

RESERVED WATER RIGHTS COMPACT COMMISSION



STEVE BULLOCK, GOVERNOR

CHRIS D. TWEETEN, CHAIRMAN

STATE OF MONTANA

Senator Debby Barrett
Dorothy Bradley
Gene Etchart
Rep. Daniel Salomon

Senator Dick Barrett
Mark DeBryker
Richard Kirn
Rep. Kathleen Williams

December ____, 2014

Senator Chas Vincent
Chairman, Water Policy Interim Committee
Legislative Environmental Policy Office
State Capitol Building
1301 E. 6th Avenue, Room 171
Helena, MT 59620-1704

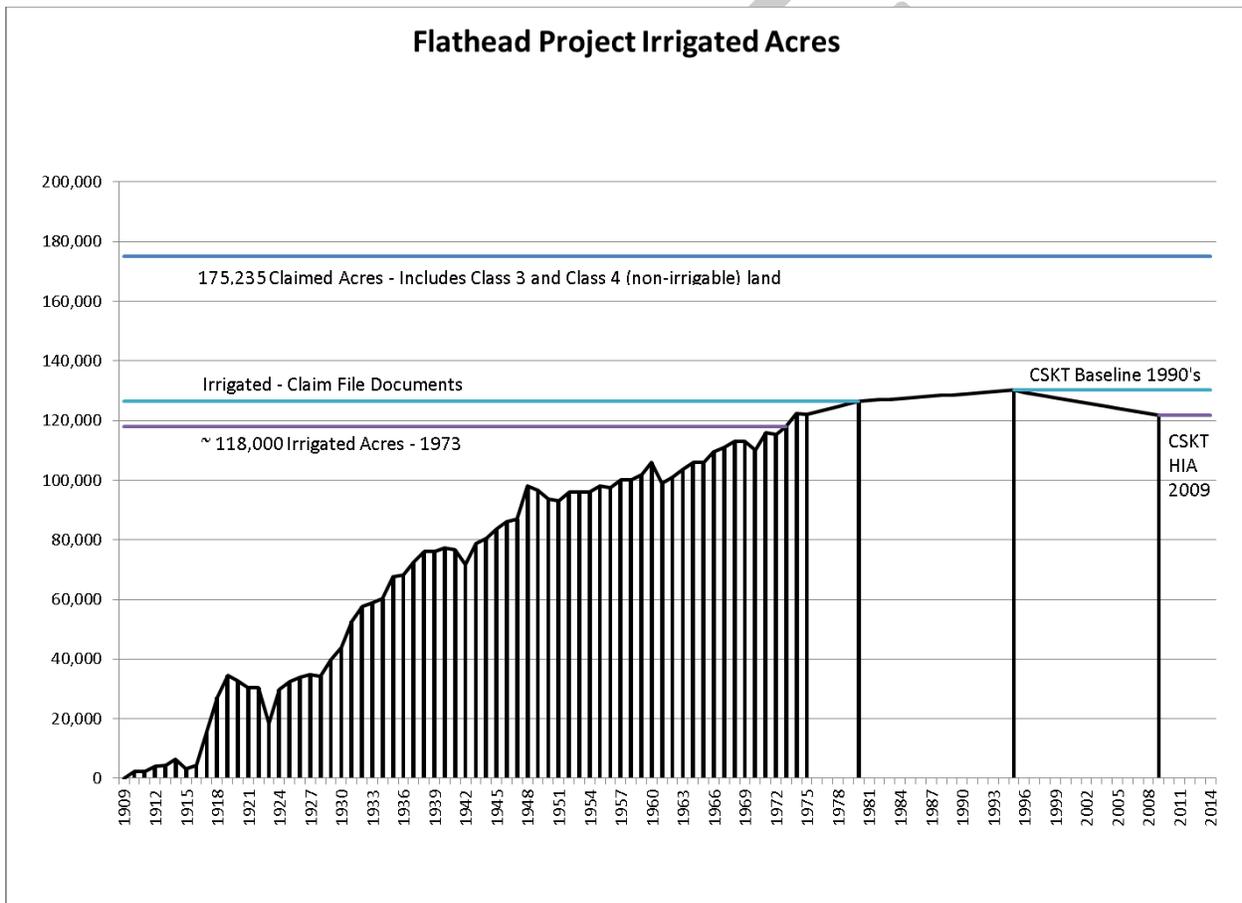
Dear Chairman Vincent and Committee Members,

Thank you for your letter of October 30, 2014 providing recommendations for the conclusion of water compact negotiation between the Confederated Salish & Kootenai Tribes and the State of Montana. The Reserved Water Rights Compact Commission (RWRCC) appreciates the diligence and thoroughness demonstrated by the Water Policy Interim Committee and its staff in their evaluation of the proposed Compact during the past interim. The RWRCC has discussed the recommendations with both the Tribes and the United States, and offers the following responses. Where the Parties have agreed to a course of action in response to a recommendation, the proposed response is conveyed from "the Parties." Where a recommended course has not yet been discussed and agreed to or is still under consideration by the Tribes or United States, the recommendation is made by the RWRCC. For ease of reference, each numbered recommendation is reproduced below, followed by the response.

1. The committee is concerned about the historic decrease in the number of irrigated acres on the Flathead Indian Reservation, and respectfully requests the negotiations to include an investigation into why this decrease has occurred. The committee also suggests the compact includes provisions to recover lands formerly irrigated, if practicable, after operational efficiencies to the Flathead Indian Irrigation Project are completed.

The Recommendation appears to encompass all irrigated land within the exterior boundaries of the Flathead Indian Reservation. The only affirmative limitation on irrigated acreage in the proposed settlement is the stipulation that the Flathead Indian Irrigation Project (FIIP) may serve no more than 130,000 acres. The testimony presented at the October 29 and 30 WPIC meetings reflected a general sense of uncertainty about the acreage presently and historically irrigated on the FIIP. It was unclear whether the wide range of acreages cited represented actual acres historically irrigated and whether these estimates applied to the FIIP or to the Reservation as a whole. These are critical distinctions that frame the analysis below.

To the extent that the referenced amounts applied only to the FIIP, they may be attributable to any of several sources. Two of the most likely and readily available sources are: 1) the surveyed estimates of irrigable acreage prior to FIIP construction¹, and 2) acres claimed by both the BIA and FJBC in their respective water rights filings with the DNRC². It is important to note that neither source represents actual currently or historically irrigated acres. The former is an estimate of *irrigable* acres before project construction. The DNRC claim files also do not represent actual irrigated acres—either past or present—because they include both Class 3 and Class 4 non-irrigable lands.³ These sources illustrate important considerations that need to be taken into account when analyzing estimates of irrigated acreage: namely whether the estimate references irrigated, assessed, irrigable, or potentially irrigable acreage; and whether the estimate applies only to FIIP lands or is inclusive of private irrigation. Taking these considerations into account, a review of the available documentation indicates actual historically irrigated acres on the FIIP to be significantly less than the claims made during the October 29-30 Committee hearing or the estimates of irrigable acreage and claim files referenced above.

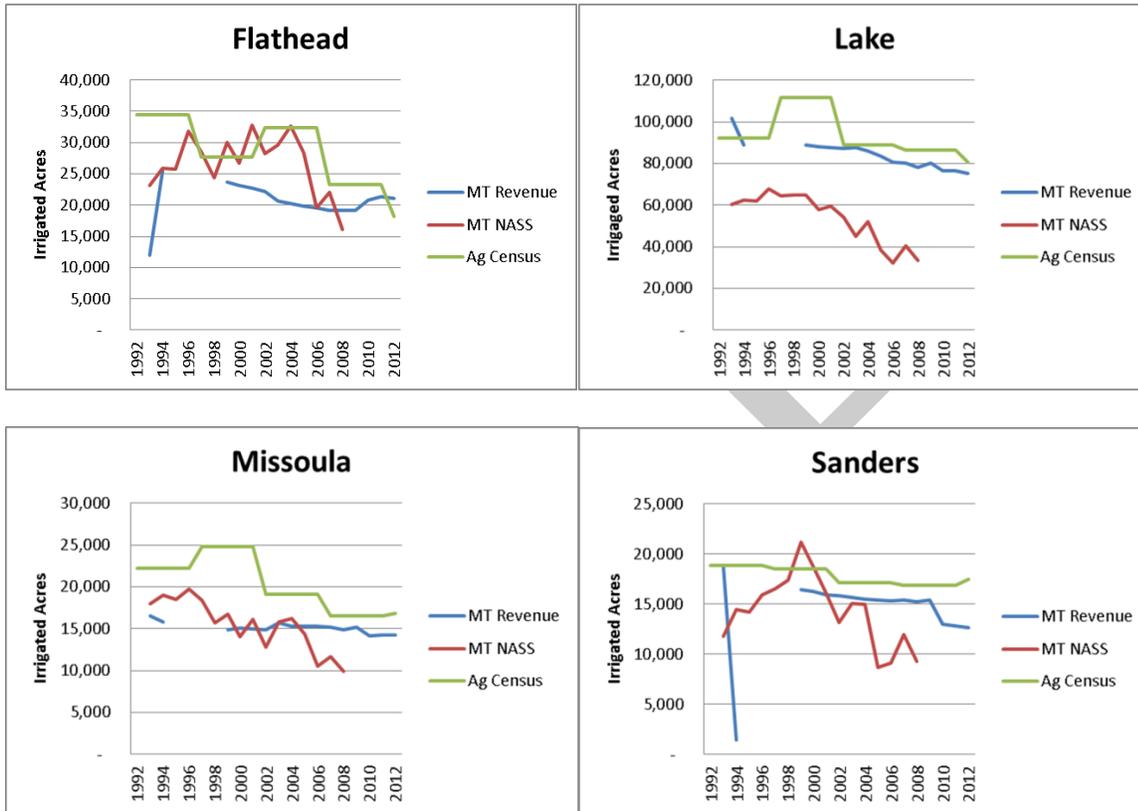


¹ One example of this type of survey is represented by “The Report of the Committee on Irrigation and Reclamation of Arid Lands on the Investigation of Irrigation Projects” (1911).

² See documents on file with the DNRC associated with Statement of Claim 76L 166594,.

³ *Id.* Including letter from Project Engineer identifying 132,918 acres as potentially irrigable.

As indicated by the chart above, actual irrigated acreage on the FIIP increased steadily to a high of approximately 130,157 acres in the mid 1990's.⁴ Beginning in the late 1990's, irrigation on the FIIP began to decline to the current level of approximately 121,719 acres.⁵ This downward trend on the FIIP reflects a decline in irrigated land across the Clark Fork Basin, as illustrated by the figures below, and across the west generally.⁶



This downward trend in actually irrigated acreage, while real, is less precipitous than some characterizations have suggested. It is likely attributable to a combination of factors, which may include the changing land use values resulting in the conversion of agricultural land to residential and commercial subdivisions and the cessation of irrigation on lands of marginal productivity. Regardless, the 130,000 acre limitation contained in the proposed Compact would allow a significant increase from current irrigated acreage to a level commensurate with the historic maximum on the FIIP. Off the FIIP, the Compact imposes no limitation on the amount of acreage that could be irrigated. On the contrary, the inclusion of the Flathead System Compact Water Right and the stored water from Hungry Horse as part of the settlement provide a significant source of mitigation water that could be used to expand agriculture on and off the

⁴ Government Accountability Office, Report to the Chairman, Subcommittee on Interior and Related Agencies, Committee on Appropriations, U.S. Senate: Indian Irrigation Projects, February 2006.

⁵ *Id.*

⁶ 2012 Census of Agriculture, United States Department of Agriculture; National Agricultural Statistics Service, USDA; Montana Dept. of Revenue.

Reservation.

2. The committee recommends the compact define a "court of competent jurisdiction" to mean "a state court or federal court, which otherwise has jurisdiction of the subject matter and the parties; or a tribal court which otherwise has such jurisdiction provided that all parties to the case consent to tribal court jurisdiction." The committee recommends that the compact commission ensures federal law provides for federal court jurisdiction.

The definition of "Court of Competent Jurisdiction" recommended by the Committee is substantively identical to that used in the Fort Peck Compact. The Tribes' testimony during the October 29-30 Committee hearing indicated that they are willing to accept a definition modified to reflect that the parties to litigation would have to consent to the exercise of both State and Tribal court jurisdiction.

As indicated by testimony from RWRCC staff during the hearing, the 2013 proposed settlement, which did not define "Court of Competent Jurisdiction", would likely have resulted in State court being the default court of competent jurisdiction for matters involving non-member activities on fee land within the Reservation. This is due to the fact that under the *Montana v. U.S.*⁷ rule, there is a general presumption against tribal courts exercising jurisdiction over non-members acting on fee land within the exterior boundaries of a reservation. A concern expressed by the Committee was that a non-tribal party to litigation brought in tribal court would have to exhaust his or her remedies in tribal court before being able to invoke State jurisdiction, thereby adding to the time and expense of litigation. Under the Committee's definition and taking into account the Tribes' proposed modification, the default court of competent jurisdiction is likely to be federal court, as all parties to a suit would have to consent to either state or tribal court jurisdiction. In response to the Committee's recommendation, the RWRCC suggests that the parties adopt a definition similar to the following:

"Court of Competent Jurisdiction" means a state or tribal court that otherwise has jurisdiction over the matter and to which the parties consent, but if no such court exists, a federal court. The Parties agree to seek congressional approval of legislation to ratify the Compact providing that (i) the United States District court for the District of Montana in Missoula is the default Court of Competent Jurisdiction, and (ii) the sovereign immunity of the United States is not waived by this provision.

This definition appears to address the Committee's recommendation while simultaneously incorporating the Tribes' position and federal concerns regarding expansion of federal court jurisdiction and involuntary waiver of federal sovereign immunity. Because only Congress can expand the jurisdiction of the federal courts, a conferral of federal jurisdiction over all Compact related disputes will need to be effected through the federal legislation implementing the Compact. This approach does carry a risk that if Congress is unwilling to provide for federal

⁷ 450 U.S. 544 (1981).

court jurisdiction, there could be factual circumstances that would result in no court having jurisdiction to hear a particular dispute.

3. The committee recommends that the Interim Technical Team, which would be created to plan future water measurements and forecasting, include local representatives and experts with the Montana Bureau of Mines and Geology, as applicable. The committee recommends the Interim Technical Team be held accountable by the Unitary Management Board, including an appeals process to the board and to courts. The committee recommends the Interim Technical Team continue its functions through irrigation project rehabilitation and integrate related roles with the Adaptive Management Team. The committee recommends the Interim Technical Team document their processes and conduct meetings in accordance with state open meetings and open records laws.

The Parties have agreed to merge the functions of the Interim Technical Team (proposed by the State) and the Adaptive Management Team (proposed by the Tribes) consistent with the Committee's recommendation. The result would be a single team, to be termed the Compact Implementation Technical Team (CITT) that would be responsible for both pre-Effective Date and post-Effective Date formulation and implementation of measurement, accounting, forecasting, water allocation, implementation of Operational Improvements and Rehabilitation and Betterment Projects, and all other duties associated with the Adaptive Management provisions of the Compact. The RWRCC proposes that the CITT be composed of a primary and a reserve member from each Party and the Project Operator when the Project Operator is an entity other than the BIA.

Under the Adaptive Management Provisions, the CITT would hold a minimum number of regularly scheduled meetings before, during, and after the irrigation season to plan, forecast, and allocate water between Tribal Instream Flows and the FIIP Water Use Right and to adapt those allocations based on existing climatic and water supply conditions throughout the irrigation season. The CITT would also be responsible for the accounting and assignment of Reallocated Water made available through implementation of Operational Improvements and Rehabilitation and Betterment projects and for ensuring that as river diversions change over time in response to these efficiency improvements, Historic Farm Deliveries continue to be met. The Parties have agreed, in accordance with the Committee's recommendation, that the CITT be subject to the same open meetings and participation provisions that govern the Water Management Board—namely that the laws providing for greater openness and public participation will govern the actions of the Team.

In further accord with the Committee's recommendation, the RWRCC proposes including language in the Adaptive Management Provisions allowing the CITT to access outside expertise, with specific reference to the Bureau of Mines and Geology. The RWRCC does not anticipate that the Bureau would need to be involved as a CITT member or in a day-to-day capacity but anticipates that the Bureau's expertise will be invaluable in some instances.

Following considerable deliberation, the RWRCC recommends against placing the CITT under the oversight of the Water Management Board. With due deference to the Committee's recommendation, the RWRCC came to this determination after lengthy consideration and in response to a number of concerns expressed by FIIP irrigators about oversight by the WMB of FIIP related functions. As the CITT would be the scientific and technical entity responsible for allocating water at FIIP headworks diversion points, its responsibilities are integrally connected to the exercise of the FIIP Water Use Right. For that reason, the RWRCC recommends, in response to public input, against WMB oversight of the CITT. The RWRCC instead proposes that the Parties exercise administrative oversight of the CITT. Oversight would be carried out by the respective technical administrative agencies of each Party having expertise in hydrology, hydrogeology, or fisheries sciences. If the Parties agree to this approach, the Director of the DNRC would be the State entity having oversight responsibility and would share this duty with similarly qualified representatives from the Tribes and United States.

The purpose of the CITT is to make necessary decisions about forecasting, water allocation, and implementation of project improvements, as well as to carry out other ongoing tasks of Adaptive Management. The highly technical nature of the CITT argues for administrative oversight that will supply the technical expertise necessary to analyze and review its decisions.

4. The committee recommends that county Commissioners from the four counties located within the Flathead Indian Reservation select technically qualified candidates for the governor's consideration for appointment to the Unitary Management Board. The committee recommends the county Commissioners use a process similar to that used to select replacement legislators.

The RWRCC is prepared to follow the Committee's recommendation. The RWRCC is currently engaged in analyzing how best to provide for County Commissioner input in a way that reflects the proportional impact of the FIIP on the respective counties, and therefore maximizes the local control emphasized by the Committee in its deliberations.

5. The committee recommends the compact commission negotiate an increase to the amount designated as DCMI water to a higher level.

The Committee's recommendation does not stipulate whether it wishes to see the 11,000 acre feet designated for State administration off the Reservation expanded or whether it would prefer to see some other portion of the Flathead System Compact Water Right allocated to Domestic, Commercial, Municipal and Industrial uses without regard to the terms of lease or place of use specified by the 11,000 acre foot allocation. As previously submitted to the Committee, the 11,000 acre feet from Hungry Horse Reservoir allocated for DCMI uses off the Reservation was calculated based on the 50 year projected growth for those types of uses in the Flathead and Clark Fork basins.

The remainder of the Hungry Horse allocation (79,000 acre feet) and the Flathead System Compact Water is not so conditioned and therefore may be used for mitigation of new DCMI as well as other types of uses, thereby providing significant flexibility for the mitigation of new uses on and off-Reservation in these basins. Because the remaining portion of the Flathead System

Compact Water Right is not limited as to purpose or place of use, it could be used anywhere in the basins where it could be made physically available. Under the terms of the Compact, any portion of the Flathead System Compact Water (with the exception of the 11,000 acre feet) may be leased for any legal use, including DCMI, on or off Reservation with the proviso that none of the water may be used outside the State.

The State negotiated vigorously for the stipulations on the 11,000 acre-feet from Hungry Horse. Any further concession that the Tribes might be willing to make on this issue would almost certainly require significant concessions in return by the State. In light of the flexibility to use the remaining portion of Flathead System Compact Water for DCMI purposes as described above, the RWRCC feels strongly that the current settlement proposal is protective of State interests and is preferable to any change and additional concessions that would be required to achieve it. While the RWRCC appreciates the Committee's concern for ensuring an adequate supply of DCMI water into the future, it respectfully suggests that the currently negotiated terms offer a desirable balance by providing a generous source of water dedicated solely to those types of uses and retaining significant flexibility to accommodate a variety of different uses into the future. For example, the agreement as currently proposed would allow for expansion of irrigation on the Reservation in addition to that already provided for on the FIIP—an issue the Committee has specifically raised. Moreover, the Parties have tentatively agreed to terms in the current negotiation that would make Flathead System Compact Water available at a very reasonable lease rate of \$8 per acre foot to irrigators on the FIIP, plus a \$25 lease fee during the irrigation season, to supplement FIIP water supplies during times of shared shortage. It is precisely this type of flexibility that the Parties seek to retain for the Flathead System Compact Water in general and the Hungry Horse water in particular.

6. The committee recommends that passage of the compact does not imply a consensual agreement between any individual residing on the Flathead Indian Reservation and the tribe.

The Parties believe that this issue would be adequately addressed by the inclusion in the Compact of the above-referenced definition of "Court of Competent Jurisdiction," but are nonetheless willing to incorporate this recommendation. The RWRCC recommends inclusion of the following language, or a substantively similar provision, in the "General Disclaimers" section of Article V.B of the Compact. This language would provide that "Nothing in this compact shall be construed or interpreted":

"To limit, diminish, modify, or enlarge any individual's adjudicatory or legislative jurisdiction except as expressly provided herein, or constitute a waiver of an individual's right to object to the Compact during the Water Court decree process."

7. The committee recommends the compact ensures ownership status of land on the Flathead Indian Reservation does not involuntarily change as a result of passage. This recommendation does not affect the tribe's efforts to acquire or purchase land and return land to trust status.

The RWRCC recommends that the Parties respond to the Committee's recommendation by the inclusion of the following language, or a substantively similar provision, the "General Disclaimers" section in Article V.B of the Compact. This language would provide that "Nothing in this compact shall be construed or interpreted":

"To transfer, convert, or otherwise change the ownership or trust status of land on the Reservation. Specifically, nothing in this compact changes fee owned land to trust land or trust land to fee land, or in any way alters the ownership status of land within the exterior boundaries of the Flathead Indian Reservation."

8. The committee recommends adoption of the proposed concept of a "delivery right authorization" to give irrigators a property right, recognizing their historic access to irrigation project water.

The Parties have agreed to incorporate the concept of a delivery right authorization or equivalent concept into the Compact. After discussion with the Parties, the RWRCC recommends the following provision, or one substantively similar, be incorporated into Article IV:

"FIIP delivery entitlement statement. Assessed land within the FIIP is entitled to have water delivered by the Project Operator if in compliance with the applicable BIA rules and guidelines for FIIP. On the Effective Date, an owner of assessed land within the FIIP may request of the Project Operator a delivery entitlement statement, which must be tendered within 90 days of the request or denied for cause. More than a year after the Effective Date, the delivery entitlement statement must be tendered or denied within 30 days. The delivery entitlement runs with the land and is valid so long as the land remains assessed. The Project Operator's refusal to issue a statement of delivery entitlement is appealable according to the Dispute Resolution Provisions of Article XX."

9. The committee recommends adoption of the proposed concept of "resource mitigation" to ensure that individual well owners negatively affected by irrigation project improvements are assured continued access to groundwater.

The parties are willing to explore the concept of "resource mitigation", which is currently contained in the draft Adaptive Management appendix. In the context of existing state law, this is a level of protection that most water users do not enjoy. Generally there is no continued right to seepage or waste. While there is a right to continuation of return flows that reach a surface water source, there is no legal provision to address the issue unless a change of use application is filed with the DNRC. The DNRC would like assurance that any mitigation provision included in the Compact would not represent an attempt to change to the underlying law governing these issues. The Parties are concerned that funding resource mitigation from settlement dollars that are intended for FIIP upgrades could preclude realization of settlement goals. The RWRCC nonetheless shares the Committee's concern about impacts to groundwater users and proposes that a mitigation fund be established as

one of the priorities to which excess interest payments are allocated from the State's proposed \$30 million contribution to settlement for FIIP pumping.

10. The committee recommends that upon successful negotiation of the compact, the compact commission and the tribe embark upon education and outreach efforts for legislators, as they consider passage of the water rights settlement during the session.

The RWRCC is prepared to follow the Committee's recommendation. During the interim, the RWRCC has consistently made its members and staff available to public requests for information, education, and dialog on the Compact. Specifically the RWRCC and staff have participated in numerous public and private meetings initiated by the RWRCC and members of the public respectively. The RWRCC is prepared to put forth a similar effort directed at members of the 64th Montana Legislature. The RWRCC is currently exploring formal and informal options for this outreach effort and will formulate an approach—in cooperation with the Parties—on the conclusion of negotiations.

11. The committee recommends that the compact commission discuss the dual management concept and explain why that is or is not feasible

The RWRCC has addressed the unitary management issue at some length in numerous documents. Specifically, the RWRCC refers the Committee to item 7 of the letter addressed to Chairman Vincent, dated December 16, 2013, and the Report issued by the RWRCC in December of 2013. Both documents are available on the RWRCC website. To summarize, while dual management was used in the six other tribal compacts negotiated by the RWRCC, the unitary management approach provided for by the Proposed CSKT Compact was an integral part of compact negotiations and represents a more practical approach to administration than does dual administration in light of the specific circumstances on the Flathead Reservation.

The unitary management approach is more practicable on the Flathead Reservation because of the heterogeneous pattern of trust land, tribally owned fee land, and non-tribal fee land and the large amount non-tribal land ownership. Because water is a unitary resource and surface water and groundwater are interconnected, the dual management approach, while feasible, carries a likelihood of duplication of technical and permitting responsibilities, conflicts of law, and administrative inconsistency that is heightened as a result of these land ownership patterns. Challenges for dual administration include the fact that many of the waters on the Reservation arise on Tribal land and flow through fee owned land; the fact that the Reservation is water rich, creating significant potential for future development of water; and the fact that non-members significantly outnumber tribal members. The Commission proposes that as part of the outreach and education efforts described above, the Parties describe a number of water management scenarios and the ways in which those scenarios would be addressed under both dual and unitary management.

Analyses conducted by RWRCC and legislative staffs have concluded that the unitary management approach is a rational and legally defensible way to administer water resources on the Reservation. While it is not the only feasible approach, it is the solution agreed to by the

Parties through the settlement process, and is the one, moreover, which minimizes the risk of conflict and duplication in the management of water on the Reservation.

Sincerely,

Chris Tweeten
Chairman, Montana Reserved Water Rights Compact Commission

DRAFT