp. of America,* 82 N.M. 690, 496 P.2d 1086 (1972) (reversing involuntary dismissal of state court suit) and *State of New Mexico v. Molybdenum Corp. of America,* 570 F.2d 1364 (10th Cir. 1978)(State prevails in disputed water right claim).
In 1980, a Partial Final Decree approved and confirmed all subfile orders adjudicating the water rights of 650 defendants, but reserved jurisdiction to adjudicate the rights of the United States. Approximately 11,400 acres with irrigation water rights were confirmed by the decree. Non-irrigation water rights totaled a diversion of about 2,250 acre-feet per year. In 1992, the water rights of the United States were adjudicated in a Final Judgment and Decree. The Decree adjudicated water uses by the U.S. Forest Service and Bureau of Land Management, including

instream flow rights for the Wild and Scenic River segment of the Red River. The description of the instream flow right was based upon a 1984 Stipulation between the United States, Molycorp, and the State.

In 1989, approximately 300 motions to amend subfile orders were filed by defendants. The State responded to these motions and the Special Master held hearings in 1990. In 1992, the Special Master filed a report on disputed water right claims and the defendants filed approximately 47 objections. Those objections have now been resolved. For the past several years, the State has been engaged in an errors and omissions process, wherein any discrepancy within an adjudicated subfile order was corrected. This process was lengthy and required several hearings, including a field office hearing conducted by the Special Master in the Village of Questa.

By April 2000, all errors and omissions had been resolved, and the adjudication advanced into final *inter se* proceedings. *Inter se* allows each water right owner to object to the water rights of others if they believe the other rights would detrimentally affect their own. *Inter se* is the final process before the Court enters a final decree. The State does not participate in these proceedings, other than to provide the Court with relevant documentation. Before sending out the Notice of *Inter Se* Proceedings to all water right owners of record, the Special Master required the State and all of the acequias in the Red River system to update the ownership records for individual water right holders. This task proved to be very onerous, but very necessary as many of the subfile orders had been entered in the 1970's. The Notice of *Inter Se* Proceedings was mailed to all known water right owners of record in May 2000, and the notice was published in two newspapers for a three-week period. No *inter se* objections were filed.

As of July 2000, a proposed final decree is being prepared and circulated for comment. The Court has proposed a presentment hearing on December 1, 2000, for the entry of the proposed final decree. The entry of the final decree will conclusively end the Red River Stream System adjudication.

Jemez River. *United States v. Abousleman, U.S. District Court No. CIV 83-1041-SC,* is a suit filed by the United States in its own behalf and on behalf of the Jemez, Santa Ana and Zia Pueblos to adjudicate water rights in the Jemez River system.

In 1988, hearings were held on questions related to the historic use of water. In 1990, the Special Master also recommended rulings to the Court on Summary Judgment motions argued by the state, United States, Pueblos and non-Indian defendants. The Master's report was objected to and oral arguments were held on those objections before the District Court. The Court has not yet issued a ruling on the 1990 Special Master's report.

During the 1996 summer drought, the Pueblos of Jemez and Zia moved for a temporary restraining order (TRO) and preliminary injunction seeking to cut off irrigation uses above the Pueblos which the Pueblos claimed diminished surface water supply for their agricultural activities. No TRO or preliminary injunction was granted by the Court. Instead, an Order was entered adopting a stipulation between the Pueblos and the community acequias. These parties are now exploring settlement options for the negotiation of the Pueblos' historic, present and future use claims.

The Court has entered a Partial Final Decree for the U.S. proprietary claims except for its Wild and Scenic River claim, which is pending before the Special Master, awaiting resolution of this issue in the Chama Adjudication.

In 1991, a proposed partial final decree on non-federal non-Pueblo water rights claims was prepared and made available for inspection. *Inter se* objections were filed by the Pueblos to sixty-one subfiles. The Special Master dismissed nineteen of the objections, and after hearing evidence on the remaining forty-two, issued a report and recommendations on April 24, 1995. The District Court has entered orders on the objections.

The court and the parties anticipate a partial Final Decree embracing all non-federal, non-Pueblo rights to be entered on or about December 1, 2000.

Lower Rio Grande Basin. *State of New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irrigation District, et al., Third Judicial District Cause No. CV 96-888* (formerly: *Elephant Butte Irrigation District v. State Engineer, Doña Ana County Cause No. CV-86-848*) was originally filed in 1986 during the height of the litigation surrounding the applications of the City of El Paso for water from southern New Mexico. After 10 years of litigation over procedural matters involving venue, jurisdiction and indispensable parties, the Office of the State Engineer secured from the legislature $250,000 for the purpose of initiating the hydrographic survey of the Lower Rio Grande. During the 1997 Legislative Session, the OSE and the ISC successfully lobbied for passage of legislation to authorize the issuance of bonds to fund the hydrographic survey for the region. Laws 1997, Ch.241 and Ch.246.

With sufficient funds in hand, the OSE hired a private engineering firm to conduct the hydrographic survey with a projected completion date in the year 2000. The first phase of the hydrographic survey, the Nutt-Hockett Basin was completed on April 29, 1998 and filed with the Court. The second phase of the hydrographic survey, the Rincon Section, was completed on May 20, 1999. The third phase of the hydrographic survey, the North Mesilla Section, was completed on June 22, 2000. Work on the fourth (South Mesilla) and fifth (Outlying Areas) sections is expected to be completed by the end of 2000.

Adjudication of all water rights in the Nutt-Hockett Basin has been largely completed and subfile orders have been entered for most of the water rights. Adjudication of water rights in the Rincon Section is progressing. Most of the Rincon Section offers of judgment have been served. North Mesilla offers of judgment will begin to be served in October 2000. Batches of about one hundred offers of judgment will be served on water-right claimants every week.

The OSE has also been successful in its request to the court to adopt procedures to streamline the adjudication process. In place of traditional adversarial litigation, the Court has adopted an alternative dispute resolution process (ADR) for resolution of legal issues and factual disputes before any formal hearings or trials are scheduled by the Court. ADR provides an opportunity for claimants to resolve issues arising after service of the original offer of judgment through informal negotiations with the OSE or formal mediation. This process should allow for acceptance of negotiated or mediated offers of judgments over the course of a couple of months after the original offer of judgment is served upon a water right claimant in the Lower Rio Grande adjudication. This fast-track approach is intended to result in a fairly rapid adjudication of water rights in the Lower Rio Grande so that the area can adequately plan for future growth. According to preliminary estimates, there are about 16,600 claims to surface and groundwater rights that will need to be adjudicated in the Lower Rio Grande, most of which are claims of individuals within the elephant Butte Irrigation District. Adjudication of the surface and groundwater rights among the many claimants will include all municipal, domestic, agricultural, industrial and other uses.

OFFICE OF ATTORNEY GENERAL
STATE OF NORTH DAKOTA

Wayne Stenehjem
ATTORNEY GENERAL

September 6, 2002

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Mr. James Pharris
Senior Assistant Attorney General
Washington Attorney General's office
1125 Washington St SE
PO Box 40100
Olympia, WA 98504-0100

RE: Water Dispute Task Force Survey

Dear Mr. Pharris:

Enclosed is North Dakota's response to the Washington Attorney General's Water Dispute Task Force Survey.

Sincerely,

Julie Krenz

Julie A. Krenz, Director
State and Local Government Division

vkk
Enclosure

North Dakota's response to Washington State Attorney General's Water Dispute Task Force Survey.

1. **Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?**

   The primary way in which federal reserved water rights disputes arise are in relation to the water permit application process. When an application is made for a water permit, notice must be given to certain individuals and entities and must be published in the county newspaper. Anyone interested in the application may file comments with the State Engineer. It is in the context of how a proposed appropriation may affect an alleged federal reserved water right that disputes or objections have arisen. This is an administrative process. Decisions of the State Engineer can be appealed to court.

   The authority in North Dakota law to adjudicate water rights, N.D.C.C. §§ 61-03-16 through 61-03-19, has never been exercised.

2. **Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or if these issues are still unresolved, what processes are in use).**

   North Dakota has not been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations. In a couple of instances tribes have sought to appropriate water which the state is fairly certain the tribe does not have a reserved water right in, without a water permit. In one of the instances, the tribe agreed to apply for a permit but submitted a letter reserving tribal rights and stating that applying for a state water permit did not waive any of the tribes rights. In the other instance, a similar solution was proposed but has not been completed.

3. **Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.**

   In one instance, the National Park Service asserted that a proposed appropriation of water would impact its reserved water rights. The Park Service did not submit as a part of the administrative proceeding any information to enable the State Engineer to determine whether a reserved right existed, nor the extent of its claim. As a result, the State Engineer did not take the "alleged" right into consideration in the permitting process. The Service did not appeal the decision.

4. **Do you have any specific process used to resolve federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? If so, please attach a copy of your statute? If the process is nonstatutory, describe how it evolved and who is involved?**

   No.

5. **From your experience, are there processes which have worked well in resolving federal reserved water rights questions, processes you would recommend to other states? Describe.**

   North Dakota has not had to resolve federal reserved water rights questions other than in the context of evaluation water permit applications.

6. **Are there aspects of your process which need improvement, or which impede successful negotiations of federal reserved water right questions? Are there lessons other states might learn from our experience? Explain.**

   See above.

7. **Would you like a copy of our report when completed? If so, list below the name and address it should be mailed to.**

   Yes. Julie Krenz
   Assistant Attorney General
   Office of Attorney General
   600 E Boulevard Ave Dept 125
   Bismarck, ND 58505-0040

OREGON

1. Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?

Oregon has a statutory permit system adopted in 1909. Individuals applying for a post 1909 water right submit applications to the Water Resources Department. The Water Resources Department reviews applications and makes permit decisions. These decisions can be appealed to the Water Resources Commission, which is a seven member government appointed citizen board. The Commission's decisions are then appealable to the Oregon Court of Appeals.

Oregon also has an adjudication process. Adjudications occur in the circuit court in the county where the water is used. The circuit court then issues a decree which states who has the right to use water, the amount and location of the water use, and the priority date of each right. The Water Resources Department then issues water right certificates for each decreed right. Pre-code rights can only be recorded through the adjudication process. Approximately two-thirds (2/3) of Oregon State's water systems have been adjudicated (covering the eastern and some Willamette valley areas of Oregon). Approximately 200 decrees have bee issued on individual streams in Oregon. An adjudication proceeding is currently underway in the Klamath Basin which involves private water uses, the Bureau of

The Water Resources Director gives notice of an adjudication to individuals and/or entities in the affected area. Individuals and or entities claiming water rights in the area to be adjudicated must file a claim with the Water Resources Department. Claims can be contested in an administrative hearing before the Director of the Water Resources Department. This decision is appealable to circuit court, which issue a final decrees on the rights. Tribal and federal reserved water rights are quantified through the adjudication process.

2. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or, if these issues are still unresolved, what processes are in use).

This is different for every tribe. There are five or six tribes in Oregon. Warm Springs tribe rights were resolved through negotiations outside of the adjudication process. Oregon has a specific statute that authorizes negotiations with the tribes outside of the adjudication system. This was a special case because there were not very many non-tribal or non-federal entities that needed to be involved. There are tribal rights at issue in Klamath River adjudication and this has been very difficult to negotiate due to the sheer number of interests involved.

The Klamath tribe rights were taken to federal court in the 1990s. This case continues to be processed in federal court and court intends to oversee Oregon's determination of what the tribes are entitled to.

Umatilla Tribe – adjudication back in 1917 and there was a Oregon Supreme Court decision which was unclear as to whether the adjudication covered the tribes. The tribe recently sought a quantification of the water right and a settlement was negotiated over this right.

Citations – Water right permit, proposed final order, Chapter ORS 537.170, 537.153, 537.173
Negotiations with tribes – Chapter 539.300 through .350 (Adjudication chapter) Ors 183.482

3. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.

There are several federal rights at issue in the Klamath River Adjudication: Crater Lake National Park, 3 Forests, BLM land, some wilderness areas, a few scenic areas. This adjudication is still outstanding. First notices went out in 1975 but they had to go to federal court so it really did not start until early 1990s.

No other adjudications involving federal rights.

4. Do you have any specific process used to resolve federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? If so, please attach a copy of your statute. If the process is non-statutory, describe how it evolved and who is involved.

No

5. From your experience, are there processes which have worked well in resolving federal reserved water rights questions, processes you would recommend to other states? Describe.

Oregon attempted to establish an alternative dispute resolution process for dealing with the rights in the Klamath River adjudication (at the same time the litigation was ongoing). The parties met over a two year period and were able to exchange a lot of helpful information. It is possible that having a forum available for negotiations at same time as proceeding with litigation has been helpful in making people more willing to settle.

6. Are there aspects of your process which need improvement, or which impede successful negotiations of federal reserved water right questions? Are there lessons other states might learn from your experience? Explain.

Believes it works pretty well. Hard to say at this point.

7. Would you like a copy of our report when completed? If so, list below the name and address it should be mailed to.

Walter Perry, Department of Justice, Justice Building, 1162 Court Street NE, Salem, OR 97301-4096, (503) 378-4096

1. Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?

South Dakota has a statutory permit process. Applications are submitted to the South Dakota Water Management Board which makes permit decisions, holds an administrative hearing and hears water disputes. Appeals can then be filed with the local circuit courts (have 30 days to appeal decision). The circuit court decision is appealable to State Supreme Court as a matter of right. South Dakota has a general statewide adjudication process. General adjudications are filed directly with the courts, with notification to interested parties, upon which the individuals must file a claim. There was an effort to begin a general adjudication in the 1980's (Missouri Water right basin) but it was never started due to the cost of proceeding with adjudication. Since that time, there has been little push for adjudications, likely due to an adequate/consistent water supply.

S. Dakota codified laws Chapter 46-10 – Adjudications
Chapter 46-1 through 46-6 – Permitting

2. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or, if these issues are still unresolved, what processes are in use).

No filed claims for tribal reserved water rights. South Dakota has not done any negotiation on reserved rights and has not been approached to do so. South Dakota is not currently involved in any general adjudications.

3. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.

Forest Service and Fish and Wildlife agencies have applied for new water rights permits through the State permitting process. Whether or not they are involved in the state system depends upon whether there was a reservation of water rights for the federal land. As a result, South Dakota has not been required to deal with federally reserved water rights.

4. Do you have any specific process used to resolve federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? If so, please attach a copy of your statute. If the process is non-statutory, describe how it evolved and who is involved.

Not Applicable.

5. From your experience, are there processes which have worked well in resolving federal reserved water rights questions, processes you would recommend to other states? Describe.

Not applicable. No reserved water rights disputes.

6. Are there aspects of your process which need improvement, or which impede successful negotiations of federal reserved water right questions? Are there lessons other states might learn from your experience? Explain.

Old US withdrawal law effective 1907-1983, stated that if US wanted to develop a water right they need only withdraw to obtain a water right. Believes this decreased the claims for federally reserved water rights.

7. Would you like a copy of our report when completed? If so, list below the name and address it should be mailed to.

Diane Best, Attorney General's Office, 500 East Capitol Avenue, Pierre, South Dakota, 57501

1. Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?

Texas does conduct general adjudications. The adjudications are administrative and are conducted by the Texas Commission on Environmental Quality. Exceptions to determinations made by the Commission can be appealed to court, which conducts a de novo review on the record.

Permit applications are also reviewed by the Commission and can be appealed to district court.

2. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or, if these issues are still unresolved, what processes are in use).

There are only three federally recognized tribes in Texas. Two tribes are in areas in which there have been general adjudications. These two tribes did not submit claims for reserved water rights. The watersheds for the area in which the third tribe is located have not yet been adjudicated. However, Texas does not anticipate that this tribe will submit any reserved water rights claim. As a result, Texas has not dealt with any issues related to tribal claims for reserved water rights.

3. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.

Not aware of any other federally reserved rights or claims. In general, the federal government has applied for water rights through the Texas permit process.

4. Do you have any specific process used to resolve federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? If so, please attach a copy of your statute. If the process is non-statutory, describe how it evolved and who is involved.

Not applicable. The Corps of Engineers can obtain authorization from Congress for water projects but this goes outside of the state system. Section 11.301 et seq – Adjudication

Permitting Chapter 11.121, 11.021, 11.134, Water Code

There have been claims made by municipalities based upon pueblo water rights in the Middle Rio Grande area. These cities are on land which had been pueblo land (cities founded by either Spanish or Mexican governments). The case(s) were appealed to the Texas Supreme Court which ultimately rules that if the documents creating the pueblo did not specifically provide for water rights, then the rights did not exist.

5. From your experience, are there processes which have worked well in resolving federal reserved water rights questions, processes you would recommend to other states? Describe.

Not applicable.

6. Are there aspects of your process which need improvement, or which impede successful negotiations of federal reserved water right questions? Are there lessons other states might learn from your experience? Explain.

Not applicable.

7. Would you like a copy of our report when completed? If so, list below the name and address it should be mailed to.

Tom Bohl, Assistant Attorney General, Natural Resources Division, P.O. Box 12548, Austin, Texas, 78711

STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL

MARK L. SHURTLEFF
ATTORNEY GENERAL

RAY HINTZE
Chief Deputy - Civil

RYAN MECHAM
Chief of Staff

KIRK TORGENSEN
Chief Deputy - Criminal

September 11, 2002

James Pharris
Senior Assistant Attorney General
Washington Attorney General's Office
1125 Washington Street SE
PO Box 40100
OLYMPIA WA 98504-0100

Dear Mr. Pharris:

Enclosed is Utah's response to the Washington Attorney General's Survey on Resolution of Federal Reserved Water Rights Disputes.

Thanks and best regards.

Very truly yours,

NORMAN K. JOHNSON
Assistant Attorney General

Enclosure

cc w/encl: Mark L. Shurtleff
Utah Attorney General

NKJ/jr

1594 WEST NORTH TEMPLE #300 • SALT LAKE CITY, UTAH 84116 • TEL: (801) 538-7227 • FAX: (801) 538-7440

UTAH RESPONSE
WASHINGTON STATE ATTORNEY GENERAL'S OFFICE
SURVEY ON RESOLUTION OF
FEDERAL RESERVED WATER RIGHTS DISPUTES

1. Brief Description of how water rights disputes are handled:

In Utah, water right disputes may be handled in several ways, depending on the circumstances. Utah has an administrative procedure for appropriation-related issues, including changes to existing water rights. The adjudication procedure is defined by statute, and is primarily a litigation process. In addition, disputes between individual water users may be resolved by private civil lawsuits. The context in which a dispute arises determines whether it is addressed through the administrative process, the general adjudication, or through a private lawsuit. In most situations involving the State, however, the first attempt to resolve issues is by negotiation or settlement, with litigation as the last resort.

2. Negotiations or litigation of federal reserved water rights for Indian Reservations:

The State Engineer's Office and the Attorney General's Office have been fairly successful, so far, in negotiating to resolve federal reserved water rights for Indian Reservations. However, in Utah the process of resolving the federal reserved water rights for tribal reservations is just beginning. If the federal reserved water rights issues for the tribal reservations cannot be resolved through negotiation, they will be litigated in the context of the general water rights adjudication pursuant to the McCarran Amendment. There is no particular, established process for the negotiations. The federal reserved water rights for the Shivwits Band of the Paiute Tribe of Utah in the Virgin River Drainage (southwest corner of the State) have been negotiated to a successful conclusion and the settlement is currently being implemented. This has been considered an important success because of the extreme scarcity of water in this part of the State. The federal reserved water rights for the Ute Indian Tribe in the Uinta Basin (northeast part of the State) has been proceeding for many years.

3. Negotiations or litigation of federal reserved water rights for other federal interests:

The State Engineer's Office and the Attorney General's Office have been successful in negotiating federal reserved water rights for Zion National Park (also in the Virgin River drainage) and several National Monuments in different parts of the State. The negotiation approach has worked well for both the state and the federal government. The Zion National Park Settlement Agreement has been used as a model for subsequent negotiations, particularly its focus on technical solutions based on significant data gathering and interchange/discussion between "mid-level" state and federal officials rather than legal disputes. One key element is that as both sides have determined the amount of water necessary for their respective needs and uses, they have made a realistic assessment of their water needs and their legal positions, and they have been willing to acknowledge the legitimacy of the other side's needs and assertions.

4. Specific process to resolve federal reserved water rights issues:

In Utah, federal reserved water rights issues are ultimately finalized through the general adjudication procedures. Ultimately, settlements that are negotiated will be integrated into the adjudication. There are no statutory procedures specifically directed at federal reserved water rights. The general adjudication process applies to all types of water rights, so there is no specific statutory process for federal reserved water rights.

5. Processes for resolving federal reserved water rights questions:

In Utah, the success of the negotiations has not been due so much to a specific process as to a general approach. For non-tribal federal reserved water rights, the key elements have been a willingness on the part of both sides to take a realistic approach to the quantity of water necessary for federal use. In the Zion National Park Water Rights Settlement Agreement, for example, the federal government agreed to subordinate its in-stream flow claims to all private water rights with priorities before January 1, 1996. This could be done, in part, because the parties recognized that the earliest priority water rights in the basin were downstream from the Park, amounting to a defacto instream water supply for the Park because the water had to flow through the Park to reach the early-priority water users. The subordination provision, which likely would not have been attained through litigation, made the Agreement much less threatening to the private water users. In addition, some of the water rights claimed by the National Park Service were based on the state appropriations process. As part of the settlement, the private water users were willing to give up a reservoir site upstream from the Park in return for a land exchange by which they acquired certain BLM lands for construction of a reservoir downstream from the Park. In summary, the process was a realistic assessment of the needs and legal positions of all the parties, as a starting point for compromise and cooperation–with significant input from technical and policy people on both sides in anticipation of attorney involvement. Perhaps the most important element was a desire to settle the issues sooner rather than later, and to do it through cooperation and settlement rather than litigation. The parties anticipate more successful negotiations.

6. Aspects that need improvement, and lessons for other states:

Each negotiation is unique, so it is difficult to generalize. If there is a lesson, it is that much can be accomplished through honest negotiations. It should be noted that the negotiations with the Shivwits band have been much more difficult because of the number of federal agencies involved and because of the peculiar relationship between the tribes and the Department of Justice.

7. Copy of report?

Yes

Norman Johnson
Office of the Utah Attorney General
1594 West North Temple #300
Salt Lake City, UT 84116

WYOMING

1. Please provide a brief description of your state's way of handling water rights disputes. Do you rely primarily on administrative processes or on litigation? If litigation, do you proceed through general adjudication cases or through individual actions involving specific claims?

Wyoming has permitting process. State Engineer issues permits and once it has been put to beneficial use it can be adjudicated by the Board of Control. Primarily administrative in nature.

Wyoming does have a general adjudication statute, 1-37-106. There has been one general adjudication on going in Water Division 3, Big Horn River General Adjudication started in 1977. This is the only general stream adjudication to date and has involved both tribal and federal reserved water rights (BLM, Forest Service, and a fraction of Yellowstone National Park). The adjudication was divided into 3 phases: Phase I dealt with tribal reserved water rights and has been finalized and quantified; Phase II involved the federal reserved water rights and resulted in stipulated settlement agreement and an interlocutory decree; Phase III is ongoing and involves individual and private water claims. The special master determined that the adjudication should be divided into three phases.

2. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights for Indian reservations in or near your state? If so, please describe the general system used to resolve these issues (or, if these issues are still unresolved, what processes are in use).

Although there were efforts to reach a negotiated settlement of the reserved right claims for the Wind River Indian Reservation (Phase I of the general adjudication), those claims were resolved through litigation; the non-Indian federal reserved right claims (Phase II) were resolved through settlement negotiations.

3. Has your state been involved in negotiations or litigation concerning the existence or extent of federal reserved water rights not related to tribal issues (national parks, national forests, military reservations)? If so please describe how these have been or are being resolved.

The non-Indian federal reserved right claims in the Big Horn River General Stream Adjudication (Phase II) were resolved through settlement negotiations. A stipulated settlement agreement was adopted by the court as a partial interlocutory decree.

4. Do you have any specific process used to resolve federal reserved water rights issues, different from the process used to determine other water rights? If so, is this process statutory? If so, please attach a copy of your statute. If the process is non-statutory, describe how it evolved and who is involved.

The process for resolution of federal reserved water rights issues has been the general adjudication process.

5. From your experience, are there processes which have worked well in resolving federal reserved water rights questions, processes you would recommend to other states? Describe.

Litigation of reserved water rights is time consuming and expensive process; every effort should be made to resolve these issues through settlement negotiations.

6. Are there aspects of your process which need improvement, or which impede successful negotiations of federal reserved water right questions? Are there lessons other states might learn from your experience? Explain.

No.

7. Would you like a copy of our report when completed? If so, list below the name and address it should be mailed to.

Jcaton@state.wy.us

MONTANA

WATER COMPACTS

State of Montana
Department of Natural Resources and Conservation

Reserved Water Rights Compact Commission

2001

Faye Bergan
Montana Reserved Water
Rights Compact Commission

MONTANA RESERVED WATER RIGHT COMPACT COMMISSION

A. Montana Reserved Water Right Compact Commission.

1. Created by statute in 1979 as part of the ongoing state-wide adjudication. Mont Code Ann. §§ 2-15-212 and 85-2-701(1).
2. Commission negotiates on behalf of the Governor. Mont Code Ann. §§ 2-15-121(1) and 85-2-701(2).
3. Statutorily directed to conclude compacts "for the equitable division and apportionment of waters between the state and its people and the several Indian tribes" and the federal government. Mont Code Ann. §§ 85-2-702 and 704.
4. Nine Commission members. Membership must consist of four legislators, four gubernatorial designees, and one Attorney General designee. Mont Code Ann. § 2-15-212(2). Four year terms. Mont Code Ann. § 2-15-212(4).
5. Commission sunset date: July 1, 2005 (recently extended from July 1, 1999). Mont Code Ann. § 85-2-217.
6. Government-to-Government negotiations. State of Montana Proclamation (March 10, 1993).
7. Bi-annual reports to the Montana Water Court on status of negotiations. Mont Code Ann. § 85-2-705.

B. Process of Negotiations

1. While negotiations are being pursued, filing of claims and all proceedings to generally adjudicated are suspended. Mont Code Ann. § 85-2-217.
2. Initiation of negotiations. Mont Code Ann. § 85-2-702.
3. Termination of negotiations. Mont Code Ann. §§ 85-2-217 and 704.
4. Priority of negotiations. Mont Code Ann. § 85-2-701(2).
5. Approval of compact by Compact Commission. Mont Code Ann. § 85-2-702(2).
6. Ratification of compact by Montana legislature. Mont Code Ann. § 85-2-702(2).
7. Ratification of compact by affected Tribal governing body. Mont Code Ann. § 85-2-702(2).
8. Approval by the appropriate federal authority. Mont Code Ann. § 85-2-702(2). Usually, Department of the Interior and the Department of Justice.
9. Congressional approval for Tribal compact.
10. Copies of compact are filed with Montana Secretary of State, U.S. State

Department, and the Tribal governing body. Mont Code Ann. § 85-2-702(2).

11. Montana Attorney General's office files the ratified and approved compact with the Montana Water Court. Mont Code Ann. § 85-2-702(3). Commission prepares staff report to describe negotiations and support compact.
12. The Water Court must include the compact in a ~~temporary preliminary or~~ preliminary decree, and unless an objection to the compact is sustained, the terms of the compact must be included in the final decree without alteration. Mont Code Ann. § 85-2-702(3). The Court may not alter or amend any of the terms of a compact except with the prior written consent of the parties in accordance with applicable law. Mont Code Ann. § 85-2-234(2).
13. If the Water Court sustains an objection to a compact, it may declare the compact void. Mont Code Ann. § 85-2-233(~~8~~).
14. The Water Court has used a standard of review for compacts similar to approval of consent decrees. In the matter of the Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation Within the State of Montana in Basins 42A, 42B, 42C, 42KJ, & 43P, Cause No. WC-93-1 (August 3, 1995). The Water Court must be satisfied that the compact is at least fundamentally fair, adequate and reasonable, and conforms to applicable laws. Id. at 6 (citing, United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990), cert. denied sub nom. Makah Indian Tribe v. United States, ____ U.S. ___, 111 S.Ct. 2889, 115 L.Ed.2d 105 (1991)). In the absence of objections, a compact has a presumption of adequacy. Id. at 7.

C. Procedures Used by Compact Commission

1. Procedural Memorandums of Understanding.
    a. Tribes and Federal Negotiating Teams.
    b. Internally with Governor's Office, Attorney General, and other State agencies.
2. Negotiating Teams negotiate, with final full Commission approval.
3. Practical solutions.
4. Technical working groups and legal/technical working groups.
5. Exchange of information and joint gathering of information.
6. Extensive public involvement.
    a. Open meeting laws. Mont. Code Ann. § 2-2-203. All negotiating sessions open to the public.
    b. Extensive mailing lists.
    c. Public informational/comment meetings. Extensive work with affected water rights holders.
7. Shared costs.

(iii) no more than three board members may be professional persons in the fields of mental health treatment and developmental disabilities treatment.

(d) A member of the board may not be a full-time agent or employee of the department of public health and human services or a mental health facility affected by Title 53, chapter 20, part 1, and Title 53, chapter 21, part 1, except this prohibition does not affect any employee of a state college or university.

(e) Board members serve for 2-year terms. The terms are staggered so that one-half of the terms expire June 30 of each year.

(3) The mental disabilities board of visitors is attached to the governor for administrative purposes. It may employ staff for the purpose of carrying out its duties as set out in Title 53, chapter 20, part 1, and Title 53, chapter 21, part 1.

History: Ap. p. Sec. 30, Ch. 466, L. 1975; amd. Sec. 16, Ch. 546, L. 1977; Sec. 38-1330, R.C.M. 1947; Ap. p. Sec. 32, Ch. 466, L. 1975; amd. Sec. 18, Ch. 546, L. 1977; Sec. 38-1232, R.C.M. 1947; R.C.M. 1947, 38-1232(part), 38-1330(part); amd. Sec. 7, Ch. 262, L. 1991; amd. Sec. 21, Ch. 255, L. 1995; amd. Sec. 8, Ch. 546, L. 1995; amd. Sec. 1, Ch. 344, L. 2001.

Compiler's Comments

2001 Amendment: Chapter 344 in (2)(a) increased board membership from five to six persons and after "persons" substituted language requiring board to consist of persons possessing qualifications necessary to carry out responsibilities defined in 53-20-104 and 53-21-104 for former language that read: "representing but not limited to consumers, doctors of medicine, and the behavioral sciences, at least three of whom may not be professional persons and at least one of whom must be a representative of an organization concerned with the care and welfare of the mentally ill and one representative of an organization concerned with the care and welfare of the mentally retarded or persons with developmental disabilities"; inserted (2)(b) and (2)(c) outlining board member requirements; inserted (2)(e) providing that board members serve 2-year staggered terms; and made minor changes in style. Amendment effective October 1, 2001.

Cross-References

Mental Disabilities Board of Visitors — generally, Title 53, ch. 20, part 1.
Powers and duties, 53-20-104.

2-15-212. Reserved water rights compact commission. (1) There is created a reserved water rights compact commission. In negotiations, the commission is acting on behalf of the governor.

(2) Commissioners are appointed as follows:

(a) two members of the house of representatives appointed by the speaker, each from a different political party;

(b) two members of the senate appointed by the president, each from a different political party;

(c) four members designated by the governor; and

(d) one member designated by the attorney general.

(3) Legislative members of the commission are entitled to receive compensation and expenses as provided in 5-2-301 for each day actually spent on commission business. Other members are entitled to salary and expenses as state employees.

(4) The commission is attached to the department of natural resources and conservation for administrative purposes only, as prescribed in 2-15-121, unless inconsistent with the provisions of Title 85, chapter 2, part 7. A sufficient and appropriate staff must be assigned to serve the commission within the budget established by the legislature. The commission staff is a principal unit within the department, and the commission shall direct and assign the staff.

(5) Members are appointed for 4-year terms and may be reappointed. A legislative member position is vacant if the person no longer serves in the legislature. The position of a member appointed by the governor or attorney general is vacant if that person is elected to the legislature. A vacancy must be filled in the manner of the original appointment.

History: En. Sec. 27, Ch. 697, L. 1979; amd. Sec. 1, Ch. 784, L. 1991; amd. Sec. 4, Ch. 418, L. 1995.

Cross-References

General powers and duties, Title 85, ch. 2, part 7.
Report on status of negotiations of Commission, 85-2-705.

2-15-213. Flathead basin commission — membership — compensation. (1) There is a Flathead basin commission.

(2) The commission consists of 21 members selected as follows:

Citation
MT ST 3-7-101
MCA 3-7-101

Found Document

Rank 1 of 1

Database
MT-ST-ANN

TEXT

MONTANA CODE ANNOTATED
TITLE 3. JUDICIARY, COURTS
CHAPTER 7. WATER COURTS
PART 1. WATER DIVISIONS

Current through the 2001 Regular Session of the 57th Legislature, chapters 1 to 594 and includes Resolutions, HJR 1 to 44, HR1 and 2, SJR1 to 22 and SR1 to 25

3-7-101. Water divisions

To adjudicate existing water rights and to conduct hearings in cases certified under 85-2-309, water divisions are established as defined in 3-7- 102. A water division shall be presided over by a water judge.

CREDIT

History: En. Sec. 1, Ch. 697, L. 1979; amd. Sec. 1, Ch. 596, L. 1985.

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Compiler's Comments

1985 Amendment: In first sentence, after "water rights", inserted "and to conduct hearings in cases certified under 85-2-309".

Purpose: Subsection (1) of sec. 1, Ch. 697, L. 1979, provided: "[This act] amends the Montana Water Use Act to expedite and facilitate the adjudication of existing water rights."

Codification: Section 35, Ch. 697, L. 1979, provided: "(1) Sections 1 through 10 of this act are intended to be codified as an integral part of Title 3, and the provisions contained in Title 3 apply to this act.

(2) Sections 11 through 27 are intended to be codified as an integral part of Title 85, chapter 2, part 2, and the provisions contained in Title 85, chapter 2, apply to this act.

(3) If the provisions of this act are not codified as stated above, the code commissioner shall add to the MCA, if necessary, statutory language to convey the intent of this section."

Because of rearrangement of the new material, Ch. 697 is now codified in Title 3, ch. 7; Title 85, ch. 2, parts 2 and 7; and 2-15-212.

Severability: Section 36, Ch. 697, L. 1979, was a severability section.

Cross-References

Constitutional rights to water, Art. IX, sec. 3, Mont. Const.

Adjudication of water rights, Title 85, ch. 2, part 2.

MCA 3-7-101
MT ST 3-7-101
END OF DOCUMENT

Citation
MT ST 3-7-201
MCA 3-7-201

Found Document

Rank 1 of 1

Database
MT-ST-ANN

TEXT

MONTANA CODE ANNOTATED
TITLE 3. JUDICIARY, COURTS
CHAPTER 7. WATER COURTS
PART 2. WATER JUDGES

Current through the 2001 Regular Session of the 57th Legislature, chapters 1 to 594 and includes Resolutions, HJR 1 to 44, HR1 and 2, SJR1 to 22 and SR1 to 25

3-7-201. Designation of water judge

(1) A water judge shall be designated within 30 days after May 11, 1979, for each water division by a majority vote of a committee composed of the district judge from each single judge judicial district and the chief district judge from each multiple judge judicial district, wholly or partly within the division. Except as provided in subsection (2), a water judge must be a district judge or retired district judge of a judicial district wholly or partly within the water division.

(2) A district judge or retired district judge may sit as a water judge in more than one division if requested by the chief justice of the supreme court or the water judge of the division in which he is requested to sit.

(3) A water judge, when presiding over a water division, presides as district judge in and for each judicial district wholly or partly within the water division.

CREDIT

History: En. Sec. 1, Ch. 697, L. 1979; amd. Sec. 1, Ch. 80, L. 1981; amd. Sec. 1, Ch. 604, L. 1989.

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Compiler's Comments

1989 Amendment: In second sentence of (1), after "subsection (2)", deleted "and 3-7-213". Amendment effective April 21, 1989.

Saving Clause: Section 9, Ch. 604, L. 1989, was a saving clause.

Severability: Section 10, Ch. 604, L. 1989, was a severability clause.

Retroactive and Prospective Applicability: Section 11, Ch. 604, L. 1989,

provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act] [effective April 21, 1989].

(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] [effective April 21, 1989] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

1981 Amendment: In last sentence of (1) inserted "except as provided in subsection (2) and 3-7-213" and inserted "or retired district judge"; in (2) inserted "or retired district judge" and "if requested by the chief justice of the supreme court or the water judge of the division in which he is requested to sit".

MCA 3-7-201
MT ST 3-7-201
END OF DOCUMENT

Citation
MT ST 3-7-501
MCA 3-7-501

Found Document

Rank 1 of 1

Database
MT-ST-ANN

TEXT

MONTANA CODE ANNOTATED
TITLE 3. JUDICIARY, COURTS
CHAPTER 7. WATER COURTS
PART 5. JURISDICTION

Current through the 2001 Regular Session of the 57th Legislature, chapters 1 to 594 and includes Resolutions, HJR 1 to 44, HR1 and 2, SJR1 to 22 and SR1 to 25

3-7-501. Jurisdiction

(1) The jurisdiction of each judicial district concerning the determination and interpretation of cases certified to the court under 85-2-309 or of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly.

(2) A water judge may not preside over matters concerning the determination and interpretation of cases certified to the court under 85-2-309 or of existing water rights beyond the boundaries specified in 3-7-102 for the judge's division except as provided in 3-7-201.

(3) The water judge for each division shall exercise jurisdiction over all matters concerning cases certified to the court under 85-2-309 or concerning the determination and interpretation of existing water rights within the judge's division as specified in 3-7-102 that are considered filed in or transferred to a judicial district wholly or partly within the division.

(4) The determination and interpretation of existing water rights includes, without limitation, the adjudication of total or partial abandonment of existing water rights occurring at any time before the entry of the final decree.

CREDIT

History: En. Secs. 1, 6, Ch. 697, L. 1979; amd. Sec. 4, Ch. 80, L. 1981; amd. Sec. 4, Ch. 596, L. 1985; amd. Sec. 4, Ch. 604, L. 1989; amd. Sec. 1, Ch. 174, L. 1997.

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Compiler's Comments

1997 Amendment: Chapter 174 inserted (4) to include abandonment of existing

water rights in the final decree; and made minor changes in style. Amendment effective March 28, 1997.

Saving Clause: Section 7, Ch. 174, L. 1997, was a saving clause.

1989 Amendment: In (2), after "3-7-201", deleted "and 3-7-213". Amendment effective April 21, 1989.

Saving Clause: Section 9, Ch. 604, L. 1989, was a saving clause.

Severability: Section 10, Ch. 604, L. 1989, was a severability clause.

Retroactive and Prospective Applicability: Section 11, Ch. 604, L. 1989, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all temporary preliminary decrees and preliminary decrees that have been issued by the Montana water courts and prospectively to all decrees issued on or after [the effective date of this act] [effective April 21, 1989].

(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] [effective April 21, 1989] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

1985 Amendment: In each of the three subsections inserted "cases certified to the court under 85-2-309 or"; and made minor changes in phraseology.

1981 Amendment: At end of (2) added "except as provided in 3-7-201 and 3-7-213".

Case Notes

Jurisdiction of District Court to "Update" Old Water Rights Decree -- Statute Governing Complaints by Dissatisfied Users Inapplicable: Pursuant to a previous writ of supervisory control, a remand to the District Court, and findings entered by the Senior Water Master, the Supreme Court found that the Order Authorizing Updated Decree, entered by the judges of the Fourth Judicial District in January of 1989, was beyond the jurisdiction of the District Court. The order was intended to deal with the problem of a 1902 water rights decree by a District Court, in which the judge adjudicated 27 water rights on Carlton Creek, that had become so brittle with age and damaged by time that the decree could not be readily handled. In the process of updating and reissuing the 1902 order, the Supreme Court found that the Fourth Judicial District Judges had actually made a de facto adjudication of water rights in an overly appropriated drainage and that that adjudication had been undertaken without notice and hearing to the holders of certain of those water rights. Citing Mildenberger v. Galbraith, 249 M 161, 815 P2d 130 (1991), and Baker Ditch Co. v. District Court, 251 M 251, 824 P2d 260 (1992), the Supreme Court held that under 85-2- 234(6), it is within the sole jurisdiction of the Water Court to determine such things as priority dates, flow rates, place of use, and means of diversion with respect to a water right. The Supreme Court also held that the matters adjudicated by the decree were not within the scope of matters cognizable under 85-5-301 because that section concerns the correct administration of a water rights decree while the Updated Decree attempts to change the terms of the decree itself. For these reasons, the Supreme Court vacated the 1989 Updated Decree. State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

No Departmental Rulemaking Authority Regarding Water Claims -- Jurisdiction in Water Courts -- Rulemaking Reserved to Supreme Court: Legislation in 1979 placed the procedure for adjudication of water claims in the Water Courts and reserved the power of rulemaking with respect to pending judicial proceedings to the

Supreme Court. Lacking express legislative authority, neither the Board nor Department of Natural Resources and Conservation has any rulemaking authority with respect to procedures in the adjudication of water rights before the Water Courts, and the Montana Administrative Procedure Act does not supply such authority. Functions of the Department respecting water claims are limited to rendering assistance to the Water Judges as set out in 85-2-243. In re Dept. of Natural Resources and Conservation, 226 M 221, 740 P2d 1096, 44 St. Rep. 604 (1987).

Jurisdiction of Water Judge Beyond Boundaries of Water Division: The apparent purpose of 3-7-501(2) is to recognize the parochial nature of water usage and assure that Water Judges are conversant with the history of water usage when making water adjudications. The provisions of 3-7-213 (now repealed) must be interpreted in conjunction with the provisions of 3-7-501. A reading of the two sections together indicates that the intent of the Legislature was to provide that a District Judge, sitting as a Water Judge, could not serve beyond the boundaries of his division absent the showing required by 3-7-213 (now repealed). Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983), followed in Marks v. District Court, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989).

MCA 3-7-501
MT ST 3-7-501
END OF DOCUMENT

Cross-References
Water rights, Art. IX, sec. 3, Mont. Const.
Water Judges, Title 3, ch. 7, part 2.

85-2-215. Consolidation of matters. The water judge may consolidate all matters concerning the determination and interpretation of existing water rights within the water judge's division in any combination or groups of claims or matters for joint hearings or proceedings conducted by the water judge or water master in any location within the division. The water judge may make such consolidations as are necessary to administer the requirements of this part and part 7 in adjudicating claims of existing water rights.

History: En. Sec. 6, Ch. 697, L. 1979.

Cross-References
Water Courts, Title 3, ch. 7.

85-2-216. Venue for water rights determinations. All matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division unless witnesses have been sworn and testimony has been taken by a district court prior to the date of the Montana supreme court order as provided in 85-2-212.

History: En. Sec. 6, Ch. 697, L. 1979.

Cross-References
Water divisions, Title 3, ch. 7, part 1.
Water Courts — jurisdiction, Title 3, ch. 7, part 5.
Proper place of trial — venue, Title 25, ch. 2.

85-2-217. Suspension of adjudication. While negotiations for the conclusion of a compact under part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of those tribes and federal agencies that are negotiating are suspended. The obligation to file water rights claims for those federal non-Indian and Indian reserved rights is also suspended. This suspension is effective until July 1, 2005, as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, 2005, the suspension must terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies are subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their federal non-Indian and Indian reserved water rights are subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section.

History: En. Sec. 27, Ch. 697, L. 1979; amd. Sec. 4, Ch. 268, L. 1981; amd. Sec. 1, Ch. 667, L. 1985; amd. Sec. 1, Ch. 358, L. 1987; amd. Sec. 2, Ch. 784, L. 1991; amd. Sec. 1, Ch. 44, L. 1997; amd. Sec. 3, Ch. 497, L. 1997.

Cross-References
Jurisdiction on Indian lands, Title 2, ch. 1, part 3.
Reserved Water Rights Compact Commission, 2-15-212.

85-2-218. Process and criteria for designating priority basins or subbasins. (1) The water judges and the department, in performing their functions in the adjudication process, shall give priority to basins or subbasins designated each biennium by the legislature. Basins or subbasins must be designated according to the following criteria:

(a) recurring water shortages within the basin or subbasin have resulted in urgent water rights controversies that require adjudication to determine relative rights;

(b) federal or Indian reserved rights are nearing determination, either by compact or adjudication, thus making adjudication of other rights in the basin or subbasin important for timely issuance of preliminary or final decrees;

(c) the basin or subbasin's location would help ensure efficient use of department and water court resources; and

(d) the adjudication process in the basin or subbasin is nearing the issuance of a decree.

(2) The water judge may designate a basin for priority adjudication upon petition of 100 or more persons who have filed claims within the basin, or he may designate a subbasin for

Cross-References
Montana Major Facility Siting Act — certification proceedings, Title 75, ch. 20, part 2.

85-2-608. Certain changes of use allowed. Notwithstanding any provision of this part, the department may approve a change of purpose of use to agricultural, irrigation, domestic, and municipal uses if it determines that the change is not contrary to the policies and purposes of this part.

History: En. 89-8-110 by Sec. 8, Ch. 116, L. 1974; R.C.M. 1947, 89-8-110.

Cross-References
Changes in appropriation rights, 85-2-402.

Part 7
Indian and Federal Water Rights — Water Rights Within Indian Reservations

Part Cross-References
Indian lands recognized to be under federal jurisdiction, Art. I, Mont. Const.
Reserved Water Rights Compact Commission, 2-15-212.
Fort Peck-Montana Compact, Title 85, ch. 20, part 2.
Northern Cheyenne-Montana Compact, Title 85, ch. 20, part 3.

85-2-701. Legislative intent. (1) 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.

(2) To the maximum extent possible, the reserved water rights compact commission established under 2-15-212 should make the negotiation of water rights claimed by the federal government or Indian tribes in or affecting the basins identified by 85-2-218 its highest priority. In negotiations, the commission is acting on behalf of the governor.

History: En. Sec. 27, Ch. 697, L. 1979; amd. Sec. 9, Ch. 651, L. 1987; amd. Sec. 466, Ch. 418, L. 1995; amd. Sec. 298, Ch. 42, L. 1997.

Cross-References
Reserved Water Rights Compact Commission, 2-15-212.
Policy considerations, 85-1-101.
Negotiations with other states by Department, 85-1-223.
Declaration of policy and purpose, 85-2-101.
Statement of claim for federal reserved water rights, 85-2-224.
Final decree, 85-2-234.

85-2-702. Negotiation with Indian tribes. (1) The reserved water rights compact commission, created by 2-15-212, may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under 85-2-701. Compact proceedings must be commenced by the commission. The commission shall serve by certified mail directed to the governing body of each tribe a written request for the initiation of negotiations under this part and a request for the designation of an authorized representative of the tribe to conduct compact negotiations. Compact negotiations commence upon receipt of the written designation from the governing body of a tribe.

(2) When the compact commission and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The compact is effective and binding upon all parties upon ratification by the legislature of Montana and any affected tribal governing body, and approval by the appropriate federal authority.

(3) Upon its ratification by the Montana legislature and the tribe, the terms of a compact must be included in the preliminary decree as provided by 85-2-231, and unless an objection to,

the compact is sustained under 85-2-233, the terms of the compact must be included in the final decree without alteration. However, if approval of the state legislature and the tribe has not been accomplished by July 1, 2005, all Indian claims for reserved water rights that have not been resolved by a compact must be filed with the department within 6 months. These new filings must be used in the formulation of the preliminary decree and must be given treatment similar to that given to all other filings.

History: En. Sec. 27, Ch. 697, L. 1979; amd. Sec. 8, Ch. 268, L. 1981; amd. Sec. 6, Ch. 667, L. 1985; amd. Sec. 2, Ch. 358, L. 1987; amd. Sec. 3, Ch. 784, L. 1991; amd. Sec. 2, Ch. 44, L. 1997.

Cross-References

Jurisdiction on Indian lands, Title 2, ch. 1, part 3.

85-2-703. Negotiation with federal government. The compact commission may also enter into separate negotiations with the federal government for the conclusion of compacts concerning the equitable division and apportionment of water between the state and its people and the federal government claiming non-Indian reserved waters within the state. The terms and conditions of such negotiations shall be the same as provided in this section for negotiations with Indian tribes.

History: En. Sec. 27, Ch. 697, L. 1979.

Cross-References

Negotiations with other states by Department, 85-1-223.

85-2-704. Termination of negotiations. (1) The commission or any negotiating tribe or federal agency may terminate negotiations by providing notice to all parties 30 days in advance of the termination date. On the termination date, the suspension of the application of part 2 provided for in 85-2-217 shall also terminate. The tribe or federal agency shall file all of its claims for reserved rights within 6 months of the termination of negotiations.

(2) Once negotiations have been terminated pursuant to subsection (1), they may be reopened only by mutual agreement of the parties.

History: En. Sec. 27, Ch. 697, L. 1979; amd. Sec. 9, Ch. 268, L. 1981; amd. Sec. 7, Ch. 667, L. 1985.

85-2-705. Status reports to chief water judge. (1) The Montana reserved water rights compact commission must submit to the chief water judge, appointed pursuant to 3-7-221, a report on the status of its negotiations on July 1, 1985, and every 6 months thereafter.

(2) Each report must state which Indian tribes and federal agencies are engaged in negotiations, whether any negotiations with Indian tribes or federal agencies have been terminated, and the progress of negotiations on a tribe-by-tribe and agency-by-agency basis. The report must be made available to the public.

History: En. Sec. 8, Ch. 667, L. 1985.

85-2-706. Renumbered 85-20-401 by Code Commissioner, 1994.

85-2-707. Renumbered 85-20-402 by Code Commissioner, 1994.

85-2-708. Water administration interim agreements within Indian reservations. (1) Because it appears to be to the common advantage of the state and Indian tribes to cooperate in matters involving the permitting and use of water within the exterior boundaries of an Indian reservation prior to the final adjudication of Indian reserved water rights and because the state does not intend by enactment of this section to limit, expand, alter, or waive state jurisdiction to administer water rights within the exterior boundaries of an Indian reservation, pursuant to the requirements of Title 18, chapter 11, the department may negotiate and conclude an interim agreement with the tribal government of any Indian tribe in Montana prior to final adjudication of Indian reserved water rights for the purpose of implementing a water administration plan and a permitting process for the issuance of water rights and changes in water right uses within the exterior boundaries of an Indian reservation.

(2) An agreement entered into pursuant to subsection (1) must:

(a) provide for the retention of exclusive authority by the state to issue permits to applicants who are not members of the tribe and to issue change of use authorizations;

(b) provide that any permits must be issued in accordance with the criteria established by state law; and

(c) provide that permits may be only for new uses with a date of priority in compliance with state law.

(3) Prior to concluding any agreement under this section, the department shall hold public meetings, after proper public notice of the meetings has been given and the proposed agreement has been made available for public review, to afford the public an opportunity to comment on the contents of the agreement.

History: En. Sec. 19, Ch. 497, L. 1997.

Part 8
Diversions From the Yellowstone River Basin

85-2-801. Definitions. Unless the context requires otherwise, in this part the following definitions apply:

(1) "Basin" means the Yellowstone River basin.

(2) "Compact" means the Yellowstone River Compact provided for in 85-20-101.

History: En. Sec. 1, Ch. 581, L. 1981.

85-2-802. Authority to approve diversions. The department may consent on behalf of the state of Montana to diversions of water from the basin pursuant to Article X of the compact, including diversions of water allocated under the terms of the compact to the other signatory states of Wyoming and North Dakota.

History: En. Sec. 2, Ch. 581, L. 1981.

85-2-803. Legislative review. (1) A diversion of water from the basin pursuant to Article X of the compact consented to by the department under the provisions of this part may not be made until one of the following occurs, whichever is later:

(a) the legislature ratifies the first determination of the department to consent to a diversion of water from the basin pursuant to Article X of the compact; or

(b) July 1, 1983.

(2) A decision by the department to disapprove a diversion of water is not subject to legislative approval.

History: En. Sec. 3, Ch. 581, L. 1981.

85-2-804. Application — notice — objections — hearing. (1) Any appropriator proposing to divert from the basin water allocated to Montana under the terms of the compact or divert from the basin unallocated compact water within Montana shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the diversion and ultimate use of the water in Montana is for a beneficial use of water;

(b) the diversion and ultimate use of water will not adversely affect the water rights of other persons;

(c) the proposed means of diversion, construction, and operation are adequate;

(d) the diversion and ultimate use will not interfere unreasonably with other planned uses or developments for which a water right has been established or a permit has been issued or for which water has been reserved;

(e) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states;

(f) the diversion and ultimate use of the water are in the public interest of Montana; and

(g) the applicant intends to comply with the laws of the signatory states to the compact.

(2) Any appropriator proposing to divert from the basin water allocated to North Dakota or Wyoming under the terms of the compact or divert from the basin unallocated compact water within North Dakota or Wyoming shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the proposed means of diversion, construction, and operation are adequate;

(b) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states; and

(c) the applicant intends to comply with the compact.

2001 OREGON REVISED STATUTES
TITLE 45. WATER RESOURCES: IRRIGATION, DRAINAGE, FLOOD CONTROL, RECLAMATION
CHAPTER 539. DETERMINATION OF WATER RIGHTS INITIATED BEFORE FEBRUARY 24, 1909; DETERMINATION OF WATER RIGHTS OF FEDERALLY RECOGNIZED INDIAN TRIBES. WATER RIGHTS BEFORE 1909
WATER RIGHTS OF FEDERALLY RECOGNIZED INDIAN TRIBES

Current through End of 2001 Reg. Sess. and 2001 Cumulative Supp.

539.300. Legislative findings.

The Legislative Assembly of the State of Oregon finds it is desirable to provide a procedure for conducting negotiations to determine the water rights of any federally recognized Indian tribe that may have a federal reserved water right claim in Oregon.

(1987 c. 81 § 2; 1993 c. 67 § 1)

O. R. S. § **539.300**

OR ST § **539.300**

END OF DOCUMENT

2001 OREGON REVISED STATUTES
TITLE 45. WATER RESOURCES: IRRIGATION, DRAINAGE, FLOOD CONTROL, RECLAMATION
CHAPTER 539. DETERMINATION OF WATER RIGHTS INITIATED BEFORE FEBRUARY 24, 1909; DETERMINATION OF WATER RIGHTS OF FEDERALLY RECOGNIZED INDIAN TRIBES. WATER RIGHTS BEFORE 1909
WATER RIGHTS OF FEDERALLY RECOGNIZED INDIAN TRIBES

Current through End of 2001 Reg. Sess. and 2001 Cumulative Supp.

539.310. Negotiation for water rights.

(1) The Water Resources Director may negotiate with representatives of any federally recognized Indian tribe that may have a federal reserved water right claim in Oregon and representatives of the federal government as trustee for the federally recognized Indian tribe to define the scope and attributes of rights to water claimed by the federally recognized Indian tribe to satisfy tribal rights under treaty between the United States and the tribes of Oregon. All negotiations in which the director participates under this section shall be open to the public.

(2) During negotiations conducted under subsection (1) of this section, the director shall:

(a) Provide public notice of the negotiations;

(b) Allow for public input through the director; and

(c) Provide regular reports on the progress of the negotiations to interested members of the public.

(1987 c. 81 § 3; 1993 c. 67 § 2)

O. R. S. § **539.310**

OR ST § **539.310**

END OF DOCUMENT

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WATER RIGHTS OF FEDERALLY RECOGNIZED INDIAN TRIBES

Current through End of 2001 Reg. Sess. and 2001 Cumulative Supp.

539.320. Agreement; submission to court.

When the Water Resources Director and the representatives of any federally recognized Indian tribe that may have a federal reserved water right claim in Oregon and the federal government have completed an agreement, the Water Resources Director shall submit an original copy of the agreement to the appropriate court. The copy shall be signed by the Water Resources Director on behalf of the State of Oregon and by authorized representatives of the Indian tribe and the federal government as trustee for the Indian tribe.

(1987 c. 81 § 4; 1993 c. 67 § 3)

O. R. S. § **539.320**

OR ST § **539.320**

END OF DOCUMENT

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Current through End of 2001 Reg. Sess. and 2001 Cumulative Supp.

539.330. Notice to persons affected by agreement.

(1) Upon filing of the agreement with the appropriate court under ORS 539.320, the Water Resources Director shall notify owners of water right certificates or permits that may be affected by the agreement:

(a) That the agreement has been filed with the court; and

(b) Of the time and manner specified by the court for filing an exception to the agreement.

(2) Unless notice by registered mail is required by the court, the notice required under subsection (1) of this section may be given by:

(a) Publication; or

(b) Any other method the director considers necessary.

(1987 c. 81 § 5)

O. R. S. § 539.330

OR ST § 539.330

END OF DOCUMENT

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WATER RIGHTS OF FEDERALLY RECOGNIZED INDIAN TRIBES

Current through End of 2001 Reg. Sess. and 2001 Cumulative Supp.

539.340. Court decree; effective date of agreement; remand.

(1) An agreement negotiated under ORS 539.310 to 539.330 shall not be effective unless and until incorporated in a final court decree, after the court has provided an opportunity for an owner of a water right certificate or permit that may be affected by the agreement or for a claimant in an adjudication that may be affected by the agreement to submit an exception to the agreement.

(2) If the court does not sustain an exception, the court shall issue a final decree incorporating the agreement as submitted without alteration.

(3) If the court sustains an exception to the agreement, the court shall remand the agreement to the Water Resources Director for further negotiation according to the provisions of ORS 539.300 to 539.350, if desired by the parties to the agreement.

(1987 c. 81 § 6; 1997 c. 708 § 1)

O. R. S. § 539.340

OR ST § 539.340

END OF DOCUMENT

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Current through End of 2001 Reg. Sess. and 2001 Cumulative Supp.

539.350. Procedures after remand of agreement.

Within 180 days after the court remands the agreement under ORS 539.340, the Water Resources Director shall file with the court:

(1) An amended agreement complying with ORS 539.320, which shall be subject to the procedure specified by ORS 539.330;

(2) A motion to dismiss the proceedings, which shall be granted by the court; or

(3) A stipulated motion for a continuance for a period not to exceed 180 days, within which period the parties shall submit to the court an amended agreement, a motion to dismiss or a motion for further continuance.

(1987 c. 81 § 7)

O. R. S. § 539.350

OR ST § 539.350

END OF DOCUMENT

THE MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

1625 11th Avenue, Helena, Montana 59620-1601 (406) 444-6841 Susan Cottingham, Program Manager
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Montana's Reserved Water Rights Compact Commission (RWRCC) was Established by the Montana Legislature in 1979 as part of the state-wide general stream adjudication process (§85-2-701, MCA).

The Compact Commission is composed of nine members. Four members are appointed by the Governor. Gene Etchart, Jack Salmond, Bob Thoft, and Tara DePuy are presently serving in that capacity. Two members are appointed by the President of the Senate. They are Senator Bill Tash and Senator Bea McCarthy. Two members are appointed by the Speaker of the House of Representatives. They are Representative Matt McCann and Representative Cindy Younkin. One member is appointed by the Attorney General; he is Chris Tweeten. Mr. Tweeten currently serves as chairman of the Commission. Legal and historical research and technical analyses are prepared for the Commission by a multi-disciplinary staff of eleven professional and technical members which includes a program manager, two attorneys, a historical researcher, an agricultural engineer, two hydrologists, a soils scientist, a digital geographer, and two administrative staff.

∇ FEDERAL RESERVED WATER RIGHTS

The Commission is authorized to negotiate settlements with federal agencies and Indian tribes that claim federal reserved water rights within the State. A federal reserved water right is a right to use water that is implied from an act of Congress, a treaty, or an executive order establishing a tribal or federal reservation. The amount of water to which the reservation is entitled depends on the purpose for which the land was reserved. In Montana, reserved water rights have been claimed for seven Indian reservations, for allotments for the Turtle Mountain Chippewa Tribe, for national parks, forests, and wildlife refuges, and for federally designated wild and scenic rivers.

The claims of the tribes and the federal agencies are suspended from adjudication in the Montana Water Court while they are being negotiated by the Compact Commission. Settlements negotiated by the Commission on behalf of the State are ratified by the Montana Legislature and the Tribal Councils and approved by the appropriate federal authorities. In some instances, approval by the U.S. Departments of Justice and the Interior will be sufficient. In other cases, where federal authorization or federal appropriations are needed to implement provisions of the settlement, congressional approval will be required.

By statute, the Legislature has prioritized the adjudication of water rights in the Milk River basin. There are three Indian reservations in that basin, the Fort Belknap, Rocky Boy's and Blackfeet Reservations, as well as two wildlife refuges managed by the U.S. Fish and Wildlife Service.

∇ PUBLIC INVOLVEMENT

Citizen participation is an essential element of each settlement negotiation and insures that the Commission's deliberations on behalf of the State address the concerns of the public and incorporate local solutions to water use problems. During these negotiations, public meetings are held during the initial stages of negotiations and again when negotiations are nearing completion.

COMPACTS NEGOTIATED BY THE COMMISSION

Fort Belknap-Gros Ventre and Assiniboine
April 2001 §85-20-1001, MCA
Fort Peck – Assiniboine and Sioux Tribes
May 1985 §85-20-201, MCA
Northern Cheyenne Tribe
September 1992 §85-20-301, MCA
U.S. National Park Service
Jan. 1994, May 1993 §85-20-401, MCA
Yellowstone National Park
Glacier National Park
Big Hole National Battlefield
Little Bighorn Battlefield National Monument
Bighorn Canyon National Recreation Area
U.S. Bureau of Land Management
September 1997 §85-20-501, MCA
Upper Missouri National Wild and Scenic River
Bear Trap Canyon Public Recreation Site
Rocky Boy's Reservation – Chippewa Cree Tribe
April 1997 §85-20-601, MCA
November 1999 PL 106-163
U.S. Fish and Wildlife Service
July 1997 §85-20-701, MCA
Black Coulee National Wildlife Refuge
Benton Lake National Wildlife Refuge
U.S. Fish and Wildlife Service (FWS)
Red Rock Lakes National Wildlife Refuge
April 1999 §85-20-801, MCA
Crow Tribe
June 1999 §85-20-901, MCA
Special Legislative Session
(effective upon Congressional Approval)

Water Right Compacts In Montana

Written by: Faye Bergan, *Legal Counsel for the Montana Reserved Water Rights Compact Commission*

Adjudication of Indian and Federal Reserved Water Rights

Montana is currently involved in a state-wide water adjudication that, as in most western states, encompasses extensive Indian and federal reserved water right claims. When the federal government establishes a tribal or federal reservation through an act of Congress, a treaty, or an executive order, it impliedly reserves enough water to accomplish the purposes of the reservation. The date of the reservation determines the priority date of the water right and federal law defines the right. Thus, Indian and federal reserved water rights, when developed, could displace existing state water right holders with later priority dates. Defining the nature and scope of Indian and federal reserved water rights through settlement or litigation is an important part of any comprehensive water adjudication process.

Seven Indian reservations, as well as federal lands managed by the National Park Service, the Forest Service, the Bureau of Land Management, and the Fish and Wildlife Service are located in Montana. In 1979, the state legislature created the Montana Reserved Water Rights Compact Commission (Compact Commission) to negotiate, on behalf of the Governor, with Indian tribes and federal agencies claiming reserved water rights in Montana. Established as an alternative to litigation, the statute calls on the Compact Commission to conclude compacts "for the equitable division and apportionment of waters between the state and its people and the several Indian tribes" and the federal government. (Mont. Code Ann. § 85-2-702.)

Montana has enjoyed remarkable success in resolving both Indian and federal reserved water right claims through settlement negotiations. To date, the State has reached settlements with the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Northern Cheyenne Tribe, and the Chippewa Cree Tribe of the Rocky Boy's Reservation. Settlements have also been reached with the National Park Service, the Bureau of Land Management, and the Fish and Wildlife Service. Discussions are on-going with the remaining tribes, the Forest Service, and the Fish and Wildlife Service for four remaining units in the federal system.

Examples of Practical Solutions for Settling Reserved Water Rights

Each compact describes the specific water right, provides for the administration of water rights, and confers some protection for state water right holders. In addition, negotiations allow the parties flexibility to explore a wide range of alternatives precluded by litigation and to incorporate unique features to meet specific needs or problems in each compact. Several of the practical solutions contained in the compacts include:

• **Dam Rehabilitation and Enlargement.** The Northern Cheyenne Compact provides for the rehabilitation and enlargement of the Tongue River Dam, owned and operated by the State. Due to severe problems with the spillway, potential dam failure threatened several communities on and off the Northern Cheyenne Reservation located downstream. As a result, the State has operated the dam well below capacity. With federal and state funding, the State is repairing and enlarging the dam. The increased stored water, used to satisfy part of the tribal water right, provides the Tribe with a dependable water supply, protects existing state water users, and fixes a long-time problem with a high-hazard dam. Construction on the dam started last year.

• **Water Exchanges.** On fully- or over-appropriated streams, future water withdrawals and development for tribal needs would severely affect other state water right holders, and, in some cases, other tribes. Each tribal compact exchanges a portion of what the tribe could have claimed in water-short drainages for off-reservation stored water or water from larger water sources. This exchanged water comprises part of the tribal water right and may be marketed.

• **Water Augmentation.** In addition to water augmentation from small storage projects, compacts provide a means to increase water availability through better coordination of water projects and increased efficiency. As part of the Rocky Boy's Compact, a state development grant will be used to improve diversion and conveyance structures to allow for continued water use at lower stream flows after tribal rights are developed. Non-Indian senior water users will have access to existing off-reservation stored water in times of shortage, instead of asserting priority over the Tribe. The state grant program provided funding for purchase of this contract water.

• **Compact Boards.** Compacts involving Indian reserved water rights provide for tribal administration of tribal water rights and state administration of state-based water rights. Should controversies arise between tribal and state water users, the compacts provide for compact boards, which consist of three members: one appointed by the tribe, one by the state, and a third selected by agreement of the other two members. Compact boards have jurisdiction to issue orders enforceable in tribal, state, or federal court. Appeals from a compact board decision are made on the record to any court of competent jurisdiction.

• **Controlled Groundwater Areas.** Negotiation enables the parties to consider more comprehensive management of a shared resource. For example, concern had been expressed that groundwater withdrawals outside of Yellowstone Park (the northern boundary lying within Montana) would affect hydrothermal features within the Park. Although scientific evidence was unclear, Congressional action creating a buffer zone around the Park had been considered. Ultimately, the National Park Service and the State created a controlled groundwater area outside the Park boundary, which the parties incorporated into the Compact. Although the Compact does not recognize a reserved water right outside of the Park, it monitors groundwater use and restricts thermal groundwater use to prevent impact to the hydrothermal system within the Park. The State manages the controlled groundwater area and the National Park Service pays for monitoring and testing.

• **Basin Closure.** Some agreements providing for water management, subordination to existing water rights, etc., require maintenance of the status quo at the time of agreement. Therefore, compacts often include provisions that close specific drainages to new water uses. Most basin closures exclude certain types of future water uses, such as domestic wells.

• **Reverse Approach.** The "reverse approach" quantifies existing and future state water use and can benefit instream flows. This approach either (1) recognizes a reserved water right to the entire flow of the stream but subordinates that right to all existing and some level of future use under state law, or (2) defines the reserved water right as all water remaining in the stream after certain levels of water development. After levels of future use identified in a compact are reached, the basin is closed to new appropriations. This method eliminates the need for actual quantification of the instream flow and prevents future enforcement controversies. The reverse approach can be applied to drainage basins of any size. The Bureau of Land Management Compact uses the reverse approach to define the instream flow reserved water right for the Upper Missouri Wild and Scenic River. The drainage basin above the Wild and Scenic River comprises over 41,000 square miles.

Montana's Negotiation Process

Part of the Compact Commission's success in negotiating settlements and concluding compacts can be attributed to the statutory settlement process. The Compact Commission, which represents Montana in government-to-government negotiations with the tribes and the federal government, consists of nine diverse members operating on a consensus basis: four appointed by the Governor, two Senate and two House members (each from a different political party), and one appointed by the Attorney General. All negotiating sessions and meetings are open to the public. The Compact Commission goes to great lengths to keep everyone informed and to elicit active public participation.

Under the statutory process, ongoing negotiations with the Compact Commission suspend filing requirements in the Water Court for Indian and federal reserved water right claims. The tribe, the United States, or the state can terminate negotiations at any time. If this occurs, the State Attorney General handles litigation commenced in the Water Court.

All agreements must be ratified by the state legislature, approved by the tribal council and/or submitted for tribal vote, and approved by the Departments of Interior and Justice. Most tribal compacts require Congressional approval (and appropriations). Finally, each compact is submitted to the Water Court for incorporation into decrees. This process is difficult and time-consuming. In fact, only the Northern Cheyenne Compact has been incorporated into a decree. However, negotiated settlements to resolve reserved water right claims allow for implementation of a range of practical solutions. Money goes to on-the-ground solutions rather than attorneys and expert witnesses as would be necessary in litigation. Most importantly, negotiations have helped forge positive, long-term relationships between the state and the tribes, and between Indian and non-Indian water users. ➤

For more information contact the Montana Reserved Water Rights Compact Commission at (406) 444-0527.

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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER AND LOWER MISSOURI RIVER DIVISIONS
SPECIAL FORT PECK COMPACT SUBBASIN
* * * * * * * * * * * * * * * * * * *

IN THE MATTER OF THE ADJUDICATION OF EXISTING AND RESERVED RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION WITHIN THE STATE OF MONTANA IN BASINS 40E, 40EJ, 40O, 40Q, 40R, & 40S	**CAUSE NO. WC-92-1**

MEMORANDUM OPINION

I. PROCEDURAL HISTORY

The Montana Reserved Water Rights Compact Commission was established in 1979 to negotiate agreements between the State, the United States, and Indian tribes for the federal and Indian reserved water rights in the State of Montana. Section 2-15-212, MCA. On April 10, 1985, the State and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (the "Compacting Parties") reached an agreement in accordance with § 85-2-702, MCA. The Fort Peck–Montana Compact ("the Compact") was subsequently ratified by the Montana Legislature, approved by the Governor of Montana, ratified by the Fort Peck Tribal Executive Board, and approved by the United States Departments of Justice and Interior.[1] The Compact is codified at

[1] The Compact was filed with the Secretary of State on April 30, 1985. Copies were then submitted on June 12, 1985, to Montana's Congressional Delegation, the Committee on Indian Affairs of the United States Senate, and the Committee on Interior and Insular Affairs of the United States House of Representatives.

§85-20-201, MCA. The State petitioned the Court for the commencement of special proceedings to review and approve the Compact.

On April 6, 1994, the Court entered its Findings of Fact, Conclusions of Law and Order granting the State's motion. The Court ordered the Compact incorporated into a preliminary decree for those basins located in and around the Reservation. Those basins are Big Muddy Creek (Basin 40R), Poplar River (Basin 40Q), the Missouri River below Fort Peck Dam (Basin 40S), Milk River below Whitewater Creek including Porcupine Creek (Basin 40O), Missouri River between Musselshell River and Fort Peck Dam (Basin 40E), and Missouri River between Bullwacker Creek and Musselshell River (Basin 40EJ), collectively referred to as the Special Fort Peck Compact Subbasin.

As authorized by § 85-2-218(1) and (3), the Court also designated the Special Fort Peck Compact Subbasin as a priority subbasin for the purposes of the special proceedings. As authorized by § 85-2-231(3), MCA, the Court designated all of the water right claims of the Assiniboine and Sioux Tribes, and the United States as the trustee for such Tribes, which were subject to adjudication under Title 85, Chapter 2, MCA (and recognized by the Compact), as a single class within the Special Fort Peck Compact Subbasin.

On April 6, 1994, a Notice of Entry of Fort Peck Compact Preliminary Decree and Notice of Availability was mailed to approximately 6200 persons claiming water rights within the Special Fork Peck Compact Subbasin and to other interested parties. Additionally, the Notice was published once a week for three consecutive weeks in twelve newspapers of general circulation covering the Special Fort Peck Compact Subbasin and the Upper and Lower Missouri River Divisions. A public meeting on the Compact, attended by approximately one hundred people, was held in Wolf Point, Montana on April 27, 1994.

Jeff Weimer, Gladys Connie Flygt, and Paul B. Tihista filed objections to the Compact. The State of Montana, joined by the Tribes and supported by the United States, moved to dismiss the objections, and the hearing on the motion was held on June 3, 1997. At the close of the hearing, the Court granted the State's Motion to Dismiss the Tihista objection. The Court denied the State's motions to dismiss the Weimer and Flygt objections, and set a final discovery schedule.

On February 9, 1998, the Tribes moved the Court for summary judgment dismissing the remaining objections and approving the Compact. The State of Montana and the United States filed supporting briefs. On February 10, 1998, the Objectors filed cross-motions for summary and partial summary judgment. The Tribes, the State of Montana, and the United States filed opposing briefs. The Court held a hearing on the motions on October 1, 1998. This Memorandum Opinion addresses the cross-motions for summary judgment on the objections to the Compact, and reviews and approves the Compact pursuant to the State's petition.

II. JURISDICTION

The Montana Water Court has jurisdiction to review the Compact under the authority granted by the McCarran Amendment of 1952 (43 U.S.C. § 666); §§ 85-2-231, 85-2-233 and 234, 85-2-701 and 702, MCA, and Article VII(B) of the Fort Peck - Montana Compact. *See also* Arizona v. San Carlos Apache Tribe , 463 U.S. 545, 564 (1983), *reh. denied* 464 U.S. 874 (1983), and State ex rel. Greely v. Confederated Salish & Kootenai Tribes ("Greely II"), 219 Mont. 76, 89, 712 P.2d 754 (1985).

III. ISSUES PRESENTED IN THE OBJECTIONS

As previously noted, after notice was provided in accordance with the law, three objections to the Compact were filed. The objection of Paul B. Tihista was dismissed for lack of standing. *See* Order of June 10, 1997 and Supplemental Order of August 10, 2001.

The two remaining Objectors argue the Compact should be declared void because certain provisions do not conform to federal law and violate established principles and limitations now part of the Indian Reserved Water Right Doctrine. Specifically, the Objectors argue in their briefs that the Compact is void because it:

1. quantifies the Tribal Water Right according to the Practicable Irrigable Acreage standard ("PIA"), which is inappropriate for this reservation;

2. recognizes instream water rights, which are not supported by federal law;

3. grants reserved rights in groundwater, which are not supported by federal law;

4. authorizes diversion of the Tribal Water Right from sources that are not appurtenant to the reservation, which is contrary to federal law;

5 authorizes use of the Tribal Water Right outside the boundaries of the reservation, which is contrary to federal law;

6 authorizes alienation of the Tribal Water Right without Congressional approval, which is contrary to federal law; and

7. violates the Equal Protection Clause of the United States Constitution, because Article IV(A)(2) irrationally discriminates between certain water users and certain watersheds.

In responding to the objections, the Tribes, the United States, and the State of Montana argue that the Objectors essentially have no standing to raise these issues.

IV. STANDARD OF REVIEW

A. The Montana Water Court's Standard of Review in deciding whether to approve a compact or declare it void

The Montana Water Court may only approve a compact or declare it void. Section 85-2-233, MCA. In determining whether a compact should be approved or declared void, the Court has concluded that a compact is closely analogous to a consent decree and should be reviewed under the

same or a similar standard. A consent decree is "essentially a settlement agreement subject to continued judicial policing." Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. Ohio 1983). It is not a decision on the merits or the achievement of the optimal outcome for all parties, but is the product of negotiation and compromise. *See* United States v. Armour & Co., 402 U.S. 673, 681-82, (1971).

Objector Weimer contends that the Court should not apply the "consent decree" standard of review in its consideration of this Compact because there are objectors to the Compact, and consent decrees are not binding on third parties. Objector Weimer asserts that the Court should instead treat the Compact as a statement of claim, like any other statement of claim in the adjudication.

A properly filed statement of claim constitutes prima facie proof its content. Section 85-2-227, MCA. Once an objection to the claim is filed, the objector then has the initial burden of producing evidence that contradicts and overcomes one or more elements of the prima facie claim. Memorandum Opinion, Water Court Case 40G-2, p. 13 (March 11, 1997).

Sections 85-2-221 and 85-2-224, MCA set forth the filing deadlines and requirements for statements of claim. The Compact is not technically a statement of claim pursuant to these statutes. The Compact is an agreement negotiated between governments. It was negotiated and reviewed in open, public forums and approved by the U.S. Departments of Justice and Interior, and by the State and Tribal executive and legislative authorities. A statement of claim does not receive such a rigorous review when it is filed. Therefore, the standard of review between a statement of claim and a Compact is different. However, even if the Court accepted Objector Weimer's contention and treated the Compact as a statement of claim, the result in approving the Compact would be the same, because Objectors did not present evidence sufficient to contradict and overcome the prima facie Compact.

Before approving a consent decree, a court must be satisfied that the settlement is at least fundamentally fair, adequate and reasonable, and because it is a form of judgment, a consent decree must conform to applicable laws. United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990), *cert. denied sub nom.* Makah Indian Tribe v. United States, 501 U.S. 1250, (1991). The purpose underlying this judicial review is not to ensure that the settlement is fair as between the negotiating parties or to give the negotiating parties more time, but to ensure that other unrepresented parties and the public interest are treated fairly by the settlement. United States. v. Oregon, 913 F.2d at 581; Davis v. City and County of San Francisco, 890 F.2d 1438, 1445 (9th Cir. Cal. 1989); SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. Cal. 1984); Collins v. Thompson, 679 F.2d 168, 172 (9th Cir. Wash. 1982); and Norman v. McKee, 431 F.2d 769, 774 (9th Cir. Cal. supra *cert. denied*, 401 U.S. 912 (1971). While the settlement must be in the public interest, it need not necessarily be in the public's *best* interest, if it is otherwise reasonable. SEC v. Randolph, *supra* at 529.

In Officers for Justice v. Civil Service Comm'n, the Ninth Circuit Court of Appeals nicely summarizes the extent and limitations inherent in this kind of review:

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be *limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.* Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators. (Citations omitted) Ultimately, the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.' *City of Detroit [v. Grinnell Corp.], 495 F.2d [448], 468 [2d Cir. N.Y. 1974)].*

688 F.2d 615, 624-625 (9th Cir. Cal. 1982), *cert denied*, Byrd v. Civil Service Commission, 459 U.S. 1217 (1983).[2] The Ninth Circuit further explained that:

> The district court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a government participant; and the reaction of the class members to the proposed settlement. (Citations omitted) This is by no means an exhaustive list of relevant considerations, nor have we attempted to identify the most significant factors. The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claims advanced, the types of relief sought, and the unique facts and circumstances presented by each individual case.

Officers of Justice, 688 F.2d 615 at 624.

The Ninth Circuit has suggested that once a court is satisfied that the decree was the product of good faith, arms-length negotiations, a negotiated decree should be *presumptively* valid and the objecting party then "has a heavy burden of demonstrating that the decree is unreasonable." United States v. Oregon, 913 F.2d at 581. The First Circuit similarly observed:

> This [deference] has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement. . . . Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sits at the table. That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance. United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. Mass. 1990).

The Court also agrees with the suggestion of the United States found at page 5 of its Response to Objector Jeff D. Weimer Motion for Summary Judgment brief that the Court's level of

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[2] *See also* United States v. Armour & Co., 402 U.S. 673, 681-682 (1971) and Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574 (1984).

inquiry into a Compact depends on whether Objectors can establish the Compact will result in material injury to their claimed rights. If the answer is no, then the Court should apply a "fundamentally fair, adequate, and reasonable and conforms to applicable law" test. If by a preponderance of the evidence, Objectors can demonstrate that their claimed right is materially injured by the Compact, the level of inquiry employed by the Court into the basis of the reserved water rights should be commensurate with the degree of injury.

B. The "Consent Decree" Standard of Review applies only to compact review, and the specific provisions of this Compact and this review have limited precedential value for reserved water rights litigated before the Water Court.

Consent decrees do not generally establish precedents for unrelated proceedings. See e.g. Davis v. N.Y.C. Housing Authority, 839 F. Supp. 215, 225 (1993); Kelly ex rel. Michigan DNRC v. FERC, 321 U.S. App. D.C. 34 (1996); Office of Consumer Counsel v. FERC, 783 F.2d 206, 235 (D.C. Cir. 1986). A proposed settlement agreement or consent decree is not to be judged against a hypothetical or speculative measure of what might (or might not) have been achieved by the negotiators. Officers for Justice v. Civil Serv. Comm'n, 688 F.2d at 625. The United States Supreme Court has stated:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation... [T]he parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. United States v. Armour & Co., 402 U.S. 673, 681-82, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971).

The Standard of Review set forth in Part A, above, only applies to the Court's review of this Compact, and similar consent decree compacts. The results achieved in this Compact are not necessarily the results that would have been reached had these reserved water right claims proceeded

through litigation on the merits.

This Compact is the unique negotiated agreement which defines the reserved water rights of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, its use, development, and administration. Every other compact which may be presented to this Court will in turn be unique and specific to the history of the reserved right, resource availability, and its own negotiation tone and process. The parties to this Compact, and the negotiators to compacts generally enjoy considerable freedom in reaching the compacted results, and may achieve results through the compact process that are more favorable to their interests than would be achieved through litigation. If other parties claiming reserved water rights proceed to litigation on the merits before the Montana Water Court, the Court will have to draw hard lines and resolve ambiguous legal precedent on many of the issues which are given a broad brush in this Compact review.

IV. DISCUSSION

A. Standing to Object

The Tribes, the United States, and the State of Montana argue that the Objectors essentially have no standing to object to the Compact because the likelihood of actual harm to the Objectors caused by the enforcement of the Compact is remote.

The standing to object to a claim in the general adjudication process in Montana during the 1994 Compact objection period was established by statute and rule. Section 85-2-233, MCA (1993) provides that:

> (1) *For good cause shown* a hearing shall be held before the water judge on any objection to a temporary preliminary decree or preliminary decree by:
>
> . . .

(iii) any person within the basin entitled to receive notice under 85-2-232(1)..."[3]

Rule 1.II(7) of the Montana Supreme Court Water Right Claim Examination Rules defines "good cause shown" to mean

> a written statement showing that one has a substantial reason for objecting, which means that the party has a property interest in land or water, or its use, that has been affected by the decree and that the objection is made in good faith, is not arbitrary, irrational, unreasonable or irrelevant in respect to the party objecting.

It is undisputed that Weimer and Flygt have claimed existing water rights within the Fort Peck Compact Subbasin.[4] Although their junior state-based water rights have not yet been finally adjudicated or actually affected by the enforcement of the Compact, the Court recognizes the *potential* for displacement or diminution of their rights in the future. The goal of Montana's statewide adjudication is to provide stability and certainty for water users by quantifying and adjudicating water right claims, including those of the Tribes, in a unified proceeding. Article I of the Compact states that one of the "basic purposes" of the Compact is "to settle existing disputes and *remove causes of future controversy* between the . . . Indians of the Fort Peck Reservation and other persons concerning waters of the Missouri River, its tributaries, and groundwater. . . ."

Given the Compact's stated purpose, the potential for future conflict, and the goal of the

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[3] Section 85-2-232(1) (1993) provides in relevant part that "the water judge shall serve by mail a notice of availability of the temporary preliminary decree or preliminary decree to *each person who has filed a claim of existing right within the decreed basin* . . . ."

[4] Flygt filed statement of claim 40EJ-W-202424-00 in Basin 40EJ (Missouri River between Bullwhacker Creek and Musselshell River) for the use of 160 miners inches of water (280 acre feet), for a reservoir and system of collection ditches, on an unnamed tributary to Dry Armelles Creek, which is tributary of the Missouri River well above Fort Peck Dam. The priority date claimed is 1942.

Weimer's predecessor-in-interest filed statement of claim 40E-W-122279-00 in Basin 40E (Missouri River between Musselshell River and Fort Peck Dam), for the use of 30 gallons per day per animal unit, for a small onstream reservoir designed to catch spring runoff, on an unnamed tributary of Seven Blackfoot Creek, which is tributary to the Missouri River well above Fort Peck Dam. Weimer's predecessor-in-interest was also issued Permit to Appropriate 40E-P-041261 in the same basin for the use of 8.0 acre feet per year, for another small onstream reservoir designed to catch spring runoff, on an unnamed tributary to Big Coulee Creek, which is also tributary to the Missouri well above Fort Peck Dam. The priority dates of these two claims are 1965 and 1982, respectively.

statewide adjudication, this Court concludes that for purposes of this review, the Objectors have sufficient standing to file objections to the Compact.

B. Validity of Compact

The Objectors have not claimed, nor does the Court conclude based on the evidence before it, that the Compact is the product of fraud, overreaching, or collusion. Therefore, the Water Court will focus the remainder of this Memorandum on whether the Compact, taken as a whole, is fair, adequate and reasonable to all concerned, including whether it conforms to existing federal law and policy, and whether summary judgment should be granted against Objectors.

C. Indian Reserved Water Rights in the Montana General Stream Adjudication

Indian reserved water rights were first recognized by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908), a case arising in the Milk River in northern Montana. The Winters Court held:

> The power of the Government to reserve the waters [of the Milk River] and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888 [treaty date], and it would be extreme to believe that within a year Congress destroyed the reservation and . . . took from [the Indians] the means of continuing their old habits, yet did not leave them the power to change to new ones.

207 U.S. 564, 577 (1908). In Cappaert v. United States, a more contemporary United States Supreme Court decision, Chief Justice Burger, writing the unanimous opinion, summarized the Reserved Water Rights Doctrine as follows:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

* * *

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

426 U.S. 128, 138-139 (1976). Although Cappaert involved federal reserved water rights for a national monument, Chief Justice Burger noted that the doctrine applies to Indian reservations and other federal enclaves and encompasses water rights in navigable and nonnavigable streams. Ibid.

Montana law has long acknowledged the existence of Indian reserved water rights and distinguished those rights from state appropriated water rights. In Greely II, the Montana Supreme Court recognized the distinctions and held that "[s]tate-created water rights are defined and governed by state law" and "Indian reserved water rights are created or recognized by federal treaty, federal statutes or executive order, and are governed by federal law." 219 Mont. at 89-90, 95.[5] In the absence of controlling federal authority, the Water Court is required to follow the directives of the Montana Supreme Court. Greely II, 219 Mont. at 99-100.

Whether by adjudication or by negotiation, determining the scope and extent of Indian reserved water rights has proved difficult at best. *See e.g.*, Greely II, 219 Mont. at 92; Ciotti, 278 Mont. at 60. As articulated by the United States Supreme Court, the Reserved Water Rights Doctrine is vague and open-ended and has been construed both broadly and narrowly by subsequent federal and state courts.[6] After nearly one hundred years of legislation, litigation, and policy-

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[5] *See also*, Confederated Salish & Kootenai Tribes v. Clinch ("Clinch"), 297 Mont. 448, 451-453, 992 P.2d 244 (1999); In re Application for Beneficial Water Use Permit ("Ciotti"), 278 Mont. 50, 56, 923 P.2d 973 (1985); and State ex rel. Greely v. Water Court ("Greely I"), 214 Mont. 143, 691 P.2d 833 (1985).

[6] For cases applying the doctrine broadly, *see e.g.* Colorado River Water Conservation District v. United States, 424 U.S. 808, 818 (1976); United States v. Ahtunum Irrigation Dist., 236 F.2d 321, 326 (9th Cir. 1956); Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908). For cases applying the doctrine narrowly, *see e.g.* Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979); United States v. New Mexico, 438 U.S. 696, 715 (1978); Cappaert v. United States, 426 U.S. 128 (1976); In re the General Adjudication of all rights to Use Water in the Big Horn River System ("Big Horn"), 753 P.2d 76 (Wyo 1988);

making, there are still no bright lines clearly and consistently delineating the Doctrine. Most of the legal issues inherent in the Doctrine remain unsettled and hotly debated and are now complicated by decades of distrust and competing policies.

Senate Bill 76 was passed in 1979 to expressly recognize Indian reserved water rights and incorporate them into the state-wide general adjudication. Greely I, 214 Mont. at 146.[7] To expedite and facilitate the difficult process of comprehensively and finally determining Indian reserved water rights in Montana, the legislature created a nine-member Montana Reserved Water Rights Compact Commission. The Commission has the authority to "negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts,"[8] the terms of which will ultimately be included in the preliminary and final State decrees pursuant to Montana law. This Compact is a product of that negotiation process.

D. The Authority of the Montana Legislature to Enter Reserved Water Rights Compacts

The Montana Legislature possesses all the powers of lawmaking inherent in any independent sovereignty and is limited only by the United States and Montana Constitutions. *See e.g.,* Hilger v. Moore, 56 Mont. 146, 163, 182 P. 477, 479 (1919), and State ex rel. Evans v. Stewart, 53 Mont. 18, 161 P. 309 (1916).

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and In re the General Adjudication of All Rights to Use Water in the Gila River System and Source ("Gila River III"), 989 P.2d 739 (1999). For cases distinguishing between Indian reserved water rights and other federal reserved water rights, *see e.g.,* Clinch, 297 Mont. 448, 992 P.2d 244 (1999); Greely II, 219 Mont. 76, 89-90, 712 P.2d 754 (1985). For cases that do not distinguish between Indian reserved water rights and other federal reserved water rights, *see e.g.,* Colorado River, at 811; United States v. District Court for Eagle County, 401 U.S. 520, 524 (1971); Cappaert v. United States, 426 U.S. at 138; and Arizona v. California, 373 U.S. 546, 601 (1963).

[7] Section 85-2-701, MCA (1979) sets forth the legislative intent as follows:

> **Legislative Intent.** 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. Therefore, it is the intent of the legislature that the attorney general's petition required in 85-2-211 include *all claimants of reserved Indian water rights* as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666. . .

[8] Section 23-15-212, MCA

Our government has long been known to be one of delegated, limited and enumerated powers. Kansas v. Colorado, 206 U.S. 46, 81-82 (1907), *citing* Martin v. Hunter's Lessee, 1 Wheat 304, 324 (1816).[9] Those powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Art. X, U.S. Constitution.[10] Although the history of the relationship between the Federal Government and the States in the reclamation of arid lands of the Western States is both long and involved, through it runs the consistent thread of purposeful and continued deference to state water law by Congress and, more recently, a blossoming sensitivity to the impact of the implied-reservation doctrine upon those who have obtained water rights under state law. California v. United States, 438 U.S. 645, 653 (1978) and United States v. New Mexico, 438 U.S 696, 699, 701, 702-705, 718 (1978).

In 1972 the people of Montana ratified a new constitution. The Montana Constitution provides in Article IX(3) as follows:

> **Water rights.** (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
>
> . . . .
>
> (3) 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.
>
> (4) The legislature shall provided for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

Pursuant to Art. IX, Section 3(4), Mont. Const. 1972, the legislature enacted the Montana Water Use Act of 1973. Title 85, Chapter 2 of the Montana Code Annotated. The Water Use Act governs the administration, control and regulation of water rights within the state of Montana.

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[9] It can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. Ibid.

[10] *See also* Kansas v. Colorado, 206 U.S. 46, 79 (1907), and United States v. Rio Grande Irrigation Company, 174 U.S. 690, 703 (1899).

Greely II, 219 Mont. 76, 712 P.2d 754 (1985) and § 85-2-101, MCA.

As long as the State acts within the parameters of the State and federal constitutions, Montana has broad authority over the administration, control and regulation of the water within the State boundaries. Accordingly, if the State negotiates, approves, and ratifies a compact that grants more water to a reserved water right entity than that entity might have obtained under a strict adherence to the "limits" of the Reserved Water Right Doctrine through litigation and does so without injuring other existing water users, the State is effectively allocating and distributing surplus state waters to that entity to resolve a dispute. In the absence of material injury to existing water users, the merits of such public policy decisions is for the legislature to decide, not the Water Court.

Therefore, in the absence of clear federal authority prohibiting the various Compact provisions and in the absence of demonstrated injury to Objectors by these provisions, the Compacting Parties are within their authority to craft creative solutions to resolve difficult problems caused by ambiguous standards. In reviewing creative solutions found in a compact, the Court has used the balancing test described earlier to determine whether the resulting compact is fundamentally fair, adequate and reasonable, and conforms to applicable law.

E. The Fort Peck-Montana Compact

1. Quantification

The scope and extent of the Tribal Water Right is set forth in Article III of the Compact. Article III(A) sets forth a general statement of the right:

> The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation have the right to divert annually from the Missouri River, certain of its tributaries, and ground water beneath the Reservation the lesser of (i) 1,050,472 acre-feet of water, or (ii) the quantity of water necessary to supply a consumptive use of 525,236 acre-feet per year for the uses and purposes set forth in this Compact with a priority date of May 1, 1888, provided that no more than 950,000 acre-feet of water, or the quantity of water necessary to supply a consumptive use of 475,000 acre-feet may be diverted annually from surface water sources. This right is held in trust by the United States for the benefit of the Tribes and is further defined and limited as set forth in this Compact." Section 85-20-201, MCA

The Objectors contend that use of the practicably irrigable acreage standard (PIA) to quantify the Tribal Water Right is inappropriate, and that even under that standard, the Tribal Water Right was incorrectly quantified.

There is no more contentious issue in Indian water law than the quantification of Indian reserved water rights. It is clear from the parties' briefs and the record before the Court that quantification of federal reserved water rights is a task of enormous complexity, to be determined without the benefit of clear or conclusive federal law, and with the potential for impacting or displacing some existing state-based water rights.

Quantification of an Indian reserved water right is governed by the amount necessary to fulfill the purposes of the reservation. *See* United States v. New Mexico, 438 U.S. 696 (1978), Cappaert v. United States, 426 U.S. 128 (1976), Arizona v. California, 373 U.S. 546 (1963), and Winters v. United States, 207 U.S. 564 (1908). However, there is no clear consensus among the federal courts as to how the "purpose" of the reservation is to be determined, the proper quantification standard to apply, or the method for quantifying the rights based on that standard.

In Winters, the Supreme Court held that when the primary purposes of an Indian reservation are not clearly articulated, the purposes must be liberally, not strictly, construed from the perspective of the Indians. 207 U.S. 564, 576-577 (1908).[11] In Arizona v. California, the United States Supreme Court held that Indian reserved water rights must be quantified to "satisfy the future as well as the

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[11] In Winters, the United States Supreme Court concluded that: "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it." 207 U.S. at 577. In United States v. Adair, the Ninth Circuit Court of Appeals quoted with favor the principle that: "While the purpose for which the federal government reserves other types of lands may be strictly construed . . . the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained. . . . Additionally, where interpretation of an Indian treaty is involved, not only the intent of the Government, but also the intent of the tribe must be discerned." 723 F.2d 1394, 1409 (9th Cir. 1983), *quoting* W. Canby, American Indian Law 245-246 (1981), and *citing* Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 675-676 (1979). *See also* United States v. Winans, 198 U.S. 371, 381 (1905); Colville Confederated Tribes v. Walton, 647 F.2d 42, 47-48 (9th Cir. 1981), *reversed* on other grounds in 752 F.2d 397 (1981); and Greely II, 219 Mont. at 90, 91.

present needs of the Indian[s]" and that given the uncertainty of a tribe's future needs, "the only feasible and fair way by which reserved water for the reservations [at least for agricultural purposes] can be measured is irrigable acreage." 373 U.S. at 601.[12]

In United States v. New Mexico, however, the same Court held that application of the doctrine is limited to only that amount of water *strictly necessary* to fulfill the *original, primary* purposes of the reservation, no more. 438 U.S. 696, 700 (1978). Also, the New Mexico Court apparently introduced a "sensitivity" concept into the required analysis so that "the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and the Congress' general policy of deference to state water law." *See* dissent of Justice Powell at 718 citing the majority opinion at 699, 701-702, and 705.

Neither the United States Supreme Court, nor any other federal court, however, has held that PIA is the *only* standard that may be applied. In recent years, the PIA standard has been criticized as being too complex, overgenerous at the expense of state water users, and anachronistically assimilistic for modern times.[13] The Objectors embrace some of these criticisms. Such criticism of

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[12] In Arizona both the Master and the Supreme Court rejected the State's argument that "the quantity of water reserved should be measured by the Indians' 'reasonably foreseeable needs." Adoption of the PIA standard was essentially a compromise between a standard that would be fair to the Indians and one that would provide certainty and finality for competing water users. In exchange for a generous standard and application (essentially the *maximum* amount the tribes could claim under the State's "reasonable needs" test, whether the tribes would ever actually need or use the water or not), the reserved water rights of the tribes were finally quantified and forever fixed in an amount that could not be enlarged, even for changed circumstances in the future. 373 U.S. 546, 600-601 (1963).

The fact that most of the agricultural land on the Fort Peck Indian Reservation has never been irrigated, therefore, does not necessarily argue against application of the PIA standard. In Greely II, the Montana Supreme Court observed that most Indian reservations use only a fraction of their reserved water rights and that: "The Water Use Act, as amended, recognizes that a reserved right may exist without a present use. Section 85-2-224(3), MCA, permits a 'statement of claim for rights reserved under the laws of the United States which have not yet been put to use.' The Act permits Indian reserved rights to be decreed without a current use." 219 Mont. at 93-94. *See also* Section 85-2-234(6), MCA, and Clinch, 297 Mont. at 452.

[13] *See e.g.* Peter W. Sly, Reserved Water Rights Settlement Manual 194 app. A (1988), at 104; Alvin H. Shrago, *Emerging Indian Water Rights: An analysis of Recent Judicial and Legislative Developments*, 26 Rocky Mt. Min. L. Inst. 1105, 1116 (1980); *Indian Reserved Water Rights: Hearings before Senate Comm. On Energy and Natural Resources*, 98th Cong., 2d Sess. 27-28 (1984)(Western States Water Council, Report to Western Governors); and Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 Ariz. L. Rev. 195 (1994). *See also* Wyoming v. United States, 492 U.S. 406 (1989); and Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 Land & Water Rev. 1, 6 (1992) (in which he asserts that Chief Justice Rehnquist and Justices White, Scalia, and Kennedy would have reversed use of the PIA standard in the Big Horn River adjudication).

the PIA standard was reflected in a more stringent application of the standard in the Big Horn adjudication in Wyoming,[14] and in the United States Supreme Court's *per curium* decision affirming the application, albeit by an evenly divided Court.[15] Despite its recent criticism, no court has yet rejected the PIA standard and the Montana Supreme Court has expressly approved it. Greely II, 219 Mont. at 93-94. The PIA standard remains the principle method of quantifying Indian reserved water rights for agricultural purposes. Therefore, the Compacting Parties' determination of the scope and extent of the Tribal Water Right by using the practicably irrigable acreage standard was appropriate and is not contrary to federal law or policy.

To quantify the Tribal Water Right, the parties agreed to use the Ten Year Plan formulated by the President's Water Policy Committee as an analytical guide and retained competent and experienced water resource specialists to assist them.[16] After several months of study, Stetson Engineers concluded that 501,755 acres (approximately one-quarter of the Reservation) could be irrigated out of the Missouri River.[17] The State's water resource specialists conducted their own investigation of Reservation lands, and, using the "prime and important" land classification of the

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[14] In Big Horn, 753 P.2d 76 (Wyo 1988), the Wyoming Supreme Court was more sensitive to state-held rights by requiring that factors such as land arability, engineering and economic feasibility must be considered in determining whether reservation land was practicably irrigable for purposes of the PIA standard.

[15] Wyoming v. United States, 492 U.S. 406 (1989).

[16] Final Report of Tribal Negotiating Team to Fort Peck Tribal Executive Board on Fort Peck-Montana Water Compact ("Tribal Report"), p. 12., which is attached as Exhibit 1 to the Affidavit of Tribal Chairman Caleb Shields, filed March 21, 1997. *See also* Affidavit of D. Scott Brown, program manager of the Compact Commission, filed March 10, 1997; Affidavit of Thomas Stetson, Stetson Engineers, water resource specialist for the Tribes, filed as Exhibit 2 to the Affidavit of Caleb Shields, filed March 21, 1997. D. Scott Brown is the program manager overseeing the State's participation in the settlement negotiations and the data and analysis produced by the State's soil scientist, hydrologist, attorney and the DNRC. Stetson, who was the Tribes' water resource and civil engineer specialist, has served as an expert witness in Arizona v. California, Big Horn, Gila River III, and most other significant Indian reserved water right cases in the last twenty years.

[17] Tribal Report, p. 13. In making that determination, Stetson Engineers reviewed extensive data from the Soil Conservation Service, the Bureau of Indian Affairs, historical hydrological stream flow data, and data on the quantity and quality of groundwater. They interpreted numerous aerial photographs, analyzed the climate and available surface water measurements, determined the available water supply and existing uses in each watershed, developed 27 maps showing land classifications, and ultimately determined the extent of the practicably irrigable acreage on the Reservation and the amount of water required per acre.

Soil Conservation Service, concluded that 487,763 acres on the Reservation were irrigable from the Missouri River (less than a 3% difference). The State then, apparently, discovered an oversight in its calculations and accepted the Stetson acreage determination.[18]

The Bureau of Indian Affairs did a title study and concluded that 291,798 of the 501,755 potentially irrigable acres are owned by the Tribes or Tribal Members or are within the Fort Peck Irrigation Project.[19] After negotiation, the Compacting Parties agreed to calculate a fixed Tribal Water Right based only on those acres presently in Indian ownership, rather than a fluctuating right based on future increases and decreases in Indian ownership.[20] The parties agreed to an average water duty of 3.6 acre-feet per acre, and this resulted in the annual diversion figure of 1,050,472 acre-feet.[21] Consumptive use was calculated by the parties to be 1.8 acre-feet per acre for full service irrigation at 50 percent average efficiency. Therefore, "the Tribal Water Right is stated alternatively in terms of the lesser of diversions and consumptive uses, whichever is less."[22]

In negotiating Article III of the Compact, the Tribes recognized that the Compact must provide some protection for existing non-Tribal uses to be politically acceptable, even if litigation would not have protected those uses.[23] The protection for existing state uses is set forth in Art. IV(A) of the Compact. The Tribes agreed not to divert surface water from the mainstem of the Milk River and, with some exceptions, to subordinate the Tribal Water Right to four categories of existing uses on the remaining Missouri River "north-south" tributaries within the Reservation (but not on the Missouri River mainstem):

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18 Tribal Report, pp. 2-4,13-14.

19 Tribal Report, p. 14.

20 Tribal Report, pp. 14-15.

21 Tribal Report, p. 15.

22 Tribal Report, p. 15, n. 23.

23 Tribal Report, p. 32.

(a) the beneficial uses of water with a priority date of December 31, 1984, or earlier established under the laws of the State and identified in Appendix A to this Compact;

(b) such rights of the United States Fish and Wildlife Service to the waters of Big Muddy Creek for the Medicine Lake National Wildlife Refuge as may be finally determined by the state water court;

(c) beneficial uses of water for domestic purposes;

(d) beneficial uses of water for stock watering purposes in existence prior to December 31, 1984, and beneficial uses of water for stock watering subsequent to that date not in excess of 20 acre-feet per year for each impoundment.[24]

The protected existing state uses identified in Appendix A of the Compact are almost all for irrigation.[25] The Tribes have estimated that "about 19,500 acres in all are irrigated on a regular basis (full-service irrigation) in these watersheds. About 13,000 additional acres are served by "water spreading" during periods of high stream flow, usually during the early spring. The . . . full-service irrigation diverts about 70,000 acre-feet and consumes about 35,000 acre-feet a year. The water spreading . . . consumes about 6,000 acre-feet annually. Most of the full-service irrigation is done from groundwater, not surface flow. Of the 19,500 acres served by full-service irrigation, almost 12,000 acres are irrigated by groundwater pumping. Use of groundwater is especially prevalent in the Porcupine Creek and Big Muddy Creek watersheds, where a total of almost 10,000 acres (mostly outside the reservation) are irrigated by groundwater."[26]

The Tribes also determined that most of the acres irrigated under existing state-based water rights (approximately 25,000 of 32,000 acres) are outside the Reservation boundaries.[27] Under the Compact, these existing irrigation uses would be protected from the Tribes' prior senior right.[28]

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24 Section 85-20-201, MCA, Fort Peck-Montana Compact, Article IV(A)(3)(a)-(d). *See also* Tribal Report, p. 15, and D. Scott Brown Affidavit, p. 4.

25 Tribal Report, p. 32.

26 Ibid.

27 Tribal Report, p. 33

28 Ibid.

In addition, approximately 1,500 acre-feet of existing municipal uses (mostly on the Poplar and Big Muddy River), 2,100 acre-feet per year of existing industrial and commercial uses (mostly on the Big Muddy River), and any existing federal reserved water rights in Big Muddy Creek and its tributaries for maintaining the Medicine Lake Wildlife Refuge are also protected.[29]

With the exception of the wildlife refuge, the Compact protects nearly 44,600 acre-feet per year of consumptive uses, which is split nearly equally between surface flows and groundwater.[30] The Tribes point out that "most surface water available in these streams during the irrigation season in normal years will be used by non-Indians exercising their state law based water rights."[31] Therefore, they conclude that by ratifying the Compact, the Tribes are foreclosed from developing substantial new appropriations from these tributary streams.[32]

Objector Weimer argues that factual disputes exist concerning the factors used to determine the quantity of the Tribal Water Right and that summary judgment is not appropriate on the quantification issue. Although Weimer identified several factors, he primarily addresses the number of irrigable acres on the reservation. He argues that a February 20, 1985 Memorandum from the Supervisor of the Hydrosciences Section of the DNRC to the Water Management Bureau Chief creates a material issue of fact.

The DNRC Memorandum concludes that approximately 167,000 acres of irrigable land could be supplied from the Milk and Missouri Rivers by the diversion of approximately 603,000 acre feet of water, that available tributary flow was limited to approximately 122,000 acre feet, and that about 133,000 acre feet was available from groundwater.[33] The Memorandum further predicts that if tribal

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29 Ibid.

30 Ibid.

31 Tribal Report, pp. 33-34.

32 Ibid.

33 Memorandum, page 18.

use of tributary water under a reserved rights settlement was not subordinated to existing non-tribal use, tribal users would likely displace some or all of an estimated 10,000 acres of non-tribal irrigation.[34]

Because of the short time available for DNRC to conduct its analyses, several simplifying assumptions were made in the Memorandum and no attempt was made to distinguish between tribal and non-tribal ownership of irrigable lands along the Milk and Missouri Rivers.[35] The Memorandum received "little critical technical review" and DNRC expressed hope in its transmittal document that "the Commission can take the time to have these results reviewed carefully by individuals outside the Department." See February 25, 1985 transmittal document from Larry Fasbender, Director of the Department of Natural Resources and Conservation, to Gordon McOmber, Chairman of the Reserved Water Rights Compact Commission.

There is nothing in the record indicating the February 20, 1985 Memorandum was ever critically and technically reviewed or that the simplifying assumptions were tested. As a result, the Memorandum has a hypothetical or speculative quality to it and the Court cannot conclude it introduces factual uncertainty. Simmons v. Jenkins, 230 Mont. 429, 432, 750 P.2d 1067 (1988) and Officers for Justice, 688 F.2d 615 at 624-625.

At most, the Memorandum represents one hasty determination of one hypothetical PIA scenario that might result if the reserved water right were litigated to a conclusion. One important concern from the State's perspective is definitely highlighted by the DNRC Memorandum. Irrigation on as many as 10,000 acres of non-tribal lands irrigated from the "north-south" tributaries within the reservation would have to be curtailed if the parties pursued litigation to its ultimate conclusion. See Memorandum at page 14. Under the Compact, irrigation on over 9,000 acres of

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34 Memorandum, page 14.

35 Memorandum, pages 1 and 18.

these non-Tribal lands will never be curtailed by the exercise of the Tribal Water Right because the Tribal Water Right is subordinated to most of the water usage on these non-Tribal lands.

Given the detailed and comprehensive research and analysis involved in determining the Tribal Water Right by the Compacting Parties and the protections provided the most threatened existing state uses of water, the Court concludes that Article III of the Compact is within the authority of the legislature, and is fundamentally fair, adequate and reasonable to all concerned.

2. Groundwater

Article III(A) and (I) of the Compact expressly extends the Tribal Water Right to groundwater. The Objectors contend that extension of the Tribal Water Right to groundwater is either not supported by, or is contrary to, federal law.

Whether Indian reserved water rights include groundwater is another unsettled question of federal law. In Cappaert v. United States, the United States Supreme Court noted that none of its cases have applied the doctrine of implied reservation of water rights to groundwater. The Court avoided directly confronting the issue by finding that the water in Devil's Hole was in fact surface water, albeit underground. 426 U.S. 128, 142 (1976).

The paucity and ambiguity of federal law and policy with respect to reserved water rights in groundwater has led to inconsistent rulings on the subject. For example, in 1968 the Federal District Court of Montana observed that "whether the [necessary] waters were found on the surface of the land or under it should make no difference." Tweedy v. Texas Company, 286 F.Supp. 383, 385 (D. Mont. 1968). According to Judge Rodeghiero, the Montana Supreme Court appears to tacitly agree. *See* dissenting opinion of Judge Rodeghiero in Clinch, 297 Mont. 448 at 458, ¶ 32 ("the majority apparently assumes that groundwater is included within the Tribes' reserved water right.")

In Big Horn, the Wyoming Supreme Court acknowledged:

> The logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater. *See Tweedy v.*

> *Texas Company*, 286 F.Supp. 383, 385 (D.Mont. 1968) ("Whether the [necessary] waters were found on the surface of the land or under it should make no difference"). Certainly the two sources are often interconnected. *See* § 41-3-916, W.S. 1977 (where underground and surface waters are "so interconnected as to constitute in fact one source of supply," a single schedule of priorities shall be made); Final Report to the President and to the congress by the National Water Commission, Water Policies for the Future 233 (1973) (groundwater and surface water 'often naturally related'); *Cappaert v. United States*, *supra* 426 at 142-143, 96 S.Ct. at 2071 (citing additional authority for this effect)."

753 P.2d 76, 99-100 (Wyo. 1988). Despite the Wyoming Supreme Court's recognition of the logic of including groundwater in Indian reserved water rights, it nevertheless declined to do so, because it could find no controlling federal law on the issue. Ibid. at 100.

In Gila River III, the Arizona Supreme Court found the Big Horn decision declining Indian reserved water rights in groundwater, unpersuasive. Instead, it found support for recognizing such rights in Winters, Arizona, and Cappaert:

> If the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

989 P.2d 739 at 747. Accordingly, the Gila III Court held that "the federal reserved water rights doctrine applies not only to surface water but to groundwater," but only "where other waters are inadequate to accomplish the purpose of the reservation." Ibid.

Given the unsettled state of federal and state law with respect to the issues, the Water Court finds that extension of the doctrine to groundwater in Article III of the Compact is neither supported by, nor prohibited by, controlling federal law. Recognizing this fact, the parties reasonably chose to avoid the risk of litigation by negotiating this issue through the Compact process.

The parties recognized the potential adverse impact reserved groundwater rights could have on existing junior state water rights. Thus, Article V(D)(1)(a) and (b), provides that, with the

exception of those tribal uses protected in Article IV, neither the State nor the Tribes shall authorize or continue the use of groundwater without the consent of the other if the use will either:

(a) result in degradation of the instream flows established pursuant to section L of Article III; or

(b) contribute to permanent depletion or the significant degradation of the quality of a ground water source which in whole or in part underlies the Reservation.[36]

In Paragraph 2 of Article V(D), the Tribes agree not to authorize a new use of groundwater which interferes with the state authorized groundwater rights protected by Article IV of the Compact, unless the State consents.[37] Article III(I)(1)-(3) provides implicitly that the Tribes cannot divert groundwater outside the Reservation for use within the Reservation, or market groundwater off the Reservation.[38] The State was not seriously concerned with tribal uses of groundwater because the Tribes are relatively downstream users and their uses are unlikely to impact surface flows, particularly on the Missouri River.[39] Therefore, in order to protect existing water rights, the State apparently was willing to authorize the Tribes to access a resource that might contain otherwise unappropriated or untapped surplus state waters.

3. Changes in Use and Instream Use

Article III(D) of the Compact provides that Tribes can put water to use for any purpose on

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36 Section 85-20-201, MCA and Final Report, pp. 44-45.

37 Section 85-20-201, MCA and Tribal Report, p. 45

38 The question of groundwater could have been litigated, of course, but if a court held groundwater was a component of the reserved water rights doctrine then the Compacting Parties might have had to address the implications arising from Sporhase v. Nebraska, 458 U.S. 941 (1982), and City of Altus v. Carr, 225 F.Supp. 828 (W.D. Tex. 1966), *summarily aff'd*, Carr v. City of Altus, 385 U.S. 35 (1966). By negotiating the groundwater issue, the Compacting Parties could add another dimension of contractual protection to the State's groundwater resources.

39 Tribal Report, pp. 45-46. The Tribes acknowledge that "very little is known concerning groundwater sources on the Reservation. Without years of study, it simply cannot be determined whether groundwater can be safely pumped from aquifers below the Reservation without depleting those aquifers. The quality of groundwater is questionable as well. Less is known about groundwater in this area than any other technical matter relating to the Tribes' water rights. We thus will be uncertain for many years as to whether and to what extent groundwater resources will be available in practice to the Tribes." Tribal Report, p. 48.

the Reservation, "without regard to whether such use is beneficial as defined by valid state law," but "[n]o use of the Tribal Water Right may be wasteful or inconsistent with the terms of this Compact."[40]

One of the specific changes in use authorized by the Compact is the right to change diverted uses into instream flow uses. Article III(L) provides that "[a]t any time within five years after the effective date of this Compact, the Tribes may establish a schedule of instream flows to maintain any fish or wildlife resource in those portions of streams, excluding the mainstem of the Milk River, which are tributaries of the Missouri River that flow through or adjacent to the Reservation."[41] These instream flow uses will have all the characteristics of the Tribal Water Right, including a priority date of 1888 and the subordination provisions in Article IV of the Compact.[42]

Flygt (whose claims are not on any of these tributaries) contends that the Tribes' right under the Compact to use the reserved water "for any purposes," including instream flow, is contrary to the prevailing principles by which Indian reserved water rights are established. This objection necessarily raises the issue of whether the purposes for which an Indian reservation was established limit the uses to which reserved water may be put.

Federal courts have not yet conclusively decided this issue. No standards have been developed concerning permissible changes in the nature of use or place of use of Indian reserved water rights.[43] The clearest Supreme Court pronouncement on the issue appears with no explanation in a supplemental decree entered in Arizona v. California, in which the United States Supreme Court approved the parties' stipulation that the Tribe's reserved water right for irrigation could be used for

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40 85-20-201(III)(D), MCA; Tribal Report, pp. 8-9.

41 85-20-201(III)(L); Tribal Report, p. 47.

42 Tribal Report, p. 47.

43 *See* Ranquist, The Effect of Changes in Nature and Place of Use of Indian Rights to Water Under the 'Winters Doctrine,' 5 Nat. Res. L 34, 35-36 (1972).

non-agricultural purposes.[44] The Court decreed:

> The foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation [of the practicably irrigable acres within the reservations] . . . shall not constitute a restriction of the usage of them to irrigation or other agricultural application. If all or part of the adjudicated water rights of any of the . . . Reservations is used other than for irrigation or other agricultural applications, the total consumptive use . . . shall not exceed the consumptive use that would have resulted if the diversions . . . had been used for irrigation of the number of acres specified for that Reservation. . . .

439 U.S. 419, 422 (1979). This decree confirmed the conclusions of the Special Master in the 1963 Arizona v. California case:

> This [method of quantifying water rights] does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses . . . . The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.

Report of Simon H. Rifkind, Special Master to the Supreme Court 265-166 (December 5, 1960), in the case of Arizona v. California, 373 U.S. 546 (1963).

In Colville Confederated Tribes v. Walton, the Ninth Circuit Court of Appeals recognized the right of the Tribes to change the use of part of their reserved water right from irrigation and fishery maintenance to an instream flow sufficient to permit natural spawning. The Court observed that:

> When the Tribe has a vested property right in reserved water, it may use it in any lawful manner. As a result, subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water. . . . We recognize that open-ended water rights are a growing source of conflict and uncertainty in the West. . . . Resolution of the problem is found in quantifying reserved water rights, not in limiting their use.

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[44] Specifically, for recreation and housing developments.

647 F.2d 42, 48, *cert.* denied 454 US 1092 (9th Cir. Wash. 1981).

The Montana Supreme Court has recognized that Indian reserved water rights include water "for future needs and changes of use." Greely II, 219 Mont. 76, 97 (1985). In contrast, in Big Horn III, the Wyoming Supreme Court rejected the argument that the Tribes could change the use of their reserved right from agricultural uses to any other purpose, including instream flows. 835 P.2d 273 at 278.

Recognizing a potential adverse impact on state water users, the Compact provides that the diversion of the Tribal Water Right, including water allocated to instream flow purposes, in the watersheds of seven "north-south" Reservation tributaries of the Missouri River and all groundwater shall be subordinated to certain referenced uses. In addition, any use of the Tribal Water Right outside the Reservation must be "beneficial" as that term is defined by valid state law. To protect state water users from increased depletion of water sources resulting from changes in use not anticipated in the original quantification process, Article III(A) and (F) provide a cap on the amount of water that may be diverted and the amount that may be consumed. As instream flows could deprive an upstream state water user of that quantity of water, the Tribes agreed in Article III(L) to count the instream flows as a consumptive use and to require the State's consent before any change from that consumptive use to instream use.[45]

Given the lack of conclusive federal law with respect to the issues, the provisions negotiated by the parties to protect existing state water uses, and the current federal policy of encouraging tribal self-sufficiency on the reservations,[46] the Water Court concludes that Articles III(A), (D) and (L) authorizing the Tribal Water Right to be used "for any purpose," including the establishment of

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[45] 85-20-201(III)(A) and (F), Tribal Report, p. 47.

[46] *See e.g.*, 55 FR 9223, "Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims," Department of the Interior, March 12, 1990.

instream flows, is within the authority of the legislature, and is fundamentally fair, adequate and reasonable to the parties and all those concerned.

4. Off Reservation Diversion, and Off Reservation Use and Marketing

Article III(A) and (I) authorize the Tribes to divert the Tribal Water Right from certain off-reservation surface water locations, including the mainstem of the Missouri River above Fort Peck Dam. Article III (D), (E), (F), (G), (I), (J), and (K) of the Compact authorize the Tribes to transfer their reserved water right use "within or outside the Reservation" to the extent authorized by federal law.[47] The Objectors contend that use of the Tribal Water Right by the Tribes or other persons off the reservation violates the purpose of an Indian reserved water right and violates federal law. Objectors specifically contend that the United States Supreme Court has limited Indian reserved water rights to on-reservation diversions through its statements that such water rights reserve "appurtenant" water. The Objectors similarly contend that authorization to transfer part or all of the Tribal Water Right for off-reservation use is contrary to federal law and policy, specifically, United States Supreme Court case law and the Indian Non-Intercourse Act of 1901, 25 U.S.C. § 77.

The United States Supreme Court has described the Reserved Water Rights Doctrine in terms of reserving "appurtenant" water:

> "This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves *appurtenant* water then unappropriated to the extent needed to accomplish the purpose of the reservation."

Cappaert, 426 U.S. 128 (1976). In Winters v. United States, the Court recognized that the governmental policy of creating reservations was to change the habits of nomadic Indians to an agricultural way of life. 207 U.S. 576 (1908). The Court stated that without water, the lands ceded

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[47] 85-20-201, MCA. Article III (K) provides:"As an incident to and in exercise of the Tribal Water Right, the Tribes may transfer within or outside the Reservation, as authorized by federal law and this Compact, the right to use water but may not permanently alienate such right or any part thereof." Article III (K) authorizes the Tribal Water Right to be exported outside the State. Article II (24) defines a "transfer" to mean "any authorization for the delivery or use of water by a joint venture, service contract, lease, sale, exchange or other similar agreement."

to the Tribes were worthless, and concluded that the government thus reserved waters for use by the Tribes. Id.

a. Off-Reservation Diversions

Objectors contend that no authority exists allowing the Tribal Water Right to be diverted from off-reservation sources, and are particularly concerned about the Tribal Water Right being possibly diverted from the mainstem of the Missouri above Fort Peck Dam. Objector Weimer cites to the above cases, as well as the Conference of Western Attorneys General American Indian Law Deskbook, 184 (1993) as authority that "[i]n general discussions of reserved water rights, the U.S. Supreme Court limits the doctrine to waters appurtenant to a reservation." Id at 11. Essentially, Objectors contend that off-reservation sources are not appurtenant to a reservation, and because the U.S. Supreme Court cases only discuss reserved water rights as reserving "appurtenant" waters, reserved water rights cannot be diverted from off-reservation sources.

In considering the authorities presented by Objectors and the Court's own review, the Objectors are correct that no federal authority exists that explicitly discusses the off-reservation diversion of Indian reserved water rights. However, the Objectors present no direct, binding authority prohibiting off-reservation diversion of these rights as provided in the Compact, and the Court has found none. These cases allow for the reservation of appurtenant water rights. None of the United States Supreme Court cases cited by the Objectors include a ruling on whether a reserved water right may be diverted off the reservation.

At least one commentator has stated that the United States Supreme Court has extended Indian reserved water rights to an off-reservation source, although the Court did so without comment as to the basis for the decision in either the decree or the opinion.[48]

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[48] Indian Reserved Water Rights: The *Winters* of Our Discontent, 88 Yale L. Journal 1689, 1697, 1699 (1979), footnotes 54 and 60.

The Water Court finds that extension of the Reserved Water Rights Doctrine to off-reservation diversions in Article III of the Compact is neither directly supported by, nor prohibited by, controlling federal authority. Recognizing this fact, the parties chose to avoid the risk of litigation by negotiating the issues through the Compact process. As stated above in Section IV(D) of this Memorandum, in the absence of clear federal authority prohibiting the Compact provisions, the Compacting Parties are within their authority to create such provisions.

The Compact places some basic limitations on the Tribes' ability to divert water from off the Reservation. These are summarized on pp. 18-23 of the Tribal Report, to include:

First. [P]aragraph 2 of Article III(K) requires the Tribes to give the State at least 180 days advance written notice of any proposed transfers of water from the Missouri River outside the Reservation, including Fort Peck Reservoir, and the opportunity to participate in the water marketing venture as a substantially equal partner with the Tribes.

Second. [P]aragraphs 5 and 6 of Article III(K) limit the total consumptive use of water that may be marketed outside the Reservation by the Tribes in any year to (1) 50,000 acre-feet (2) plus 35 percent of any amount over 200,000 but less than 300,000 acre-feet authorized to be transferred by the State under state law, (3) plus 50 percent of any amount over 300,000 acre-feet authorized to be transferred by the State under state law. Paragraph 6 provides that if the State is not itself authorized to transfer at least 50,000 acre-feet of water annually, the Tribes may market water subject to any volume limitations provided by federal law, or if there are no federal limitations, subject to any volume limitations imposed by state law on holders of state water rights. In no event shall the quantity limitation on the Tribes be less than 50,000 acre-feet per year.

Third. [S]ection D of Article III provides that ["outside the Reservation, any use of water in the exercise of the Tribal Water Right shall be beneficial as defined by valid state law on the date the Tribes give notice to the State of a proposed use outside the Reservation."] Although the State cannot generally regulate tribal water marketing, it could under this provision ban a particular use of water proposed to be marketed by the Tribes outside the Reservation if the use proposed was non-beneficial under state law.

Fourth. [S]ection E of Article III provides that the Tribes or any diverter or user of water marketed by the Tribes shall comply with valid state laws regulating the siting, construction, operation or uses of any industrial facility, pipeline or the like which transports or uses the water outside the Reservation. This Section is intended to apply statutes such as the State's Major Facilities Siting

Act to industries using or transporting water marketed by the Tribes outside the Reservation.

Fifth. [T]he limitations on monthly diversions that Tribes may take from the Missouri River in Section F of Article III impose a constraint on diversion of water for marketing outside the Reservation, as well as on-reservation uses such as irrigation. . . .

Sixth. [U]nder Section G of Article III the Tribes must comply with any valid state law prohibiting or regulating export of water outside the State at the time of a proposed transfer. . . .

Seventh. [S]ection I of Article III sets the sources from which diversions may be made for uses outside the Reservation. Paragraph 3 of Section I provides that the Tribes can divert water for marketing outside the Reservation from the mainstem of the Missouri River from Fort Peck Reservoir or downstream. This paragraph and III(J)(3) provide that diversions from the mainstem of the Missouri River can also be made *upstream* from Fort Peck Reservoir, but these must comply with all state laws and secure the consent of the State legislature. . . .

Eighth. [W]hile diversions from Fort Peck Reservoir or downstream from Fort Peck Dam do not have to comply with state regulatory and administrative requirements, the Tribes are required by III(J)(1) to give advance notice to the State showing that:

> (1) the off-reservation use of water will be beneficial as defined by valid state law;
>
> (2) the means of diversion and construction and the operation of any diversion works outside the Reservation are adequate;
>
> (3) the diversion will not adversely affect any federal or state water right actually in use at the time notice is given without the owner's consent;
>
> (4) that the proposed use does not cause any unreasonable significant environmental impact;
>
> (5) that the larger diversions in excess of 4,000 acre-feet per year and 5.5 cubic feet per second of water will not:
>
> > (i) substantially impair the quality of water for existing uses in the source of supply;

(ii) be made where low quality water can economically be used and is legally and physically available to the Tribes for the proposed use;

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

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

Paragraph 2 of Article III, Section J authorizes legal challenges to proposed off-reservation diversions within 30 days after expiration of the notice given the State by the Tribes, in a court of competent jurisdiction, by the State or a person whose rights are adversely affected by the diversion or proposed use. If a court case is brought, the Tribes have the initial burden of proving by a preponderance of the evidence that the notice was sufficient to show the above five items. Pursuant to Article II(23), the notice given to the State by the Tribes will be provided to the Director of the State Department of Natural Resources and Conservation. The Court has no reason to conclude that the Director would not promptly provide personal notice to potentially affected state-based water users.

Although the Compacting Parties were free to negotiate the provisions regarding off-reservation diversions due to the absence of federal law to the contrary, these notice provisions and limitations confer additional protection for any state-based water users that could potentially be affected by such off-reservation diversions. The Water Court concludes that the provisions in Article III(A) and (I) authorizing off-reservation diversion of the Tribal Water Right are fundamentally fair, adequate and reasonable.

b. Marketing, Off-Reservation Use, and the Indian Non-Intercourse Act

The Objectors have stated that based upon cases such as New Mexico, 438 U.S. 696, 699 (1978), Walton, 647 F.2d 42, 48 (1981), Cappaert, 426 U.S. 128 (1976), and Winters, 207 U.S. 564 (1908) "[t]here is no legal authority for removing the reserved right from the reservation." Objector

Weimer's Brief in Support of Motion for Summary Judgment, p. 10. Objector Flygt states that she is "unaware of any standard which attaches marketability and off-reservation use to a reserved water right established by Congress." Objector Flygt's Motion for Partial Summary Judgment and Brief in Support, p. 12. Objector Flygt also contends that such off-reservation use conflicts with the "primary purpose doctrine" as set forth in Winters and subsequent cases, in that the primary purpose of the Fort Peck Reservation should be interpreted as providing a means for the Tribes to become "a pastoral and agricultural people." Id. at 7.

The federal courts have not yet conclusively decided whether Indian reserved water rights may be severed and transferred apart from the land. Some cases suggest that reserved water rights are inseparably appurtenant to the reservation and may not be used elsewhere. *See e.g.* Cappaert, 426 U.S. 128 (1976) and New Mexico, 438 U.S. 696, 699 (1978). Other cases, however, suggest that once quantified, Indian reserved water rights are vested property rights which the Indians may use and transfer in any lawful manner. *See e.g.*, Walton, 647 F.2d 42 (1981) and Arizona, 373 U.S. 546 (1963).

The Objectors also contend that the Indian Non-Intercourse Act of April 12, 1901, 25 U.S.C. 177, prevents the off-reservation use, and specifically marketing, of reserved water rights. The Act provides that:

> No purchase, grant, lease, or other conveyance of *lands*, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. (Emphasis added)

25 U.S.C.S. § 177 (2001). The consent of the United States is required for such transactions to be effective. *See e.g.* County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985), *reh den.* 471 U.S. 1062 (1985).

Article III(J) of the Compact expressly prohibits the *permanent* alienation of any part of the Tribal Water Right, either on or off the Reservation, and Article III(K) authorizes the Tribes to

transfer a portion of the Tribal Water Right only "as authorized by federal law and this Compact." Accordingly, an off-reservation transfer will happen only if Congress authorizes it to happen.[49] If a future off reservation transfer is prosecuted without the authorization of federal law and the Compact, then any aggrieved person has recourse to the appropriate judicial system.

Objectors are correct that no federal authority exists that explicitly discusses the off-reservation use and marketing of Indian reserved water rights. However, the Objectors present no direct, binding authority prohibiting off-reservation use and marketing of these rights as provided in the Compact, and the Court has found none. These cases allow for the reservation of appurtenant water rights. None of the United States Supreme Court cases cited by the Objectors include a ruling on whether a reserved water right may be used or marketed off the reservation.

The Water Court finds that extension of the Reserved Water Rights Doctrine to off-reservation uses and marketing in Article III of the Compact is neither supported by, nor prohibited by, controlling federal law. Recognizing this fact, the parties chose to avoid the risk of litigation by negotiating the issues through the Compact process. As stated above in Section IV(D) of this Memorandum, in the absence of clear federal authority prohibiting the Compact provisions, the Compacting Parties are within their authority to create such provisions.

The State and the Tribes recognized the potential impact the right to transfer part or all of an Indian reserved water right for off-reservation use could have on those holding state water rights.[50] To protect those state water rights, the Compacting Parties included certain restrictions in the Compact. The Tribal Report, pages 18-23, summarizes these restrictions as set forth above in

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[49] According to one commentator, the Compact was specifically structured to avoid the necessity for immediate congressional approval for fear that downstream Missouri River states would withhold their consent due to the potential implications of the Compact's water awards on their future water supply. *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 Ariz. L. Rev. 195, n. 215.

[50] The Water Court notes that the junior water rights owned by the Objectors are diverted from unnamed tributaries to tributaries of the Missouri River many miles upstream from the Fort Peck Indian Reservation.

Section IV(D)(4)(a) of this Memorandum.

Paragraph 2 of Article III, Section J authorizes legal challenges to proposed off-reservation uses within 30 days after expiration of the notice given the State by the Tribes, in a court of competent jurisdiction, by the State or a person whose rights are adversely affected by the diversion or proposed use. If a court case is brought, the Tribes have the initial burden of proving by a preponderance of the evidence that the notice was sufficient to show the above five items. Pursuant to Article II(23), the notice given to the State by the Tribes will be provided to the Director of the State Department of Natural Resources and Conservation. Again, the Court has no reason to conclude that the Director would not promptly provide personal notice to potentially affected state-based water users.

Although the Compacting Parties were free to negotiate the provisions regarding off-reservation use and marketing of the Tribal Water Right due to the absence of federal or state law to the contrary, these notice provisions and limitations in the Compact confer additional protection for any state-based water users that could potentially be affected by such off-reservation diversions. The Court recognizes the extensive restrictions placed on off-reservation transfers. In light of the absence of federal law to the contrary, and considering the notice provisions in the Compact and additional restrictions on off-reservation marketing, the Water Court concludes that the provisions set forth in Article III (D), (E), (F), (G), (I), (J), and (K) authorizing transfers of the Tribal Water Right for off-reservation use are not in violation of federal law or policy, are within the authority of the legislature, and are fundamentally fair, adequate and reasonable.

5. Equal Protection

Finally, the Objectors contend that Article IV(A) violates the Equal Protection Clause of the Montana Constitution, because if applied as agreed, it would subordinate the Tribal Water Right to *some* junior state water rights on *some* watersheds, but not all junior state-based water rights on all

watersheds.

Equal Protection of the law requires that all persons be treated alike under like circumstances. Classification of persons is allowed as long as it has a permissible purpose. Billings Assoc. Plumbing, Heating, & Cooling Contractors v. Bd. Of Plumbers, 184 Mont. 249, 602 P.2d 597 (1979), *citing* Montana Land Title Ass'n v. First Am. Title, 167 Mont. 471, 539 P.2d 711 (1975) and United States v. Reiser, 394 F. Supp. 1060 (D.C. Mont. 1975), reversed on other grounds by United States v. Reiser, 532 F.2d 673 1976. The applicable test is whether the classification is rationally related to a legitimate governmental interest. Montana Const. D & F Sanitation Serv. v. Billings, 219 Mont. 437, 713 P.2d 977 (1986).

The Objectors admit that any injury they may suffer as a result of not being included among the protected junior state water uses is merely potential and not actual. They have not yet received a "call" for their water and, given the facts, they probably never will. As the State points out, "[g]iven the extremely small size of Mr. Weimer's and Mrs. Flygt's claims, the odds that the Tribes would bother to exercise a call against them are extremely small. The fears of Mr. Weimer and Mrs. Flygt that the Tribes would seek to secure water from [an unnamed tributary] to Dry Armelles Creek, and an unnamed tributary of Seven Blackfoot Creek, both ephemeral streams, rather than from the adjacent Fort Peck Reservoir, are simply illogical."[51]

The Tribes emphasize this remoteness and further argue that under the Compact they could only make an upstream call in a year when they are actually using the water, when storage in the Fort Peck Reservoir is unavailable, and the flows of the Missouri River are less than one million acre-feet i.e. less than one-quarter of the lowest flows for any year on record (in the drought of the 1930s).[52]

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[51] State of Montana's Memorandum in Support of Motion to Dismiss Objections and to Approve Fort Peck-Montana Compact, filed March 10, 1997, p. 4, n. 1.

[52] Assiniboine and Sioux Tribes of the Fort Peck Reservation Responsive Memorandum of the Fort Peck Tribes to Objectors, filed April 15, 1997, p. 5.

Although the Objector's standing to raise the constitutionality of the subordination provisions of the Compact is questionable, Olson v. Dept. of Revenue, 223 Mont. 464, 469-470, 726 P2d 1162 (1986), *citing* Chovanak v. Mathews, 120 Mont. 520, 188 P.2d. 582 (1948), the Court will discuss this matter further.

More of the reasoning behind the subordination provisions is described by D. Scott Brown in his Affidavit, filed with the Water Court on March 10, 1997:

> The Compact Commission's studies indicated that on the Milk River and the "north-south tributaries" (i.e. Porcupine Creek, Poplar River, Big Muddy Creek, Little Porcupine Creek, Wolf Creek, Tule Creek and Chelsea Creek), it would be difficult to protect existing users -- most of whom had priority dates junior to the Tribe -- and recognize the Tribal Water Right. In fact, most existing users on those streams already experienced shortages even without the addition of potential new uses. Devising a method to allow for the protection of those junior users thus became one of the main priorities of the Compact Commission in further negotiations.
>
> In an effort to secure such protections, the Compact Commission and Tribes agreed to shift any new tribal uses away from the Milk River and the "north-south tributaries" toward the Missouri River, where there was available unappropriated water. The general approach that was settled on was to secure protections for water users on the Milk River and "north-south tributaries" by providing the tribes with greater flexibility to market and use its Missouri River water.

The Tribes agreed to negotiate the issue because of the importance they attach to off-reservation marketing of their water, and because they recognized that a Compact must provide some protection for existing uses to be politically acceptable, even if successful litigation would not have protected those uses.[53] While it was apparently worth subordinating part of their Tribal Water Right to a *limited* number of existing uses on a *limited* number of sources, it would be unreasonable to expect the Tribes to do the same for *all* existing junior uses on *every* water source that "might" be influenced by the exercise of the Tribal Water Right. Requiring all concessions to be applied equally across-the-board would unduly restrict and likely defeat the negotiation and settlement process.

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[53] Tribal Report, p. 32

Forced to choose, it was rational and reasonable for the State to protect junior water users on the north-south tributaries with perennially low flows that surely would be displaced by the exercise of the Tribal Water Right, over the junior water users on the abundant mainstem of the Missouri River or its intermittent tributaries that are many miles away and whose potential for injury is very remote.

The subordination provisions of Article IV are the result of a negotiation process intended to serve the legitimate governmental purpose of completing the state-wide adjudication process as quickly and efficiently as possible, thereby providing certainty and finality for all water users and developers. Accordingly, the Water Court concludes that the subordination provisions of Article IV do not violate the Equal Protection clause of the Montana Constitution.

VI. FUNDAMENTAL FAIRNESS OF COMPACT AS A WHOLE

After more than four years of intense, adversarial negotiations, the Fort Peck-Montana Compact was concluded "finally and forever" determining the Tribal Water Right of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. The Compact was authorized by federal and state law, negotiated by competent professionals experienced in the field of water resource law and knowledgeable about the water needs of the State and the Reservation. They in turn were advised by competent specialists in the field of water resource analysis and water law. The investigation conducted by the parties and their specialists was comprehensive, involving extensive research and surveys, data interpretation, soil and water analysis, financial analysis and numerous calculations and projections.

It is clear that the Compact is not the product of fraud or overreaching by or collusion between the Compacting Parties. The factual and legal positions of the parties were vigorously debated and often seemed irreconcilable. In 1983, the first proposed Compact was rejected by the Governor's office, and negotiations broke off altogether. Negotiations commenced one year later, and additional concessions to resolve disputed issues were made on both sides of the negotiating

table.

A careful balancing of various facts went into settling the final Compact. Potential adverse effects on the State, the Tribes and the junior state water uses were fairly considered, and a number of reasonable provisions were ultimately included to protect against such effects. Out of over 6,200 potentially effected water users who received notice of the Compact, only three objections were filed, and one of those objections was subsequently dismissed for the objector's lack of standing.

None of the provisions of the Compact are prohibited by federal law or policy. The goals of finally and conclusively quantifying the Tribal Water Right and completing the Montana comprehensive water right adjudication substantially outweigh the minimal potential for injury to the Objectors' remote, junior water rights. The Compact has been ratified by the Montana Legislature, approved by the Governor, ratified by the Fort Peck Tribal Executive Board, and approved by the United States Departments of Justice and Interior. The Compact as a whole carries a strong presumption of fairness, adequacy, and reasonableness.

Just as this Court concluded in its "Order to Confirm and Approve the Northern Cheyenne Tribal Water Right contained in the Northern Cheyenne Compact," filed August 3, 1995, this Compact resolves legal issues and rights that began over one hundred years ago and achieves an end result that could never be reached were the Tribal Water Right litigated before this Court. Like the Northern Cheyenne Compact, the Fort Peck-Montana Compact is a remarkable achievement for a settlement process created in 1979 as an untried, first of its kind concept, and it validates the confidence reposed by the 1979 Legislature in the Reserved Water Rights Compact Commission, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, and the United States that good faith negotiations can achieve solutions to difficult problems.

VII. SUMMARY JUDGMENT

A. Standard of Review for Summary Judgment

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), M.R.Civ.P. In applying the standard, all reasonable inferences are viewed in the light most favorable to the party opposing summary judgment. Erker v. Kester, 296 Mont. 123, 988 P.2d 1221, 1224 (1999). However, the facts presented in opposition must be of a substantial and material nature. Brothers v. General Motors, 202 Mont. 477, 658 P.2d 1108 (1983). Speculation is not sufficient to raise a genuine issue of material fact. Cheyenne Western Bank v. Young, 179 Mont. 492, 587 P.2d 401 (1978); State v. DeMers, 192 Mont. 367, 628 P.2d 676 (1981). Absent affirmative evidence to defeat the motion, the motion is properly granted. In re Estate of Lien, 270 Mont. 295, 892 P.2d 530 (1995), *overruled* on other grounds in Estate of Daniel G. Bradshaw, 305 Mont. 178, 24 P.3d 211 (2001).

B. Discussion

The issues set forth in the cross motions for summary judgment have been addressed in the above discussion concerning the objections to the Compact, and such discussion is incorporated herein. The Objectors in this case have failed to prove by more than mere speculation that any genuine issues of material fact remain for the Montana Water Court to decide. The Objectors have failed to provide the affirmative evidence necessary to defeat the motion and overcome the strong presumption of reasonableness, fairness, and legal sufficiency this Compact carries with it.

All negotiations and adjudications quantifying Indian reserved water rights involve extensive and complex disputed issues of facts and law. They inherently involve competing interests in a scarce resource, the allocation of which must be determined by ambiguous, perhaps anachronistic

law, evolving governmental policies, and increasingly sophisticated science – all amidst rapidly changing circumstances, within the confines of a complex adjudication process. That is precisely the incentive for the negotiation and settlement of complex water right adjudications.

In the negotiation process, the uncertainties inherent in the determination of the Assiniboine and Sioux Tribal Water Right were employed by the parties as tools to gain leverage and bargaining power. Compromise moved the process forward.[54] In exchange for saving the cost and inevitable risk of litigation, the parties each gave up something they might have won in trial at the Montana Water Court.[55] In the settlement process, the parties resolved to their own satisfaction all of the remaining issues of fact and law. It is not for the Montana Water Court to re-negotiate those disputes or rule on their merits.

CONCLUSION

For the reasons set forth above and further detailed in the submissions of the parties, the Court has entered its Order Approving and Confirming the Fort Peck-Montana Compact and dismissing the objections thereto.

DATED this 10 day of August, 2001.

C Bruce Loble

C. Bruce Loble
Chief Water Judge

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[54] *See e.g.* SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984), citing United States v. Armour & Co., 402 U.S. 673, 681 (1971).

[55] Armour, *supra*, at 681

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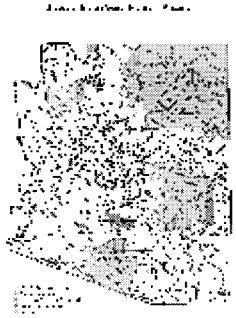
INDIAN WATER RIGHTS CLAIMS: SETTLEMENT UPDATE

In Arizona, as in most states, negotiation of Indian water rights claims has been litigation driven. Indian water right claims are based on "reserved water rights" for federal reservations established under the "Winters Doctrine."

- Ak Chin Indian Community
- Tohono O'odham Nation
- Salt River-Pima Maricopa Indian
- Fort McDowell Indian Community
- San Carlos Apache Tribe
- Yavapai-Prescott Indian Tribe
- Gila River Indian Community
- Upper Gila Valley
- Navajo Nation and the Hopi Tribe



When the federal government established the Indian reservations it did not expressly claim associated water rights. In 1908, the U.S. Supreme Court in Winters v. United States, found that a federal reservation includes an amount of water necessary to fulfill the reservation's purpose. Priority dates are based on the date of the enactment of the treaty, act of Congress, or Executive Order establishing the reservation. In 1963, the Supreme Court further defined reserved water rights for Indian reservations by including the standard of practicably irrigable acreage as a method of quantifying the right.

Litigation to quantify Indian water rights claims is usually a lengthy and expensive process. Settlement of the tribal claims benefits private and public parties by providing the water certainty necessary to plan long-term economic development. Also, settlement may be less expensive than litigation. However, the greatest benefit of settlements may be the goodwill created by neighboring communities working together for Arizona's future.

When the settlement process begins, parties potentially impacted by the Indian water rights claims identify the sources of water necessary to satisfy the tribal needs. A federal negotiating team works with the parties to assure that federal requirements, including local cost contribution, are met. The Arizona Department of Water Resources (ADWR) participates in the settlement discussion, offering technical assistance and ensuring state water laws and policies are followed. In addition to ADWR's efforts, the state has created the Office of Indian Water Rights Settlement Facilitation. The parties may utilize the facilitator for information, facilitation and mediation purposes.

When local parties agree on a settlement, the issue is taken to the United States Congress for approval and funding. Generally, the congressional act ratifies the agreement among the parties, authorizes congressional appropriations, and may require a state contribution. The parties then finalize

the implementing agreement, seek any necessary state appropriation, and seek approval of the court in either the Gila River General Stream Adjudication or the Little Colorado General Stream Adjudication.

AK CHIN INDIAN COMMUNITY

By Congressional action in 1978 and 1984, the Ak Chin Indian Community was awarded an annual entitlement to 75,000 acre-feet (85,000 acre-feet in wet years) of water delivered via the Central Arizona Project (CAP) and other Colorado River water. Delivery of this water has commenced. In 1992, Congress amended the 1984 Act to authorize the Community to lease any unused CAP water to off-reservation users within the Tucson, Pinal and Phoenix Active Management Areas.

TOHONO O'ODHAM NATION

In 1982, the Southern Arizona Water Rights Settlement Act (SAWRSA) was enacted by Congress to address the water claims of the San Xavier and Shuck Toak Districts of the Tohono O'odham Nation. SAWRSA awarded the districts an annual entitlement to 37,800 acre-feet of CAP and 28,200 acre-feet of settlement water to be delivered by the Secretary of the Interior to the two districts. The districts may also pump a limited amount of groundwater. In addition to state and local financial contributions the City of Tucson contributed 28,200 acre-feet annually of effluent to be used by the Secretary to facilitate deliveries to the districts (through sale or exchange). The districts may lease the CAP and settlement water within an area slightly larger than the Tucson Active Management Area.

The settlement has not yet been implemented. Court claims have not been dismissed against the non-Indian parties; little water has been delivered to the districts. SAWRSA has been amended to extend the Secretary's delivery deadline and to retain the locally funded Cooperative Fund for the Nation (the state contributed $2.75 million). Further amendments will be sought to facilitate implementation so that full utilization of CAP can occur.

The Tohono O'odham Nation's claims to water will not be completely satisfied until the water rights claims of the Sif Oidak District in Pinal County, commonly known as Chui Chu, are addressed. While that district currently has a contract for 8,000 acre-feet of CAP water, it has stated a need of nearly 100,000 acre-feet. The Nation has requested that a federal negotiating team be established so that negotiations can be commenced.

SALT RIVER-PIMA MARICOPA INDIAN COMMUNITY

In the Salt River-Pima Maricopa Indian Community Water Rights Settlement Act of 1988, Congress approved an agreement which gave the Community an annual entitlement to 122,400 acre-feet of water plus storage rights behind Bartlett and modified Roosevelt Dams. The parties to the agreement were: Salt River Project, Roosevelt Water Conservation District, Roosevelt Irrigation District, Chandler, Glendale, Mesa, Phoenix, Scottsdale, Tempe, Gilbert, the Central Arizona Water Conservation District, the United States and the State of Arizona.

The sources of water for the Community under the settlement are from the Salt

River, Verde River, groundwater and CAP water. The Community is allowed to pump groundwater, but must achieve safe-yield when the East Salt River sub-basin in the Phoenix Active Management Area does so. The Community has leased its 13,000 acre-feet CAP allocation to the Phoenix valley cities from 2000 to 2099. The Arizona State Legislature appropriated $3 million, which was added to $47 million from the United States for the Community's trust fund. This settlement was approved by the court in the Gila River General Stream Adjudication for incorporation into the final decree in that case.

FORT MCDOWELL INDIAN COMMUNITY

In 1990, Congress ratified an agreement between the Fort McDowell Indian Community (FMIC) and neighboring non-Indian communities, including Salt River Project, Roosevelt Water Conservation District, Chandler, Mesa, Phoenix, Scottsdale, Tempe,

Gilbert, the Central Arizona Water Conservation District, the United States and the State of Arizona. Under that agreement, FMIC is provided an annual entitlement to 35,950 acre-feet of water from the Verde River and CAP. The 18,233 acre-feet of CAP in the water budget may be leased for 100 years or less off-reservation within Pima, Pinal, and Maricopa counties. A lease of 4,300 acre-feet to Phoenix has already been signed. This settlement also provides for a minimum stream flow on the Lower Verde River of 100 cfs.

In accordance with the 1990 Act, a development fund was created with $23 million from the United States and with a $2 million appropriation by the Arizona State Legislature. The settlement was approved by the court in the Gila River General Stream Adjudication and will be incorporated into a final decree in that case.

SAN CARLOS APACHE TRIBE

The water rights claims of the San Carlos Apache Tribe to the Salt River side of their reservation were settled through congressional enactment of the San Carlos Apache Tribe Settlement Act of 1992. The Tribe was awarded an annual entitlement to 71,435 acre-feet of water from the following sources: Salt River, Gila River, Black River and CAP. The 64,135 acre-feet of CAP water may be leased off-reservation within Pima, Maricopa, Pinal, Yavapai, Graham, and Greenlee counties. Groundwater may also be pumped from under the reservation.

The settlement agreement has been approved by the court in the Gila River General Stream Adjudication for incorporation into the final decree in that case. Signatory parties include: Salt River Project, Roosevelt Water Conservation District, Phelps Dodge Corporation, the Buckeye Irrigation Company, the Buckeye Water Conservation and Drainage District, Chandler, Glendale, Globe, Mesa, Safford, Scottsdale, Tempe, Gilbert, Carefree, the Central Arizona Water Conservation District, the United States and the State of Arizona. This agreement includes a 100-year lease with the City of Scottsdale for a portion of the Tribe's CAP water.

In 1994, the Arizona State Legislature appropriated $3 million, which was added to $38.4 million from the United States, for the Tribe's development trust fund. The water right claims of the San Carlos Apache Tribe to the Gila River side of

the reservation will be the subject of separate discussions or litigation.

YAVAPAI-PRESCOTT INDIAN TRIBE

In 1994, Congress enacted the Yavapai-Prescott Indian Tribe Water Settlement Act. The Act settles the Tribe's water rights claims by: 1) confirming the Tribe's right to pump groundwater within the boundaries of the reservation, 2) providing for the relinquishment of the Tribe's CAP contract, the proceeds to be used for a water service contract with the City of Prescott, and 3) providing that the Tribe may divert a portion of the water from Granite Creek currently diverted by the Chino Valley Irrigation District.

The Act also provides authorization to the Tribe and the City of Prescott to market their CAP water to the City of Scottsdale, which has been completed. The Act required a state appropriation of $200,000 which was made in the 1994 session of the Arizona State Legislature and was added to the Tribe's CAP proceeds fund. The Gila River General Stream Adjudication approved this settlement for incorporation into the final decree in that case.

GILA RIVER INDIAN COMMUNITY

The Gila River Indian Community (GRIC) claims an annual entitlement to over 1.5 million acre-feet in the Gila River General Stream Adjudication. A federal negotiating team was established to facilitate settlement discussions. Since that time a settlement water budget of an annual entitlement to 653,500 acre-feet has been the basis for the negotiations. A variety of water sources are being discussed including CAP water, the Gila River and groundwater. The potential parties to the settlement discussion include many non-Indian neighbors: Salt River Project, Roosevelt Water Conservation District, San Carlos Irrigation and Drainage District, Hohokam Irrigation District, New Magma Irrigation District, Phoenix valley cities, Central Arizona Irrigation and Drainage District, Maricopa-Stanfield Irrigation District, the United States, Central Arizona Water Conservation District and the State of Arizona.

Discussions have taken place between GRIC and individual parties, but a full settlement may be dependent upon the quantity of CAP water available for Indian settlements and the costs associated with CAP water. When settlement reached Congressional and state approval will be sought. In 1997 the ADWR published a preliminary Hydrographic Survey Report on water uses and lands of the Gila River Indian Reservation. This report further defines the issues to any potential settlement or litigation.

UPPER GILA VALLEY

The Indian and non-Indian water users who are parties in the United States v. Gila Valley Irrigation District, et al., Globe Equity No. 59 (entered June 29, 1935), also known as the Globe Equity Consent Decree, have been in litigation over the management of the Decree.

The major parties to the consent decree include: San Carlos Apache Tribe, Gila River Indian Community, the United States on behalf of the tribes, Upper Valley Defendants (irrigators in the Gila Valley and Franklin Irrigation Districts), San Carlos Irrigation and Drainage District, Asarco Mining Company, and Phelps-Dodge Corporation.

Major issues in the ongoing enforcement litigation are: 1) reliable water supply for downstream decreed right holders (particularly the tribes); 2) improved water quality below the irrigation districts; 3) the impact of groundwater pumpage on the availability of surface water; and 4) storage in San Carlos Reservoir.

Discussions on these issues for settlement are included in the Gila River Indian Community negotiations.

LITTLE COLORADO RIVER BASIN

The Navajo Nation, Hopi Tribe, Zuni Pueblo and the San Juan Southern Piaute Tribe have been negotiating with non-Indian water users in the Little Colorado River basin, the State of Arizona and the federal government for several years in a settlement committee appointed by the Little Colorado General Stream Adjudication Court. The Arizona Department of Water Resources prepared a technical report for the parties and meetings have been held on a periodic basis.

The court has issued a stay of the proceedings in 1994 during which time the parties are directed to bring settlement discussions to a conclusion. If a settlement cannot be reached the court is expected rule on how the litigation should proceed.

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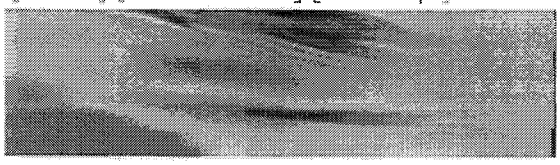

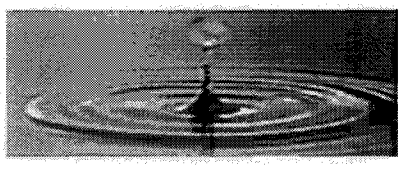

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FEDERAL RESERVED WATER RIGHTS

Federal reserved water rights are based upon a reservation of water by the United States government, typically stemming from case law, presidential executive order, or an act of Congress. For example, Indian reserved rights are generally based upon the 1908 United States Supreme Court decision in Winters v. United States of America, 207 U.S. 564 (1908), establishing the "Winters Doctrine." Finally, some non-Indian federally reserved rights are invoked by Congressional Act, such as the Wilderness Act or other federal reservation creation acts.

Federal reserved claims differ from state law based claims in that beneficial use of water and the perfecting of a water right are not required (in all cases). For example, federal rights are set aside, or reserved, for use on the reservations (non-Indian or Indian) regardless of whether the water is put to beneficial use. The only stipulations are that the water be utilized for the defined purpose of the reservation and that it claims a priority date based upon the creation of the reservation.

Federal water law is predominantly based on case law handed down over the years in numerous federal court decisions. Some of the leading cases decided by the United States Supreme Court are:

HENRY WINTERS, ET AL. V. UNITED STATES OF AMERICA, 207 U.S. 564 (1908)

The Court established in 1908 what is now known as the "Winters Doctrine." It found that an Indian reservation (in this case, the Fort Belknap Indian Reservation) may reserve water (of the Milk River in Montana) for future use in an amount necessary to fulfill their purpose with a priority dating from the treaty, act of congress, or executive order that established the reservation (May 1, 1888 in this case).

CAPPAERT V. UNITED STATES OF AMERICA, 426 U.S. 128 (1976)

This interesting case, decided by the Court in 1976, involved the issue of groundwater pumping and its impact on the surface water resources at a nearby federal national monument (Devil's Hole National Monument, Nevada). The junior groundwater pumpers (Cappaert) were restricted to ensure desert pup-fish (a threatened and endangered species) survival. The Court, however, ruled that the federal reserved right quantification was limited to the primary purpose of the reservation and only to the minimum amount of water necessary to fulfill the purpose of the reservation. Put simply, the National Park Service was allowed to retain exclusive rights to enough water (in the pool) in order to maintain the minimum amount necessary to ensure the survival of the fish. Any amount of water over and above this minimum was available for pumping by the Cappaerts.

UNITED STATES OF AMERICA V. NEW MEXICO, 438 U.S. 696 (1978)

In 1978, the Court found that the reserved water rights on national forests apply only to the preservation of timber resources and water flows. All other claimed needs were to be considered secondary purposes and the federal government would have to obtain rights like any other appropriator under state law. The Court also cautioned that quantification of these reserved rights should involve consideration of the potential impacts on downstream junior state law-based water rights appropriators.

ARIZONA V. CALIFORNIA, 373 U.S. 546 (1963), SUPP., 439 U.S. 419 (1979), SUPP., 460 U.S. 605 (1963)

This landmark decision, initially entered in 1963, with a subsequent decree issued in 1964, confirmed the division of waters of the Colorado River among the Lower Basin States (Arizona, California, and Nevada). The Court quantified the reserved rights of five Indian reservations (along the Colorado River) on the basis of the amount of water necessary to irrigate all practicably irrigable acres (PIA) on the reservations. This is known as the PIA method of quantifying reserved rights. The Supreme Court also placed stipulations and requirements on the State of New Mexico regarding uses of water from the Gila River (and tributaries) and confirmed that the contribution of the flow of the Gila River was excluded from Arizona's 2.8 million acre-feet annual Colorado River entitlement.

In addition to Indian reservations, Court decisions have extended the reserved right doctrine to encompass water uses in national forests, national parks and monuments, military reservations, and lands formally reserved and administered by the Bureau of Land Management.

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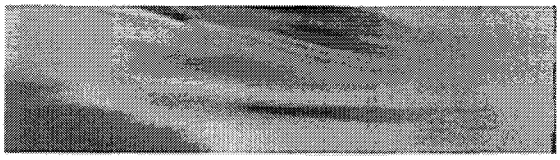

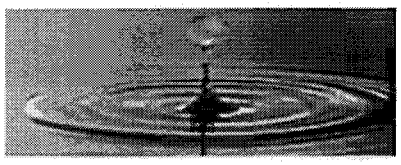

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