

Meeting of the
MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

February 26, 2013 at 7:00 P.M.

Meeting Location

Montana Association of Counties
MACo Conference Room
2715 Skyway Drive
Helena, MT 59602

Chris Tweeten, Chairman

AGENDA

- 1) Call to Order and Introductions
- 2) Chairman's Report – Chris Tweeten
- 3) Confederated Salish Kootenai Tribes Compact – Jay Weiner
ACTION ITEM – motion to approve Compact for submittal to 2013 Legislature
- 4) Public Comment *Review of modifications to Compact & Ordinance since the 11/8/12 version*
- 5) Adjourn

Final Proposed Compact and Appendices Available At:
<http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/Default.asp>

Compact Commission Contact Information:

Phone: 406-444-6841

Email: dnrrwrcc@mt.gov

Web: <http://dnrc.mt.gov/rwrcc/default.asp>

*Motion to Approve Compact w/ contingency - WUA -
by Dan Salomon (Rep.)*

Second the motion - Sen. Dick Barrett

Vote in favor

Chris Tweeten
Rep. Kathleen Williams
Rep. Dan Salomon
Sen. Dick Barrett
Dorothy Bradley
Rick Kinn
MAAK DeBruycker
Gene Fitchart (by proxy)

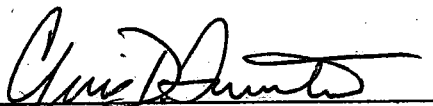
Vote Against

Sen. Bobby Barrett

IN WITNESS WHEREOF the representatives of the State of Montana have signed this Compact

on the 26th of February 2013.

FOR THE STATE OF MONTANA
MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION



Chris D. Tweeten, Chair


Senator Debby Barrett



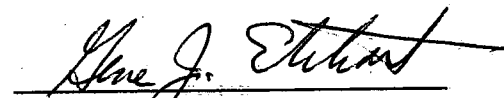
Senator Dick Barrett



Dorothy Bradley



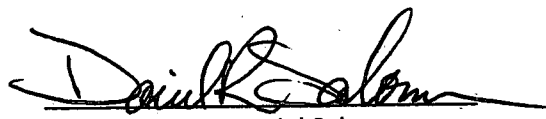
Mark DeBruycker



Gene J. Etchart



Richard Kirn



Representative Daniel Salomon



Representative Kathleen Williams

February 21, 2013

Montana Reserved Water Rights Compact Commission:

I, Gene Etchart, vote to approve the proposed Confederated Salish and Kootenai Tribes-Montana Water Rights Compact and for its submission to the 2013 Montana Legislature for ratification. I authorize Compact Commission Chairman Chris Tweeten to cast my vote for any motion to that effect.

A handwritten signature in cursive script, appearing to read "Gene Etchart", with a long horizontal flourish extending to the right.

Gene Etchart, Commissioner
MT RWRCC

Schultz, Bill (DNR)

From: Schultz, Bill (DNR)
Sent: Wednesday, February 27, 2013 8:46 AM
To: Tubbs, John; Baker, Tim; O'Brien, Kevin; Beck, Judy
Cc: Weiner, Jay; Tweeten, Chris
Subject: RWRCC Approves CSKT Compact
Attachments: 2-26-13 Compact Commission CSKT vote news release final.docx

The RWRCC voted to submit the CSKT compact, contingent on approval of the Water Use Agreement, to the 2013 Legislature. The vote was 8-1 with Senator Debby Barrett voting "no". Approximately 100 people attended. The meeting ran from 7-9:30 pm. 24 people provided comments as proponents and 6 people provided comments as opponents. Proponents included representatives from Mission Valley business community, Tribal Council, irrigators, tribal members. Opponents included irrigator, realtor, Sen Jackson, general public. The attached press release was e-mailed to multiple media addresses after the meeting closed. I can be reached today at 370-1249.

Bill Schultz, Program Manager
Reserved Water Rights Compact Commission
2705 Spurgin; Bldg C
Missoula, MT 59804
406-542-5880
bischultz@mt.gov

Reserved Water Rights Compact Commission Approves CSKT Compact for Submittal to 2013 Legislature

FOR IMMEDIATE RELEASE

RWRCC Contact:

Chris Tweeten

406-459-0255

Jay Weiner

(406) 444-6844

Bill Schultz

(406) 542-5880

February 26, 2013

The Montana Reserved Water Rights Compact Commission (RWRCC) met Tuesday evening in Helena to consider approving the Confederated Salish and Kootenai Tribes – Montana water compact and submitting it to the 2013 Legislature. The nine member commission voted to forward the negotiated settlement to the Legislature for its consideration, with ratification contingent on approval of the Flathead Indian Irrigation Project (FIIP) Water Use Agreement by the CSKT and the Flathead Joint Board of Control.

“The Compact presents a historic opportunity to resolve long-standing questions regarding water use in western Montana,” Compact Commission Chairman Chris Tweeten said. “Legislative approval will allow the Water Court to complete the water adjudication in a timely way, and will pave the way for orderly water development on the Reservation, where court decisions have created a chaotic situation for water users.”

“Over the past five years, we’ve come a long ways digging ourselves out of the recession. The Water Compact is a positive step forward in continuing in the right direction for economic growth in Lake County,” said Jarrod Shew, branch manager of First Interstate Bank in Polson. “It gives certainty to property owners, business people, and new people moving in from the outside.”

The Compact quantifies the CSKT’s rights on and off the reservation and settles the Tribes’ water claims for all time. The compact provides protections for existing water users and ensures that water is available for future development.

“The agreement has dealt very fairly with the farmers. I believe that every agricultural person in the valley is protected and that the negotiations have created an agreement that can allow us all to move forward positively as a community on the Reservation,” said Susan Lake, a farmer in Ronan.

The agreement also provides for the administration of water rights on the Reservation, something that has been absent since 1996.

“Since 1996, the Department of Natural Resources and Conservation has not been able to process new water right applications or changes to existing water rights on the Flathead Reservation under a series of Orders from the Montana Supreme Court. This freeze on new applications cannot be lifted until the compact is settled and the Tribes’ water rights are quantified,” said Tim Davis, DNRC Water Resources Division Administrator.

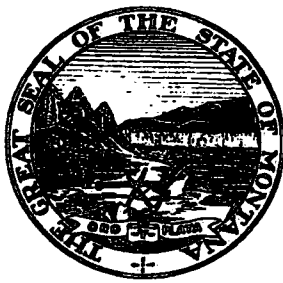
The CSKT water compact has been negotiated over many years. The Compact Commission, the CSKT and the United States held monthly public negotiation sessions between 2007 and 2012. The settlement consists of the Water Rights Compact and the Unitary Management and Administration Ordinance. Proposed settlement documents were released in November 2012, and were the subject of 15 public meetings held around western Montana in November and December. Changes were made to the documents in response to public comment received, and the final documents were posted on February 14, 2013. The final documents can be found on the RWRCC website at: <http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/Default.asp>. These documents are what the negotiation teams will seek to have ratified by the 2013 Legislature.

“The proposed compact is a result of 10 years of tough negotiations. It’s a good agreement and I hope it becomes law. It will provide for predictability and certainty for the business community on the Reservation,” said Ric Smith, the broker-owner of Century 21/Big Sky Realty in Polson.

The Flathead Joint Board of Control’s authority to approve the Water Use Agreement is the subject of litigation. The Flathead Joint Board of Control has appealed to the Montana Supreme Court the state district court decision enjoining it from executing the Water Use Agreement.

After State ratification, both the US Congress and the CSKT need to give final approval to the settlement. It would then be submitted to the Montana Water Court for inclusion in the Water Court’s final decrees.

##



RESERVED WATER RIGHTS COMPACT COMMISSION SIGN IN SHEET FOR

MEETING RWRCC
DATE 2/26/13

PLEASE PRINT

Name	Organization	Address	City/ST/Zip	Phone
<i>Jesse Nereimay</i>				
SARA SCHMIDT	BLACKFOOT CHALLENGE		QUANDO MT	
Steve TBBOL	WMWUA, LLC		ROMAN MT	544-8706
E.J. Redding	redding@47-North.net			
Name	Organization	Address	City/ST/Zip	Phone
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Name	Organization	Address	City/ST/Zip	Phone
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Judy Samuelson			Print signatures	
Rebecca McLean	CSKT	Pub 16		406 675-2700
Dick Erb		Maiese		706-644-2020
Tracy Tule	Conelot	Spearville		
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WIFE GALE	SELF		RONAN 59864	
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DON HAPPEL	MADISON CO.	PO Box 278	VIRGINIA CITY, MT 59755	



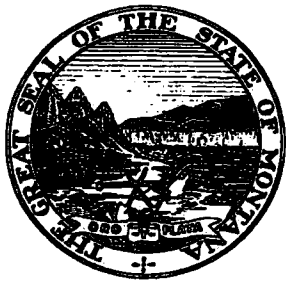
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John Metropoulos		Helena		461-4294
Grand Osee		6899 Miners Trail	Helena, MT 59602	458-6365
Robert Ray	DEQ	10 Box 200908	Helena MT 59620	444-5319
Gordon Wind	FILP-CME		St. Ignatius MT	745-2661
John Biggs	WMWUA	30513 Allison Rd	St. Ignatius, mt.	210-3698
Brian Quigley	RMSGA	Box 265	AVON, MT 59713	492-8710



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Name	Organization	Address	City/ST/Zip	Phone
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<i>Dan J. Decker</i>	<i>CSKT</i>	<i>P.O. Box 278</i>	<i>Pablo, MT 59855</i>	<i>(406) 675-2700</i>
<i>Candace West</i>	<i>DNRC</i>		<i>Helena MT</i>	<i>444-6702</i>
<i>Ruth Swaney</i>	<i>N/A</i>	<i>PO Box 104</i>	<i>Pablo MT 59855</i>	<i>406-745-1140</i>
<i>Thomas Antiste</i>	<i>N/A</i>	<i>Box 144</i>	<i>Big Arm</i>	<i>406-849-5640</i>
<i>Rosemary Caje</i>	<i>CSKT</i>	<i>Box 51</i>	<i>Elmo MT 59915</i>	
<i>Garyn Kallan</i>		<i>113 Buchanan SW Roman</i>	<i>MT 59864</i>	<i>274-2171</i>
<i>Sue Antiste</i>	<i>N/A</i>	<i>PO Box 144</i>	<i>Big Arm MT</i>	<i>406-849-5640</i>
<i>Dorothy Fairly</i>	<i>CSKT</i>	<i>Box 584</i>	<i>Aulee MT</i>	<i>675-2700</i>
<i>Jarred Dupuis</i>	<i>N/A</i>	<i>PO Box 812</i>	<i>59855</i>	<i>675-8281</i>
Name	Organization	Address	City/ST/Zip	Phone

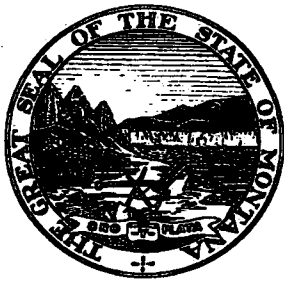


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DATE _____

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Name	Organization	Address	City/ST/Zip	Phone
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Genp Erb	WMWDA			406-544-9588
Matt Gravelley	RMSGA	Avon	Avon	406-492-0518
Shane Morigeau	CSKT		Ronan MT	406-546-7194



RESERVED WATER RIGHTS COMPACT COMMISSION

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DATE 2/26/13

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Name	Organization	Address	City/ST/Zip	Phone
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JARROD SHEW	FIRST INTERSTATE BANK	33015 BAYSIDE LN	Polson, MT 59860	406-883-8807
John Longlund	DNRC	Helena		444-6014
Rory Honning		Polson		
Marsha Straun		Ronan		
Bob Starke		St. Ignace		
Jack Lake		Ronan		
Paul Wadsworth		ST. Ignace	MT	531 6824
Llewellyn Best		110 PACHE LN	Ronan 59864	
Joe Dungle	CSKT	ST. IGNACE	59865	

CSKT – MONTANA WATER RIGHTS COMPACT

BACKGROUND

- The Montana legislature established the Montana Reserved Water Rights Compact Commission in 1979 to integrate reserved water rights into the state adjudication process. A federal reserved water right is created when a Treaty or other federal action sets aside federal land from the public domain. The water right carries the priority date of the reservation of the land, even though the water might not be put to use at that time. The Commission is charged with negotiating water rights “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.” MCA 85-2-701(2) and 702.
- The Confederated Salish & Kootenai Tribes (“Tribes”) and the Compact Commission have provisionally agreed to a water rights settlement (the “Compact”), and intend to ask the Montana Legislature to ratify it during the 2013 session. Congress and the Tribes must also give final ratification to the Compact. The Compact must then be approved by the Montana Water Court.

COMPACT BASICS

In general the Compact:

- Protects all existing water uses for non-irrigation rights from any exercise of the Tribes’ water rights in all affected water basin, on- and off-reservation.
- Protects on-reservation irrigators within the Flathead Indian Irrigation Project (FIIP) through a Water Use Agreement negotiated among the Tribes, the Flathead Joint Board of Control and the United States.
 - The Water Use Agreement ensures continued access to irrigation water despite the senior priority date of the Tribes’ instream flow water rights.
 - The Water Use Agreement includes a process for efficient irrigators with a demonstrable need to secure access to extra water.
- Protects other on-reservation irrigators either through the opportunity to protect a level of water use equivalent to the level of water use FIIP irrigators will have or through limitations on the enforceable levels of the Tribes’ instream flow rights .
- Recognizes off-reservation instream flow rights for the Tribes, to which they have strong legal claims as a result of language in the 1855 Hellgate Treaty.
 - Restrictions on the exercise of these off-reservation rights protect off-reservation irrigators.
 - All non-irrigators off the Reservation are protected from any exercise of the Tribes’ water rights.
- Establishes a Water Management Board and a Unitary Management Ordinance (“Law of Administration”) to govern the administration and enforcement of all water rights within the boundaries of the Flathead Reservation.
 - No Board jurisdiction off the Reservation.
 - Nothing in the settlement changes or gives the Tribes any jurisdiction off the Reservation.
- Provides processes for the Tribes to lease portions of their water rights to on- and off-reservation users in Montana.
- Provides for an allocation of 90,000 acre-feet of water stored in Hungry Horse Reservoir for the Tribes to use or lease, of which 11,000 acre-feet must be made available for lease for off-reservation mitigation.
- In exchange for rights and benefits recognized by the Compact, the Tribes agree to waive and relinquish all other water rights claims in Montana.

CSKT TRIBAL WATER RIGHT

INSTREAM FLOWS

- On-reservation instream flow rights recognized at various specific measurement points.
- Exercise of on-reservation instream flow rights that overlap with streams used by the FIIP to be governed by FIIP Water Use Agreement.

Prepared by the Montana Reserved Water Rights Compact Commission
February 12, 2013

- Off-reservation time immemorial instream flow rights on mainstems of Kootenai, Swan and Lower Clark Fork Rivers and Placid Creek. Limitations on enforcement of these rights, including protection from call for all valid non-irrigation rights, provided in the Compact.
- Co-ownership of various water rights held by MFWP in Bitterroot, Flathead and Blackfoot River Basins. Co-ownership of FWP claims in Kootenai Basin still under discussion in wake of opposition from Lincoln County.
- Co-ownership of former Milltown Dam water right. Change in purpose of that right from hydro to fisheries made by legislative approval of Compact rather than through DNRC change process.
- Beneficial interest in contracts for stored water owned by MFWP in the Bitterroot (from Painted Rocks Reservoir and Lake Como).

OTHER WATER USES

- FIIP right made part of Tribal Water Right. Exercise of FIIP right subject to FIIP Water Use Agreement.
- Water right from mainstem of Flathead River ("Flathead System Compact Water") for future development or lease. Right backstopped by 90,000 acre-feet from Hungry Horse.
- Minimum pool water right for Flathead Lake at elevation of 2883 feet above mean sea level.
- Water right for wetlands and high mountain lakes located on trust lands.
- Water right for (tribally owned) Boulder Creek and Hellroaring hydroelectric projects.
- Water right co-owned with MFWP or USFWS (as applicable) for on-reservation wetlands on lands owned by MFWP/USFWS.
- Water rights for tribal religious and cultural uses and other existing tribal uses confirmed.

ADMINISTRATION

- Water Management Board (WMB) composed of five members, two appointed by governor, two by Tribes, fifth by the four appointed members. One non-voting member appointed by US.
- WMB applies Law of Administration (LOA), which is only effective if enacted in parallel into State and Tribal Law. LOA may only be amended if both State and Tribes enact parallel amendments.
- LOA applies equally to tribal members and non-members. Governs issuance of new water rights and authorizations to change existing water rights, and enforcement. Largely but not completely mirrors Montana Water Use Act. Retains (though at different volume levels) State law exceptions for streamlined permitting of small domestic and stick uses.

CONTRIBUTIONS TO SETTLEMENT

- Governor's budget contemplates \$55 million State contribution to settlement. Of the \$55 million, \$30 million is envisioned as going to the FIIP to help defray increased pumping costs and for other needs as part of the implementation of the FIIP Water Use Agreement; \$4 million for stockwater mitigation to offset FIIP cessation of stock water deliveries outside irrigation season; \$4 million for water measurement; \$4 million to cost share on-farm efficiency improvements; and \$13 million to Tribes for protection and enhancement of aquatic and terrestrial habitat (part of compromise over settlement of Tribes' on- and off-reservation instream flow water rights claims).
- Federal funding at a level to be set in the congressional ratification bill. Funding levels generally set after tribal-federal negotiations and roughly benchmarked to federal programmatic responsibilities and litigation exposure. Federal funding for recent Montana Indian water rights settlements has been much higher than State funding level.

Proposed Compact and Appendices Available At:

<http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/Default.asp>

Compact Commission Contact Info

Phone: 406-444-6841

Email: dnrrwrcc@mt.gov

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Prepared by the Montana Reserved Water Rights Compact Commission
February 12, 2013

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MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION
February 26, 2013 at 7:00 P.M.**

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MACo Conference Room
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Chris Tweeten, Chairman

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Phone: 406-444-6841

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The following is a track changes comparison of the final proposed Compact dated February 13, 2013, with the draft Compact that was released to the public on November 8, 2013. As is readily apparent, the vast majority of the changes are typographical, dealing with issues such as capitalization, punctuation, formatting and stylistic consistency. Specific changes that were made in response to public comment or for other reasons are identified and explained in notes on the righthand margin of these pages.

**PROPOSED WATER RIGHTS COMPACT
ENTERED INTO BY
THE CONFEDERATED SALISH & KOOTENAI TRIBES,
THE STATE OF MONTANA, AND
UNITED STATES OF AMERICA**

February 13, 2013

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**PROPOSED WATER RIGHTS COMPACT
ENTERED INTO BY
THE CONFEDERATED SALISH AND KOOTENAI TRIBES,
THE STATE OF MONTANA, AND
UNITED STATES OF AMERICA**

This Compact is entered into by and among the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, the State of Montana, and the United States of America to settle all existing claims to water of or on behalf of the Confederated Salish & Kootenai Tribes within the State of Montana.

ARTICLE I – RECITALS

WHEREAS, pursuant to the Hellgate Treaty of 1855, 12 Stat. 975, the Confederated Salish and Kootenai Tribes reserved the Flathead Indian Reservation; and

WHEREAS, the Confederated Salish & Kootenai Tribes claim aboriginal water rights and, pursuant to said Treaty, reserved water rights to fulfill the purposes of the Treaty and the Reservation; and

WHEREAS, in 1979, the United States, on its own behalf and on behalf of the Confederated Salish & Kootenai Tribes, their members and Allottees brought suit in the United States District Court for the District of Montana to obtain a final determination of the Tribes' water rights claims, see *United States v. Abell*, No. CIV-79-33-M (filed April 5, 1979); and

WHEREAS, as a result of Congressional action and subsequent judicial interpretation, state courts have been found to possess, under certain circumstances, adjudicatory jurisdiction over federal reserved water rights held in trust by the United States for the benefit of Indians; see, McCarran Amendment 43 U.S.C. 666; *Colorado River Conservation District v. United States*, 424 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); and

WHEREAS, the State of Montana initiated a general stream adjudication pursuant to the provisions of Chapter 697, Laws of Montana 1979, which includes claims regarding the Confederated Salish & Kootenai Tribes' water rights; and

WHEREAS, the Montana Reserved Water Rights Compact Commission, under 85-2-702(1), MCA, is authorized to negotiate settlement of water rights claims filed by Indian tribes or filed on their behalf by the United States claiming reserved waters within the State of Montana; and

WHEREAS, the Federal district court litigation was stayed in 1983 pending the outcome of Montana State court water adjudication proceedings, see *Northern Cheyenne v. Adsit*, 721

F.2d 1187 (9th Cir. 1983); and

Deleted: .

WHEREAS, the adjudication of Confederated Salish & Kootenai Tribes' water rights in the State court proceeding has been stayed while negotiations are proceeding to conclude a compact resolving all water rights claims of the Confederated Salish & Kootenai Tribes; and

WHEREAS, the Confederated Salish & Kootenai Tribes, or their duly designated representatives, have authority to negotiate the Compact and the Tribal Council has the authority to execute this Compact pursuant to Article 6, Section 1, subsections (a), (c), and (u) of the Constitution and Bylaws of the Confederated Salish and Kootenai Tribes said Constitution adopted and approved under Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended; and

WHEREAS, the United States Attorney General, or a duly designated official of the United States Department of Justice, has authority to execute the Compact on behalf of the United States pursuant to the authority to settle litigation contained in 28 U.S.C. 516-17 and the Federal legislation identified in Article VIII.B; and

Deleted: sections

WHEREAS, the Secretary of the Interior, or a duly designated official of the United States Department of the Interior, has authority to execute the Compact on behalf of the United States Department of the Interior pursuant to 43 U.S.C. 1457, inter alia, and appropriate Federal legislation as identified in Article VIII.B; and

WHEREAS, the Confederated Salish & Kootenai Tribes, the State of Montana, and the United States agree that the Tribal Water Right and other water rights described in the Compact, subject to the provisions of the Act of Congress identified in Article VIII.B, is in satisfaction of the water rights claims of the Tribes, their members and Allottees, and of the United States on behalf of the Tribes and their members and Allottees; and

WHEREAS, the Parties agree that it is in the best interest of all Parties that the water rights claims of the Confederated Salish & Kootenai Tribes be settled through agreement between and among the Tribes, the State of Montana, and the United States; and

WHEREAS, the Parties agree that there is a clear hydrological interrelationship between the surface and groundwater of the Reservation, and each use of water on the Reservation may affect water use by all water users on the Reservation; and

WHEREAS, the Parties agree that prudent and knowledgeable conservation, management, and protection of the uses of water resources of the Reservation are essential to the health and welfare of all residents of the Reservation; and

WHEREAS, the Parties seek to secure to all residents of the Reservation the quiet enjoyment of the use of waters of the Reservation for beneficial uses; and

WHEREAS, the Parties desire to create a unitary administration system that would provide a single system for the appropriation and administration of the waters of the Reservation and for the establishment and maintenance of a single system of central records for all water uses of the Reservation regardless of whether the use is based on State or Federal law; and

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NOW THEREFORE, the Parties agree to enter into the Compact for the purpose of settling the water rights claims of the Confederated Salish & Kootenai Tribes, their members, and Allottees of the Flathead Indian Reservation, and of the United States on behalf of the Tribes, their members and Allottees, and to provide the necessary foundation for the establishment of a board composed of Tribal and State appointed representatives to provide for the unified administration of all water resources on the Reservation.

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ARTICLE II - DEFINITIONS

The following definitions shall apply for purposes of the Compact:

1. "Acre-foot" or "Acre-feet" means the amount of water necessary to cover one acre to a depth of one foot and is equivalent to 43,560 cubic feet of water.
2. "Acre-Feet per Year" means an annual quantity of water measured in Acre-feet over a period of a calendar year.
3. "Allottee" or "Allottees" means an owner of an interest in a tract of land held in trust by the United States which was allotted pursuant to the Act of April 23, 1904, 33 Stat. 302, as amended, or the Act of February 25, 1920, 41 Stat. 452, as amended.
4. "Appropriation Right" means a right to appropriate water issued by the Water Management Board pursuant to the terms of this Compact and the Law of Administration.
5. "Arising Under State Law" means, as applied to a water right, a water right created under Montana law and does not include water rights created or defined under Federal law.
6. "Basin 76D" means the hydrologic Basin 76D, including the Kootenai River and its tributaries, as shown in Appendix 1.
7. "Basin 76E" means the hydrologic Basin 76E, including Rock Creek and its tributaries, as shown in Appendix 1.
8. "Basin 76F" means the hydrologic Basin 76F, including the Blackfoot River and its tributaries, as shown in Appendix 1.

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Comment [fw1]: The definition of "Annual" was deleted as the term is never used in the proposed Compact.

Deleted: <#>"Annual" means during one calendar year

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9. "Basin 76G" means the hydrologic Basin 76G, including the Clark Fork River above the Blackfoot River, and its tributaries, as shown in Appendix 1.
10. "Basin 76GJ" means the hydrologic Basin 76GJ, including Flint Creek and its tributaries, as shown in Appendix 1.
11. "Basin 76H" means the hydrologic Basin 76H, including the Bitterroot River and its tributaries, as shown in Appendix 1.
12. "Basin 76I" means the hydrologic Basin 76I, including the Middle Fork of the Flathead River and its tributaries, as shown in Appendix 1.
13. "Basin 76J" means the hydrologic Basin 76J, including the South Fork of the Flathead River and its tributaries, as shown in Appendix 1.
14. "Basin 76K" means the hydrologic Basin 76K, including the Swan River and its tributaries, as shown in Appendix 1.
15. "Basin 76L" means the hydrologic Basin 76L, including the Flathead River below Flathead Lake, and its tributaries, as shown in Appendix 1.
16. "Basin 76LJ" means the hydrologic Basin 76LJ, including the Flathead River to and including Flathead Lake, and its tributaries, as shown in Appendix 1.
17. "Basin 76M" means the hydrologic Basin 76M, including the Clark Fork River between the Blackfoot River and the Flathead River, and its tributaries, as shown in Appendix 1.
18. "Basin 76N" means the hydrologic Basin 76N, including the Clark Fork River below the Flathead River, and its tributaries, as shown in Appendix 1.
19. "Call" means the right of the holder of a water right with a senior priority date and an immediate need for a use of water to require a holder of a water right with a junior priority date to refrain from appropriating water otherwise physically available until the senior water right is satisfied.
20. "cfs" means cubic feet per second.
21. "Change in Use" means an authorized change in the point of diversion, the place of use, the period of use, the purpose of use, or the place of storage of an Appropriation Right issued by the Water Management Board under this Compact and the Law of Administration, or of an Existing Use. A changed water right retains the original priority date of that right.

22. "Compact" means this water rights settlement entered into by the Confederated Salish & Kootenai Tribes, the State and the United States.
23. "DNRC" means the Montana Department of Natural Resources and Conservation, or any successor agency.
24. "Effective Date" means the date on which the Compact is finally approved by the Tribes, by the State, and by the United States, and on which the Law of Administration has been enacted and taken effect as the law of the State and the Tribes, whichever date is latest.
25. "Existing Use" means a use of water under color of Tribal, State or Federal law in existence as of the Effective Date, including uses in existence on that date that are eligible for either of the registration processes set forth in the Law of Administration; provided that any portion of a Water Right Arising Under State Law within the Reservation that is, at any point after the date the ratification of the Compact by the Montana legislature takes effect under State law, voluntarily relinquished or is legally determined to be abandoned, relinquished, or have otherwise ceased to exist, shall be stricken from the relevant basin decree as a Water Right Arising Under State Law and be entitled to no further protection as such a right or as an Existing Use.
26. "Farm Turnout Allowance" or "FTA" means the volume of water that each acre of land served by the FIIP is entitled to have applied to it in a given irrigation season, as determined by the Project Operator pursuant to the FIIP Water Use Agreement.
27. "Flathead Indian Irrigation Project" or "FIIP" means the irrigation project developed by the United States to irrigate lands within the Reservation pursuant to the Act of April 23, 1904, Public Law 58-159, 33 Stat. 302 (1904), and the Act of May 29, 1908, Public Law 60-156, 35 Stat. 441 (1908), and includes, but is not limited to, all lands, reservoirs, easements, rights-of-way, canals, ditches, laterals, or any other FIIP facilities, whether situated on or off the Reservation, headgates, pipelines, pumps, buildings, heavy equipment, vehicles, supplies, records or copies of records and all other physical, tangible objects, whether of real or personal property, used in the management and operation of the FIIP.
28. "FIIP Influence Area" means the area encompassing the lands served by diversion works that are directly influenced by the operations of the FIIP as identified on the map attached hereto as Appendix 2.
29. "FIIP Water Use Agreement" means the agreement entered into by the Tribes, the Flathead Joint Board of Control, and the United States, which specifies the administration of FIIP and FIIP-related instream and irrigation portions of the Tribal Water Right, and which contains ancillary agreements, as attached hereto as Appendix 3.

Deleted: whether situated on or off the Reservation,

Comment [jw2]: The italicized text below was deleted as it was an explanatory note accompanying the November 8, 2012, draft Compact. It was never intended to be part of the Compact language. The sentiment expressed in the note remains accurate, as the FIIP Water Use Agreement has not been finally approved as of February 13, 2013.

Deleted: *[This reference presumes that negotiations over the FIIP Water Use Agreement are successfully concluded among the Flathead Joint Board of Control, the Tribes and the United States. It does not presuppose the ultimate contents of that agreement.]*

30. "Flathead Indian Reservation" or "Reservation" means all land within the exterior boundaries of the Indian Reservation established under the July 16, 1855 Treaty of Hellgate (12 Stat. 975), notwithstanding the issuance of any patent, and including rights-of-way running through the Reservation.

31. "Flathead Joint Board of Control" means the Flathead Joint Board of Control, the operating agent of the Flathead, Mission, and Jocko Valley Irrigation Districts, local governments under Montana law.

Comment [jw3]: The term "FJBC" is not used in the proposed Compact.

Deleted: " or "FJBC"

32. "Flathead Reservation Water Management Board" or "Board" means the entity established by this Compact and the Law of Administration to administer the use of all water rights on the Reservation upon the Effective Date.

33. "Flathead System Compact Water" means that portion of the Tribal Water Right consisting of 229,383 Acre-feet per year that the Tribes may withdraw from the Flathead River or Flathead Lake, which includes up to 90,000 Acre-feet per year stored in Hungry Horse Reservoir, with a maximum total volume consumed of 128,158 Acre-feet per year.

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34. "Groundwater" means any water that is beneath the surface of the earth.

35. "High Mountain Lakes" means those lakes shown in Appendix 17.

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36. "Hungry Horse Dam" means the dam that is a part of the Hungry Horse Project.

Comment [jw4]: Definitions 36 and 38 were added in the interest of clarity.

37. "Hungry Horse Project" means that project authorized by the Act of June 5, 1944 (58 Stat. 270, Public Law 78-329) to be constructed and operated by the US Bureau of Reclamation. The Act of May 29, 1958 (Public Law 85-428) amended the authorizing act to make Hungry Horse a Reclamation project subject to Reclamation laws.

38. "Hungry Horse Reservoir" means the reservoir that is a part of the Hungry Horse Project.

39. "Individual Indian Owner" means a Tribal member and his or her heirs or an Allottee and his or her heirs who is an owner of trust or restricted lands and who has a documented use of the Tribal Water Right registered pursuant to the terms of this Compact and the Law of Administration.

40. "Instream Flow" means a stream flow retained in a watercourse to benefit the aquatic environment. Instream Flow may include natural flow or streamflow modified by regulation, diversion, or other modification.

41. "Law of Administration" means the body of laws enacted by both the State and the Tribes to provide for the administration of surface water and Groundwater within the Reservation, as well as those waters that appertain to the operation and maintenance of

the FIIP that have been diverted or transported onto the Reservation for FIIP purposes, that are both materially consistent with the substantive provisions of Appendix 4.

42. "Lease" means, as applied to the Tribal Water Right, to authorize a Person or Persons to use any part of the Tribal Water Right through a service contract, temporary assignment, or other similar agreement of limited duration.
43. "MFWP" means the Montana Department of Fish, Wildlife, and Parks, or any successor agency.
44. "New Development" means the development of a use of the Tribal Water Right set forth in the Compact, from any source, commencing after the Effective Date, and encompasses all uses of the Tribal Water Right not included within the definition of Existing Use.
45. "Parties" means the Tribes, the State, and the United States.
46. "Person" means an individual or any other entity, public or private, including the Tribes, the State, and the United States, and all officers, agents and departments of each sovereign.
47. "Project Operator" means that entity with the legal authority and responsibility to operate the Flathead Indian Irrigation Project.
48. "Secretary" means the Secretary of the United States Department of the Interior, or the Secretary's duly authorized representative.
49. "State" means the State of Montana and all officers, agencies, departments and political subdivisions thereof.
50. "Stock Water" means water used for livestock.
51. "Tribal Council" means the duly elected governing body of the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana.
52. "Tribal Natural Resources Department" means the governmental subdivision of the Tribes authorized by Tribal Ordinance No. 78-B, as amended, or any successor agency.
53. "Tribal Water Right" means the water rights of the Confederated Salish & Kootenai Tribes, including any Tribal member or Allottee, whose basis is Federal law, as set forth in Article III.A, Article III.C.1.a through j, Article III.C.1.k.i, Article III.C.1.l.i, Article III.D.1 through 3 and Article III.D.7 and 8. The term "Tribal Water Right" also includes those rights identified in Article III.H that are appurtenant to lands taken into trust by the United States on behalf of the Tribes.

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Comment [jw5]: The definition of "Secretarial Water Rights" was deleted because the term is not used in the proposed Compact.

Deleted: "Secretarial Water Rights" means those interests in irrigation water represented by written statements of historic water use on Reservation land, compiled and published by the United States Department of Interior under authority of a June 27, 1912, letter of the Acting Commissioner of Indian Affairs, C.F. Hauke, entitled "Field-Irrigation, 20512-1912, 16332-1912, McG C, Private Ditches", to document irrigation water use that pre-existed the construction of the Flathead Indian Irrigation Project. The written statements were produced by several three-member committees appointed by the Acting Commissioner of Indian Affairs during the first two decades of the twentieth century. The several committees were comprised of the Flathead Agency Superintendent of the Bureau of Indian Affairs, a Tribal representative selected by the Tribal Council and an Engineer for the United States Reclamation Service

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Comment [jw6]: The definition of "Tribal Water Right" was modified in the interest of clarity, to make a clear differentiation between the Tribes' water rights being recognized in the Compact whose basis is federal law and those whose basis is state law.

54. "Tribes" means the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, and all officers, agencies, and departments thereof.
55. "United States" means the Federal government and all officers, agencies and departments thereof.
56. "Water Rights Arising Under State Law" means those valid water rights Arising Under State Law existing as of the Effective Date and not subsequently relinquished or abandoned, as those rights are: decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permitted by DNRC; exempted from filing in the State adjudication pursuant to 85-2-222, MCA; or excepted from the permitting process pursuant to 85-2-306, MCA.
57. "Wetland" means an area that is inundated or saturated by surface water or Groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

ARTICLE III ~~WATER RIGHTS OF THE TRIBES~~

The water rights of the Tribes quantified in Article III are composed of two parts: water rights whose basis is federal law that are defined and referred to as the Tribal Water Right and those Water Rights Arising Under State Law identified in Article III.C.1.k.ii, III.C.1.l.ii, III.D.4 and 5, and III.H.

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Comment [jw7]: This language was added for the same reason Definition 53 was modified.

A. Religious or Cultural Uses. The Tribal Water Right described in this Article III includes all traditional, religious, or cultural uses of water by members of the Confederated Salish & Kootenai Tribes within Montana. Individual exercises of traditional cultural or religious uses are exempt from the Registration process contained in the Law of Administration.

B. Abstracts of Water Right. Abstracts of water right appended to this Compact are a substantive element of this Compact. The language of the abstracts, including all informational remarks, shall control in the event of any inconsistency between the Compact and the abstracts of water right; provided however, that the Parties upon written mutual agreement may make technical corrections to the abstracts prior to the Parties submission to the Montana Water Court of the motion for entry of the Proposed Decree identified in Article VII.B. Such technical corrections are pursuant to, and shall not be deemed a modification or amendment of, this Compact.

Comment [jw8]: While the Parties have reviewed the abstracts carefully and believe they are all entirely accurate, this language was added to ensure that inadvertent errors that may be discovered in the future may be corrected. This language does *not* allow any of the Parties individually or collectively to make substantive changes to the abstracts.

C. Basins 76L and 76 LJ and Flathead Indian Irrigation Project Irrigation Water Diversions from Basins 76F and 76N.

1. Quantification.

- a. Flathead Indian Irrigation Project.** The Tribes have the right to water that is supplied to the Flathead Indian Irrigation Project to be used for such purposes in such volumes and flow rates and from such sources of supply as identified in abstracts of water right attached hereto as Appendix 5 to this Compact. The exercise of this portion of the Tribal Water Right is subject to the FIIP Water Use Agreement entered into by the Tribes, the Flathead Joint Board of Control, and the United States. That Agreement is attached to this Compact as Appendix 3.

The priority date for the portion of the Tribal Water Right used by the FIIP is July 16, 1855.

- b. Existing Uses by the Tribes, their Members and Allottees.**
- i.** The Tribal Water Right includes all existing uses by the Tribes, their members and Allottees that are not Water Rights Arising Under State Law and are not otherwise specifically quantified in other sections of this Article III.
 - ii.** Water Rights Arising Under State Law held by the Tribes, their Members and Allottees will be satisfied pursuant to their own terms as finally decreed by the Montana Water Court or permitted by the DNRC. Deleted: its
 - iii.** For each existing use identified in this Article III.C.1.b.i to be valid and enforceable, the Tribes, or each Tribal member or Allottee claiming such an existing use shall complete the process for the registration of uses of the Tribal Water Right set forth in the Law of Administration. Such uses include but are not limited to irrigation, Stock Water, domestic, commercial, municipal and industrial, as well as those historically irrigated allotments that are held by individuals in trust by the United States that are not served by the FIIP that are identified on the map and table attached hereto as Appendix 6.
 - iv.** Uses of the Tribal Water Right for which abstracts are appended to this Compact, including uses on the FIIP, are exempt from the registration requirement set forth in Article III.C.1.b.iii. Deleted: ii
 - v.** The priority date for water uses registered pursuant to Article III.C.1.b.iii and the Law of Administration is July 16, 1855. Deleted: ii
- c. Flathead System Compact Water.** The Tribes have a direct flow water right from the Flathead River with the following elements: Deleted: attributes

Source of Water: Flathead River, Flathead Lake, and the South Fork of the Flathead River up to Hungry Horse Reservoir

Point of Diversion: From Flathead Lake or the Flathead River, either on or off of the Reservation

Purpose: Any beneficial use

Diversion Volume: 229,383 Acre-feet per year

Depletion Volume: 128,158 Acre-feet per year

Period of Diversion and Depletion: January 1 through December 31

Comment [jw9]: The new language is to make clear what has been the Parties' consistent intent – that the water subject to this right may be sourced from the Flathead River between Hungry Horse Dam and the confluence of the Flathead and the Clark Fork. The original language ("Flathead River") was insufficiently precise.

- i. As part of the Tribal Water Right quantified in this Article III.C.1.c, the Tribes shall be entitled to an allocation of 90,000 Acre-feet per year, as measured at the Hungry Horse Dam, of storage water in Hungry Horse Reservoir.
- ii. This water right shall be used in a manner that ensures impacts associated with the exercise of this water right are such that those impacts are no greater than those identified in model run: Natural Q + 90K of the United States Bureau of Reclamation's Final Flathead Basin Depletions Study (USBR, October 2012), appended hereto as Appendix 7. In the event that the impacts exceed those identified in model run: Natural Q + 90K of the United States Bureau of Reclamation's Final Flathead Basin Depletions Study, the use of the water right set forth in this Article III.C.1.c shall be reduced in such amounts as are necessary to immediately achieve impacts that are no greater than those identified in model run: Natural Q + 90K of the United States Bureau of Reclamation's Final Flathead Basin Depletions Study.
- iii. The releases of the stored water identified in Article III.C.1.c.i shall be limited in accordance with the "Biological Impact Evaluation and Operational Constraints for a proposed 90,000 Acre-foot withdrawal" (State of Montana, September 14, 2011) appended hereto as Appendix 8. The Parties upon mutual written agreement, and in conformance with other applicable provisions of law including but not limited to the Endangered Species Act of 1973, 16 U.S.C. 1531, *et seq.*, may amend the Biological Impact Evaluation Constraints identified in the September 14, 2011 report. Such amendments are pursuant to, and shall not be deemed a modification or amendment of, this Compact.
- iv. The exercise of this water right shall conform with the minimum instream flow schedules, as measured at the USGS gaging station on the Flathead River at Columbia Falls (12363000) and the USGS gaging station on the Flathead River at Polson (12372000) as identified in Tables 3 through 6 of the United States Bureau of Reclamation's Final Flathead Basin

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Depletions Study, as well as the minimum flow requirements set forth in Table 5 must also be met downstream at USGS gaging station on the Flathead River at Perma (123887000). The exercise of this water right shall also conform to the ramping rates, as measured below Kerr and Hungry Horse Dams, and identified in Tables 3 through 6 of the United States Bureau of Reclamation's Final Flathead Basin Depletions Study. In the event that the minimum instream flow schedules or ramping rates are not met, the use of the water right set forth in this Article III.C.1.c shall be suspended until such time as those minimum instream flow schedules and ramping rates are achieved. The Parties upon mutual written agreement, and in conformance with applicable Endangered Species Act and Federal Energy Regulatory Commission licensing requirements for the three previously identified sites, may amend the limitations for releases from Hungry Horse Reservoir that are required to conform with minimum instream flow and ramping rate schedules at these sites. Such amendments are pursuant to, and shall not be deemed a modification or amendment of, this Compact.

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v. The exercise of this water right shall also conform with the Flathead Lake filling criteria identified on page 12 of the United States Bureau of Reclamation's Final Flathead Basin Depletions Study.

vi. The Tribes may use any amount of the stored water identified in Article III.C.1.c.i that is not necessary to be released each year pursuant to the provisions of Articles III.C.1.c.ii-v, for any beneficial purpose, subject to the terms and conditions of this Compact, including the total diversion and depletion volumes associated with the water right set forth in this Article III.C.1.c.

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vii. Use of the 90,000 Acre-feet of water from Hungry Horse Reservoir is subject to the approval of, and any terms and conditions specified by, Congress.

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viii. The priority date for Flathead System Compact Water is July 16, 1855.

ix. Any development by the Tribes of this Flathead System Compact Water Right outside the boundaries of the Reservation shall be pursuant to Article IV.B.5.d.

x. The abstract of water right for this Flathead System Compact Water Right is attached hereto as Appendix 9.

Comment [jw10]: This language was added to reflect the fact that the Parties have agreed to allow the Tribes, under specific conditions set forth in detail in Article IV.B.5 below, to develop Flathead System Compact Water off the Flathead Indian Reservation. This issue was unintentionally left ambiguous in the November 8, 2012 draft Compact.

d. Instream Flow Rights on Reservation.

Comment [jw11]: The November 8, 2012 draft Compact inadvertently omitted a reference to the Flathead System Compact Water abstract. This addition corrects that omission.

i. **Natural Nodes.** The Tribes have Instream Flow rights in the quantities and locations identified in the abstracts of water right attached hereto as Appendix 10.

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ii. **FIIP Nodes.** The Tribes have Instream Flow rights in the quantities and locations identified in the abstracts of water right attached hereto as Appendix 11. The exercise of these rights is subject to the provisions of the FIIP Water Use Agreement entered into by the Tribes, the Flathead Joint Board of Control, and the United States.

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iii. **Other Instream Flows.** The Tribes have Instream Flow rights in the quantities and locations identified in the abstracts of water right attached hereto as Appendix 12. The Tribes shall defer the enforcement of each of these rights until an enforceable flow schedule for that right has been established pursuant to the process set forth in the Law of Administration for the development of such enforceable schedules.

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iv. **Interim Instream Flows.** Until such time as the Instream Flow water rights set forth in Article III.C.1.d.ii become enforceable, the Tribes shall be entitled to enforce those interim instream flows established pursuant to *Joint Board of Control v. United States*, 832 F.2d 1127, cert. denied, 486 U.S. 1007 (1988), in any stream subject to those interim instream flows. These interim instream flows are identified in the document attached hereto as Appendix 13. The Tribes and the United States shall enforce these interim instream flows only pursuant to existing practice as of November 1, 2012, as described in the protocols attached hereto as Appendix 14. If operational or other improvements agreed to by the Tribes and Project Operator lead to greater interim instream flows, then those instream flows will also be enforceable only pursuant to existing practice as of November 1, 2012, as described in the protocols attached hereto as Appendix 14. Once the Instream Flow water rights set forth in Article III.C.1.d.ii become enforceable for any stream identified in this Article III.C.1.d.iv, the interim instream flow for that stream shall cease to be effective in the relationship identified in Appendix 13.

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Comment [jw12]: This language was added to reflect the fact that the proposed FIIP Water Use Agreement recognizes that there may be incremental phase-ins of increased instream flows if various conditions are met.

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v. The priority date for the Instream Flow water rights set forth in this Article III.C.1.d is time immemorial.

e. **Minimum Pool Elevations in Flathead Indian Irrigation Project Reservoirs.** The Tribes have the right to water necessary to maintain minimum pool water levels for FIIP reservoirs in the quantities and locations set forth in the table and abstracts of water right appended hereto as Appendix 15. The exercise of these rights is subject to the restrictions of the Bureau of Indian Affairs' annual review of reservoir operations.

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The priority date for the water rights set forth in this Article III.C.1.e is July 16, 1855.

- f. **Wetland Water Right.** The Tribes have the right to all naturally occurring water necessary to maintain the Wetlands identified in the abstracts of water right attached hereto as Appendix 16.

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The priority date for the Wetlands water rights set forth in this Article III.C.1.f is time immemorial.

- g. **High Mountain Lakes Water Right.** The Tribes have the right to all naturally occurring water necessary to maintain the High Mountain Lakes identified in the abstracts of water right attached hereto as Appendix 17.

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The priority date for the High Mountain Lakes water rights set forth in this Article III.C.1.g is time immemorial.

- h. **Flathead Lake.** The Tribes have the right to all naturally occurring water necessary to maintain the level of the entirety of Flathead Lake at an elevation of 2883 feet above mean sea level as described in the abstract of water right attached hereto as Appendix 18.

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The priority date for the water right set forth in this Article III.C.1.h is time immemorial.

- i. **Boulder Creek Hydroelectric Project.** The Tribes have the right to water necessary to operate the Boulder Creek Hydroelectric Project as identified in the abstracts of water right attached hereto as Appendix 19.

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The priority date for the Boulder Creek Hydroelectric Project water right set forth in this Article III.C.1.i is July 16, 1855.

- j. **Hellroaring Hydroelectric Project.** The Tribes have the water right to water necessary to operate the Hellroaring Hydroelectric Project as identified in the abstracts of water right attached hereto as Appendix 20.

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The priority date for the Hellroaring Hydroelectric Project water right set forth in this Article III.C.1.j is July 16, 1855.

- k. **Wetlands Appurtenant to Lands Owned by Montana Fish Wildlife and Parks.**

i. The Tribes and MFWP have the right to all naturally occurring water necessary to maintain the Wetlands identified in the abstracts of water right attached hereto as Appendix 21.

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The priority date for Wetland water rights appurtenant to lands owned by MFWP is time immemorial.

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ii. Upon the Effective Date, the Tribes shall be added as a co-owner with MFWP of water right number 76L 153988-00, the abstract of which is attached hereto as Appendix 22. MFWP shall make reasonable efforts to defend this right in the Montana General Stream Adjudication. The Tribes have the right but not the duty to participate in the defense of this right in the Adjudication.

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iii. The Tribes shall be added in an expeditious manner as a co-owner to any water right with a fish or fish and wildlife purpose that is appurtenant to land acquired by MFWP on the Reservation after the Effective Date.

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iv. The Tribes shall be added in an expeditious manner as a co-owner to any Wetlands water right acquired by MFWP pursuant to the Law of Administration.

v. MFWP shall be the sole entity entitled to manage the water rights identified in Article III.C.1.k. The recognition of these co-owned water rights does not confer on the Tribes any authority over the management of the MFWP-owned lands to which these water rights are appurtenant.

MFWP shall meet and confer with the Tribes on a biennial basis, or on such other timeframe as the Tribes and MFWP may mutually agree, to discuss the exercise of these water rights.

I. Wetlands Appurtenant to Lands Owned by Department of Interior Fish and Wildlife Service.

i. The Tribes and DOI FWS have the right to all naturally occurring water necessary to maintain the Wetlands identified in the abstracts of water right attached hereto as Appendix 23.

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The priority date for Wetland water rights appurtenant to lands owned by DOI FWS is time immemorial.

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ii. Upon the Effective Date, the Tribes shall be added as a co-owner with DOI FWS of water right numbers 76L 99338 00, 76L 99339 00, and 76L 99340 00, the abstracts of which are attached hereto as Appendix 24. DOI

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FWS shall make reasonable efforts to defend this right in the Montana General Stream Adjudication. The Tribes have the right but not the duty to participate in the defense of this right in the Adjudication.

- iii. The Tribes shall be added in an expeditious manner as a co-owner to any water right with a fish or fish and wildlife purpose that is appurtenant to land acquired by DOI FWS on the Reservation after the Effective Date.
- iv. The Tribes shall be added in an expeditious manner as a co-owner to any Wetlands water right acquired by DOI FWS pursuant to the Law of Administration.
- v. DOI FWS shall be the sole entity entitled to manage the water rights identified in this Article III.C.1.i. The recognition of these co-owned water rights does not confer on the Tribes any authority over the management of the DOI FWS-owned lands to which these water rights are appurtenant.
- vi. DOI FWS shall meet and confer with the Tribes on a biennial basis, or on such other timeframe as the Tribes and DOI FWS may mutually agree, to discuss the exercise of these water rights.

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D. Instream Flow Water Rights Off of the Reservation.

1. Mainstem Instream Flow Right in the Kootenai River (Basin 76D). The Tribes have an Instream Flow water right for the mainstem of the Kootenai River for the reach and with the associated flow rates set forth in the abstract of water right attached hereto as Appendix 25. The measurement point for this water right is USGS streamflow gage #12305000 located at Leonia, Idaho.

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- a. The priority date for this water right is time immemorial.
- b. The period of use of this water right is January 1 to December 31 of each year.
- c. The purpose of this water right is for the maintenance and enhancement of fish habitat. This right shall not be changed to any other or additional purpose.
- d. The point of diversion and place of use for this water is instream. This water right shall not be exercised in conjunction with any artificial diversion.
- e. The ability to enforce this right shall be suspended so long as Libby Dam remains in existence and the Army Corps of Engineers' operations of that dam are conducted consistently with the 2008 Federal Columbia River Power

System Biological Opinion, and the 2010 updated Biological Opinion, specifically as described in Reasonable and Prudent Alternative Action (RPA) No. 4 (Storage Project Operations), Table No. 1 (Libby Dam), including the Northwest Power and Conservation Council's 2003 mainstem amendments to the Columbia River Basin Fish and Wildlife Program, or any subsequent Biological Opinion(s) governing the same RPAs and Operations.

f. In the event of changes to the U.S. Army Corps of Engineers' (Corps) responsibilities under the Endangered Species Act of 1973, 16 U.S.C. 1531, *et seq.* (ESA), such as the delisting of resident and anadromous fish species, that no longer require the Corps to operate Libby Dam pursuant to ESA section 7 biological opinions or other substantive ESA requirements, the United States, acting through the Corps, the Tribes, and the State shall establish written protocols and understandings on meeting and enforcing the Tribes' mainstem Instream Flow right in the Kootenai River while also ensuring that the Corps' operations of Libby Dam meet all Federal statutory and regulatory requirements and obligations. Provided however, that any such enforcement protocol shall not alter the limitations on Call set forth in Article III D.1.g.

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g. Should the suspension on enforcement set forth in Article III.D.1.e be lifted due to the removal of Libby Dam, this water right may be exercised to make a Call only against junior users whose point of diversion is from the mainstem of the Kootenai River and not its tributaries, the purpose of whose rights is irrigation and whose source of supply is surface water, or against junior users the purpose of whose rights is irrigation, whose source of supply is Groundwater that is connected to the mainstem of the Kootenai River, and whose flow rate is greater than 100 gallons per minute.

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h. Call may be made only when the average daily flow drops below the enforceable level for the previous 24-hour period.

2. **Mainstem Instream Flow Right in the Swan River (Basin 76K).** The Tribes have an Instream Flow water right for the reach of the mainstem of the Swan River with the associated flow rates set forth in the abstract of water right attached hereto as Appendix 26. The measurement point for this water right is USGS streamflow gage #12370000 located immediately below Swan Lake near Big Fork, Montana.

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- a. The priority date for this water right is time immemorial.
- b. The period of use of this water right is January 1 to December 31 of each year.
- c. The purpose of this water right is for the maintenance and enhancement of fish habitat. This right shall not be changed to any other or additional purpose.

- d. The point of diversion and place of use for this water right is instream. This water right shall not be exercised in conjunction with any artificial diversion.
- e. The Tribes, and/or the United States on behalf of the Tribes, shall be entitled to make a Call to enforce this water right only against junior users the purpose of whose rights is irrigation and whose source of supply is surface water, or against junior users the purpose of whose rights is irrigation, whose source of supply is Groundwater connected to surface sources in Basin 76K and whose flow rate is greater than 100 gallons per minute.
- f. Call may be made only when the average daily flow drops below the enforceable level for the previous 24-hour period.

3. Mainstem Instream Flow Right in the Lower Clark Fork River (Basin 76M and 76N). The Tribes have a 5000 cfs Instream Flow water right for the reach of the mainstem of the Clark Fork River as set forth in the abstract of water right attached hereto as Appendix 27. The measurement point for this water right is USGS streamflow gage #12391950 located immediately below Cabinet Gorge Dam in Idaho.

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- a. The priority date for this water right is time immemorial.
- b. The period of use of this water right is January 1 to December 31 of each year.
- c. The purpose of this water right is for the maintenance and enhancement of fish habitat. This right shall not be changed to any other or additional purpose.
- d. The point of diversion and place of use for this water right is instream. This water right shall not be exercised in conjunction with any artificial diversion.
- e. The Tribes, and/or the United States on behalf of the Tribes, shall be entitled to make a Call to enforce this water right only against junior users whose point of diversion is from the mainstem of the Clark Fork River and not its tributaries, the purpose of whose rights is irrigation and whose source of supply is surface water, or against junior users the purpose of whose rights is irrigation, whose source of supply is Groundwater connected to the mainstem of the Clark Fork River and whose flow rate is greater than 100 gallons per minute.
- f. Call may be made only when the average daily flow drops below the enforceable level for the previous 24-hour period.

- g. For so long as the Cabinet Gorge and Noxon Dams remain in existence, the enforceable level of this right is a flow rate equal to the lesser of 5000 cfs or the minimum flow level established by the FERC as a condition on the license for the Cabinet Gorge and Noxon Dams as that license condition may be modified over time.

4. Co-ownership of Instream and Public Recreation Water Rights Held by MFWP.

a. Upon the Effective Date, the Tribes shall be added as a co-owner with MFWP of the Water Rights Arising Under State Law held by MFWP for Instream Flow and recreation purposes that are identified on the tables attached hereto as Appendix 28 and Appendix 29. Nothing in this co-ownership changes any of the other elements of these Water Rights Arising Under State Law, including their priority dates or flow rates.

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i. The Water Rights Arising Under State Law identified in Appendix 28 shall be included as part of the proposed decree to be filed with the Montana Water Court pursuant to Article VII.B.1.

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ii. The Water Rights Arising Under State Law identified in Appendix 29 shall proceed through the Montana General Stream Adjudication as though they were not included in this Compact. MFWP shall make reasonable efforts to defend each of these rights identified in Appendix 29 in the Montana General Stream Adjudication. The Tribes have the right but not the duty to participate in the defense of these rights in the Adjudication.

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Comment [jw13]: This section was reorganized to allow it to interface better with the proposed decree set forth as Appendix 38. The text is identical to that contained in the November 8, 2012 draft Compact.

b. As co-owners, the Tribes and MFWP shall meet and confer on a biennial basis, or on such other timeframe as the Tribes and MFWP may mutually agree, to discuss the exercise of the rights identified in Article III.D.4.a, with a goal of establishing a joint plan for the exercise of these rights. Notwithstanding this planning process, the Tribes and MFWP each retain(s) the unilateral right to exercise each water right identified in Article III.D.4.a as each deem(s) appropriate, but neither the Tribes nor MFWP has any affirmative duty to take any particular action in regard to the exercise of any of these rights.

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5. Co-ownership of Water Right Number 76M 94404-00 (Milltown Dam) in Basin 76G (Upper Clark Fork).

a. Upon the date the ratification of this Compact by the Montana legislature becomes effective under State law, Water Right Arising Under State Law number 76M 94404-00 is changed as follows: the right is split into two

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separate active and enforceable Water Rights Arising Under State Law, 76M 94404-01 and 76M 94404-02, and the original water right elements shall be changed to support the maintenance and enhancement of fish habitat and shall take the form of two enforceable hydrographs. The elements of the changed and split water right are set forth in the two water rights abstracts attached hereto as Appendix 30. The measurement point for 76M 94404-01 will move upstream along the Clark Fork River to USGS gage #12334550 at Turah, Montana, and the measurement point for 76M 94404-02 will move upstream along the Blackfoot River to USGS gage #1234000 at Bonner, Montana.

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Comment [jw14]: The language here was reordered because the November 8, 2012 draft Compact inadvertently transposed the measurement points for 76M 94404-01 and 76M 94404-02. The substance of this provision is unchanged.

- i. The period of use of this water right is January 1 to December 31 of each year.
- ii. The point of diversion and place of use for this water right is instream.
- iii. This water right shall not be exercised in conjunction with any artificial diversion.
- iv. MFWP, and the Tribes after they become co-owners, and subject to the limitation on enforcement set forth in Article III.D.5.c, shall be entitled to make a Call to enforce this water right only against junior users the purpose of whose rights is irrigation and whose source of supply is surface water, or against junior users the purpose of whose rights is irrigation, whose source of supply is Groundwater and whose flow rate is greater than 100 gallons per minute.

v. The enforceable levels of this water right are identified in the table attached hereto as Appendix 31. The minimum enforceable level of this right is 700 cfs at the location of USGS gage #1234000 at Bonner, and 500 cfs at the location of USGS gage #12334550 at Turah.

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vi. Call may be initiated on the day following a five-consecutive-day-period where four out of five average daily river flows fall below their respective daily enforceable hydrographs values; Call may persist until such time as two average daily flows of the previous five-consecutive-day-period are in excess of their respective enforceable hydrograph's values.

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Comment [jw15]: The word "management" was deleted because several comments received by the Parties identified concern that the use of that word suggested that there was to be management of subjects beyond the water right (such as fishing access or land). That is not the Parties' intent and nothing in the proposed Compact confers on the Tribes any new jurisdiction over anything. The intent of this language is simply to ensure that the Tribes and MFWP coordinate their efforts to exercise this co-owned water right.

- b. Upon the Effective Date, the Tribes shall be a co-owner with MFWP of this water right. As co-owners, the Tribes and MFWP shall meet and confer on a biennial basis, or on such other timeframe as the Tribes and MFWP may mutually agree to, regarding the exercise of these rights, with a goal of establishing a joint plan for the exercise of this right. Notwithstanding this planning process, the Tribes and MFWP each retains the unilateral right to exercise this water right as each deems appropriate, but neither the Tribes nor

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MFWP has any affirmative duty to take any particular action in regard to the exercise of this right.

- c. The ability to enforce this right shall be suspended for a period of 10 years from the date the ratification of this Compact by the Montana legislature becomes effective under State law. During and after this period, the Tribes and MFWP shall engage with other stakeholders in the Upper Clark Fork Basin on water management subjects including, but not limited to, drought planning and the exercise of this water right in conjunction with the other water rights in the Basin.
- d. For any analysis of the legal availability of water in the Upper Clark Fork Basin, this right shall be considered to have a year-round flow rate of 2000 cfs as measured at the location of USGS gauge #12340500 below the confluence of the Blackfoot and Clark Fork Rivers.
- e. No owner of this water right, acting independently or jointly, shall be entitled to lease, sell or change the purpose of this water right.
- f. The Water Rights Arising Under State Law identified in this Article III.D.5 shall be finally decreed as part of the decree of this Compact that will be proposed to the Montana Water Court pursuant to Article VII.B.

Comment [jw16]: Subsections (e) and (f) were added in response to public comment to make the intent of the Parties' more clear. Concerns were raised that these points were insufficiently identified in the November 8, 2012 draft Compact.

6. Contract Rights to Stored Water Held by MFWP in Basin 76H (Bitterroot).

- a. MFWP is a party to two contracts for the delivery of stored water from Painted Rocks Reservoir: MFWP Water Purchase Contract Painted Rocks, between MFWP and DNRC, July 12, 2004 (attached hereto as Appendix 32); and Water Purchase Contract, March 5, 1958, as amended on March 5, 1958 (attached hereto as Appendix 33). In the event that MFWP obtains an ownership interest in any water rights pursuant to these contracts or obtains an ownership interest in any water rights pursuant to any future contract for the delivery of water from Painted Rocks Reservoir, MFWP shall take all steps necessary to vest the Tribes as a co-owner of said water rights in an expeditious manner.
- b. MFWP is a party to a contract for the delivery of stored water from Lake Como: Agreement Between the Bitterroot Irrigation District and the United States Department of the Interior, Bureau of Reclamation for the Operation of the Enlarged Storage Pool at Lake Como, July, 1994 (attached hereto as Appendix 34). In the event that MFWP obtains an ownership interest in any water rights pursuant to this contract, or obtains an ownership interest in any water rights pursuant to any future contract for delivery of water from Lake Como, MFWP shall take all steps necessary to vest the Tribes as a co-owner

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of said water rights in an expeditious manner.

- c. MFWP shall manage the Painted Rocks and Como contract rights, in a prudent, biologically based and environmentally sound manner, and within the terms and conditions of these contracts. MFWP will manage in the same manner any future contracts for the delivery of water from Painted Rocks or Lake Como to which MFWP becomes a party. The Tribes are an intended beneficiary of MFWP's management of these contracts, and have the right to challenge MFWP's management decisions in a court of competent jurisdiction.
- d. MFWP shall meet and confer with the Tribes on a biennial basis, or on such other timeframe as the Tribes and MFWP may mutually agree to, regarding the management of these contract rights. If the Tribes become co-owners of any water right pursuant to this Article III.D.6 of the Compact, the Tribes and MFWP shall each retain the independent right to exercise each water right as each deems appropriate. Neither the Tribes nor MFWP has any affirmative duty to take any particular action in regard to the exercise of any of such rights. The Tribes do not assume any liability arising out of or resulting from any of the contracts identified in this Article III.D.6 pertaining to co-ownership of rights to stored water in Basin 76H.

7. **Instream Flow Right on the North Fork of Placid Creek (Basin 76 F).** The Tribes have an Instream Flow water right for the upper reach of the North Fork of Placid Creek with the associated flow rates set forth in the abstract of water right attached hereto as Appendix 35. The measurement point for this water right shall be within the main channel of the North Fork of Placid Creek, below the North Fork Placid Creek FIIP Diversion as located within the SE ¼ of the NW ¼ of the SE ¼ of Section 29 in Township 17 North Range 16 West.

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- a. The priority date for this water right is time immemorial.
- b. The period of use of this water right is January 1 to December 31 of each year.
- c. The purpose of this water right is for the maintenance and enhancement of fish habitat. This right shall not be changed to any other or additional purpose.
- d. The point of diversion and place of use for this water right is instream. This water right shall not be exercised in conjunction with any artificial diversion.
- e. The Tribes, and/or the United States on behalf of the Tribes, shall be entitled to make a Call to enforce this water right only against junior users the purpose of whose rights is irrigation and whose source of supply is surface water of

Placid Creek, or against junior users the purpose of whose rights is irrigation, whose source of supply is Groundwater connected to Placid Creek and whose flow rate is greater than 100 gallons per minute.

- f. Call may be made only when the average daily flow drops below the enforceable level for the previous 24-hour period.
- g. The exercise of this portion of the Tribal Water Right is subject to the provisions of the FIIP Water Use Agreement entered into by the Tribes, the Flathead Joint Board of Control, and the United States.

Comment [Jw17]: The language below was deleted because it is addressed in the proposed FIIP Water Use Agreement.

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8. Instream Flow Rights on Kootenai River Tributaries (Basin 76D). The Tribes have Instream Flow water rights for the reaches of the Kootenai River tributaries Big Creek, Boulder Creek, Steep Creek and Sutton Creek, with the associated flow rates set forth in the abstracts of water right attached hereto as Appendix 36.

Comment [Jw18]: This entire subsection (8) was added in response to concerns voiced in Lincoln County during the public comment process. The November 8, 2012 draft Compact contemplated the Tribes becoming co-owners of certain water rights owned by MFWP on the Tobacco River and Young Creek. Concerns were raised that the inclusion of the Tobacco and Young rights in the Compact posed problems for the town of Eureka. Legislators from Lincoln County proposed the recognition of the rights set forth in this subsection (8) and the removal of the Tobacco and Young rights from the Compact. This change was made in response to those comments. (The Tobacco and Young rights had been included in what is now Appendix 28 and what had been Appendix 24 in the November 8, 2012 draft Compact. Those rights are no longer included in Appendix 28 or anywhere in the proposed Compact.)

- a. The priority date for this water right is time immemorial.
- b. The period of use of this water right is January 1 to December 31 of each year.
- c. The purpose of this water right is for the maintenance and enhancement of fish habitat. This right shall not be changed to any other or additional purpose, changed to consumptive use, or transferred to different ownership.
- d. The point of diversion and place of use for this water right is instream. This water right shall not be exercised in conjunction with any artificial diversion.
- e. Water rights held by the United States Forest Service pursuant to the United States Forest Service-Montana Water Rights Compact, 85-20-1401, MCA, shall not be subject to Call by the Tribes and/or the United States on behalf of the Tribes.
- f. The recognition of the Instream Flow water rights in this Article III.D.8 does not confer on the Tribes any authority over the management of National Forest System lands within Basin 76D, or any claim to ownership or other rights in that land. With the exception of future diversionary uses by the United States on National Forest System lands in excess of the Forest Service's reserved rights identified in Article III.D.8.e, the Tribes hold the United States harmless for delivery of water or maintenance of flows to meet this instream flow right in Basin 76D.

E. Period of Use. The period of use of the Tribal Water Right set forth in this Article III shall be January 1 to December 31 of each year, provided however, that any portion of that water right that is dedicated to seasonal use, including irrigation use, shall have a

period of use as set forth in the registration of such right pursuant to the Law of Administration, if applicable, or as otherwise provided in the abstract of any such water right, or in the FIIP Water Use Agreement attached hereto as Appendix 3.

F. Points and Means of Diversion. The points and means of diversion for use of the Tribal Water Right set forth in this Article III are as set forth in the abstracts of water rights attached to this Compact or as may be provided for under the Law of Administration.

G. Call Protection.

1. Non-Irrigators. The Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in this Compact, and the United States agree to relinquish their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose purpose(s) do(es) not include irrigation.

2. Groundwater Irrigators with Flow Rates Less Than 100 Gallons Per Minute. The Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in this Compact and the United States agree to relinquish their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose purpose is irrigation and whose source of supply is Groundwater and whose flow rate is less than or equal to 100 gallons per minute.

3. Irrigators Within the FIIP Influence Area.

- a. The Tribes, the United States, and, pursuant to the FIIP Water Use Agreement, the Project Operator and the Flathead Joint Board of Control, agree to relinquish their right to exercise the Tribal Water Right to make a Call against that portion of any Water Right Arising Under State Law identified in Article III.G.3.b that is equal to the quantity of water established as the Farm Turnout Allowance, or the quantity of that owner's historic beneficial use, whichever is less, whose owner enters into a consensual agreement as described in this Article III.G.3.
- b. Water Rights Arising Under State Law whose owners are eligible to enter into consensual agreements as described in this Article III.G.3 are those rights:
 - i. whose purpose is irrigation;
 - ii. whose point(s) of diversion or place(s) of use are within the FIIP Influence Area; and
 - iii. whose source of supply is surface water; or

- iv. whose source of supply is Groundwater and whose flow rate is greater than 100 gallons per minute.
- c. The Tribes, the United States, and, pursuant to the FIIP Water Use Agreement, the Project Operator and the Flathead Joint Board of Control, agree to enter into the consensual agreement described in this Article III.G.3 with every owner of a Water Right Arising Under State Law described in Article III.G.3.b who wishes to enter into such an agreement with them. The following conditions shall apply to any such consensual agreement:
 - i. the owner of the Water Right Arising Under State Law shall measure all diversions, report the measured amount of those diversions to the Project Operator, and agree to divert no more water each year than the quantity established as the FTA for each irrigation season or the quantity of that owner's historic beneficial use as decreed by the Montana Water Court, whichever is less, and shall not expand water use beyond the terms of the agreement;
 - ii. the owner of a Water Right Arising Under State Law does not acquire any entitlement to any delivery or diversion of water from the FIIP, whether the water is stored or run of the river, by entering into a consensual agreement as described in this Article III.G.3;
 - iii. irrigation use pursuant to any Water Right Arising Under State Law whose owner enters into a consensual agreement as set forth in this Article III.G.3 shall be limited to the irrigation season identified annually by the FIIP;
 - iv. the method and frequency of measurement of the diversion must be identified and be at a reasonable level of accuracy and frequency to demonstrate that the diversion does not exceed the FTA for each irrigation season or the quantity of that owner's historic beneficial use, whichever is less; and
 - v. this agreement is permanent and is binding on the heirs and assigns of the owner of each Water Right Arising Under State Law who enters into such agreement.
- d. The entering into a consensual agreement as set forth in this subsection (3) does not relieve the owner of any claim to a Water Right Arising Under State Law that is at issue in the Montana General Stream Adjudication from the obligation of prosecuting that water right claim through the Montana General Stream Adjudication.

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- e. If a consensual agreement is entered into among the Tribes, United States, the Project Operator and the owner of a Water Right Arising Under State Law described in this Article III.G.3.b prior to the issuance of the final decree for Montana Water Court Basin 76L and 76 LJ, as applicable, that agreement shall terminate as a matter of law if the claimed Water Right is terminated as a result of proceedings conducted in the Montana General Stream Adjudication.
- f. If a consensual agreement is entered into among the Tribes, the United States, the Project Operator, and the owner of a Water Right Arising Under State Law described in this Article III.G.3.b prior to the issuance of the final decree for Montana Water Court Basin 76L and 76 LJ, as applicable, and such owner has a claim in the Montana General Stream Adjudication that is ultimately decreed a quantity of water for that claim less than the quantity established in the agreement, the consensual agreement shall protect only the lesser amount of water.
- g. If the owner of a Water Right Arising Under State Law described in this Article III.G.3.b ceases to use that portion of that water right above the FTA pursuant to a consensual agreement as set forth in this Article III.G.3.b:
 - i. that nonuse does not represent an intent by the owner of that water right to wholly or partially abandon that water right or to not comply with the terms and conditions of that right; and
 - ii. the period of nonuse may not create or may not be added to any previous period of nonuse to create a presumption of abandonment.
- h. Any use of a Water Right Arising Under State Law subject to a consensual agreement described in this Article III.G.3 exceeding the volume of water specified in the consensual agreement shall be subject to Call by the Tribes, the United States, or the Project Operator for that amount of water in excess of the terms of the consensual agreement.

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- i. A Person who has both an entitlement to the delivery of water from the FIIP and a Water Right Arising Under State Law to serve the same acreage may only protect from Call, by entering into a consensual agreement pursuant to this Article III.G.3, a total quantity of water equal to the FTA for each irrigation season for each acre served, irrespective of whether the water applied to each acre is pursuant to that Person's FIIP delivery right or that Person's Water Right Arising Under State Law.

4. Water Rights Upstream of the Reservation (Basins 76I, 76J, and 76LJ). The Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in this Compact, and the United States agree to relinquish their right to

exercise the Tribal Water Right to make a Call against any water right located upstream of the Flathead Reservation in Basins 76I, 76J, and 76LJ, except for those Water Rights Arising Under State Law:

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- a. whose purpose is irrigation and whose source of supply is surface water, and whose point of diversion is:
 - i. the mainstem of the Flathead River, including Flathead Lake;
 - ii. the North Fork of the Flathead River;
 - iii. the Middle Fork of the Flathead River; or
 - iv. the South Fork of the Flathead River.

- b. whose purpose is irrigation, whose source of supply is Groundwater connected to one of the sources identified in Article III.G.4.a, and whose flow rate is 100 gallons per minute or greater.

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- c. The Tribes and the United States agree that the Tribal Water Right recognized in the Compact may not be exercised to make Call against any Water Right Arising Under State Law upstream of the Flathead Reservation and located on a tributary to the Flathead River not identified in Article III.G.4.a.

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5. Water Rights on the Little Bitterroot River Outside the Reservation (Basin 76L).

The Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in this Compact, and the United States agree to relinquish their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose point of diversion is outside the Flathead Reservation and whose source of supply is the Little Bitterroot River or its tributaries.

6. Any Water Right Arising Under State Law the purpose of which is irrigation and that is susceptible to Call by the Tribes pursuant to Articles III.D.1.g, III.D.2.e, III.D.3.e, III.D.5.a.iv, III.D.7.e, III.G.4.a, or III.G.4.b whose purpose is changed after the Effective Date to something other than irrigation shall remain susceptible to Call pursuant to the terms and conditions of this Compact as though the purpose of the Water Right Arising Under State Law was still irrigation.

Comment [jw19]: This provision was added in response to comments received from off-Reservation irrigators who were concerned a future change in purpose of a right that is susceptible to Call at the time the proposed Compact is approved might leave remaining irrigators more vulnerable to the effects of a Call.

H. Water Rights Arising Under State Law Appurtenant to Lands Acquired by the Tribes. For lands acquired by the Tribes within the Reservation, the Tribes have the right to any Water Right Arising Under State Law acquired as an appurtenance to the land. At such time as the acquired land is transferred to trust title status or at the conclusion of the adjudication of the Water Rights Arising Under State Law that are

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<#>Land Acquired by the Tribes with Appurtenant Water Rights Arising Under State Law.¶

held by the Tribes, whichever is later, the Tribes shall file a Trust Transfer form with the Water Management Board, as provided in the Law of Administration and the water right appurtenant to the land shall be transferred to the Tribal Water Right quantified in this Compact with a priority date of July 16, 1855, provided that the Tribes shall continue to use the acquired water right as historically used or may change the use of the acquired water right pursuant to the provisions for change of use set forth in Article IV.B.4 and the Law of Administration.

ARTICLE IV – IMPLEMENTATION OF COMPACT

- A. Trust Status of Tribal Water Right.** The Tribal Water Right shall be held in trust by the United States for the benefit of the Tribes, their members and Allottees.
- B. Use of Tribal Water Right.**
1. **Persons Entitled to Use Tribal Water Right.** The Tribal Water Right may be used by the Tribes, their members, Allottees, or their lessees or assigns.
 2. **Effect of Non-Use of the Tribal Water Right.** Non-use of all or any portion of the Tribal Water Right described in Article III shall not constitute a relinquishment, forfeiture, or abandonment of such right.
 3. **Review of Registration of Existing Uses of the Tribal Water Right.**
 - a. Within five (5) years after the Effective Date, the Board shall provide the DNRC with a report, in a form materially consistent with that of abstracts of water rights decreed by the Montana Water Court, listing all uses of the Tribal Water Right that were registered pursuant to the Law of Administration as being in existence as of the Effective Date. Provided however, the following categories of registered uses do not need to be included in the report to DNRC: 1) uses that, were they Water Rights Arising Under State Law, would have been exempt, pursuant to 85-2-222, MCA, as that statute read as of December 31, 2012, from the filing requirements of the Montana General Stream Adjudication; or 2) uses that, were they Water Rights Arising Under State law, would qualify as exceptions to the permit requirements of 85-2-306, MCA, as that statute read as of December 31, 2012.
 - b. Within six (6) months after receipt of the report, the DNRC must agree, agree in part, or disagree with the report. If the DNRC takes no action by the end of the six month period after the report is received, the report shall be deemed accepted. If the DNRC agrees in part or disagrees with the report, the State, the Tribes, and the United States shall meet within ninety (90) days of

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<#>Kerr Hydroelectric Project. ¶

Comment [jw20]: The language in the November 8, 2012 draft Compact concerning the water rights associated with Kerr Dam has been removed because it became clear during the public comment period that its inclusion only caused confusion. At no point have the Parties intended to be recognizing or quantifying the water rights associated with Kerr Dam as part of the Compact. Those rights are Water Rights Arising Under State Law which the Tribes have the right to acquire in 2015 under the terms of the Federal Regulatory Energy Commission License for Kerr Dam. Those rights will be decreed in the normal course of the Adjudication of Basin 76L.

The intent behind including a reference to the Kerr Rights in the November 8, 2012 draft Compact was to preclude the possibility of a future argument to the effect that the failure to mention the Kerr rights in the Compact means that the Tribes somehow waived their right under the FERC license to acquire ownership of the Dam and the associated state law-based water rights. The reference to the Kerr rights in Article V serves to preclude that possibility, and the language that used to be here has been deleted here to avoid further confusion.

Deleted: addition to the water rights set forth above, the Tribes have the following rights to water: The Kerr Hydroelectric Project (Kerr Project) is a hydroelectric generating project located on the Flathead River within the Reservation. It is authorized by the Federal Energy Regulatory Commission (FERC) pursuant to possessory and operational requirements set forth in a FERC license for the Kerr Project, FERC Project No. 5 (32 FERC #61,070, July 17, 1985) as amended. The Kerr Project License at Ordering Paragraph (C)(1) grants the Tribes a unilateral and exclusive right to acquire the Kerr Project commencing September 5, 2015. The Tribes intend to exercise this right at the earliest opportunity. Should they do so, then the Tribes will become sole licensee and owner of the Kerr Project and associated Water Rights Arising Under State Law. So long as the Tribes are licensee and owner of the Kerr Project, the Tribes will be vested with all right, title and interest in and to all Water Rights Arising Under State Law that are associated with the FERC license for the Kerr Project. This identification in the Compact of these Water Rights Arising Under State Law is not intended to effect any change or alteration to any of the attributes of these Water Rights Arising Under State Law associated with the Kerr Project. These rights will be finally decreed through the normal course of the adjudication.

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issuance of the DNRC's notice of disagreement in an effort to resolve the issue(s) giving rise to the disagreement. If, after meeting and conferring, the State, the Tribes, and the United States are still unable to come to agreement on the list of existing uses, all disagreements over the contents of the list must be brought to the Water Management Board for resolution of the dispute under Article IV.C.4.c within 180 days of the issuance of the DNRC's notice of disagreement.

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Comment [jw21]: This last clause was added to make the dispute resolution process clearer.

4. Change in Uses of the Tribal Water Right.

Except for those portions of the Tribal Water Right that are not eligible to be changed to another purpose, any user of a portion of the Tribal Water Right who proposes to change such use must seek authorization to change the use of that right. Such applications for authorizations to change use shall be heard and decided by the Board pursuant to Article IV.C.4.b of the Compact and the Law of Administration, provided that the Board may not consider any change application of Flathead System Compact Water unless the applicant has secured the written consent of the Tribal Council to apply for a Change in Use authorization.

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Comment [jw22]: This language was to be added to make the intent of the Parties more clear. Certain categories of the Tribes' water rights (such as instream flow rights) may not be changed to another purpose. The language in this subsection 4 in November 8, 2012 draft Compact (which lacked the new first clause) could be read to be inconsistent with that intent.

5. New Development of the Tribal Water Right.

a. The Tribes, or any Person with authorization from the Tribes, may develop a new use of the Tribal Water Right on the Reservation after the Effective Date. Such development may only proceed upon the issuance of an Appropriation Right for the New Development by the Board pursuant to Article IV.C.4.a and the Law of Administration.

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b. The Tribes, or any Person with authorization from the Tribes, may develop a new use of the Flathead System Compact Water Right set forth in Article III.C.1.c off the Reservation after the Effective Date, but only after complying with the provisions of Article IV.B.5.c.

Comment [jw23]: Subsections (b)-(e) were added to make explicit the process by which the Tribes might develop a use of Flathead System Compact Water off the Flathead Reservation, and to make clear that the DNRC would have jurisdiction over approving any such new development.

c. Any new development by the Tribes of a portion of the Tribes' Flathead System Compact Water Right off the Reservation shall be treated as a change in use. The DNRC shall process each change application pursuant to the provisions of 85-2-302, 307-310 and 314, MCA. Prior to developing Flathead System Compact Water for beneficial use off the Reservation, the Tribes must comply with the provisions of subsections (1)-(3) and (8)-(17) of 85-2-402, MCA, as those provisions read on December 31, 2012;

d. In the event that, after the Effective Date, the Montana legislature substantively amends or repeals any of the sections identified in Article IV.B.5.c, the Tribes and the DNRC shall meet no later than 60 days after the effective date of the State legislative action amending or repealing to

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determine whether the provisions of State law set forth in Article IV.B.5.c or the new provisions of State law shall govern the process for off-Reservation development of new uses of the Flathead System Compact Water Right set forth in Article III.C.1.c. In the event that the Tribes and the DNRC are unable to agree, the provisions of State law identified in Article IV.B.5.c shall remain in effect. Any modification to the provisions of Article IV.B.5.c agreed to by the Tribes and the DNRC in response to future State legislative action shall be pursuant to and not a modification or amendment to this Compact.

- e. If the Tribes' use of Flathead System Compact Water off the Reservation involves diversion or transportation facilities located off the Reservation, the Tribes shall apply for and obtain all permits, certificates, variances and other authorizations required by State laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water, prior to exercising a use of the Flathead System Compact Water Right off the Reservation.

6. Lease of the Tribal Water Right.

a. Lease of the Tribal Water Right generally.

- i. Pursuant to the terms and conditions of this Compact and the FIIP Water Use Agreement, the Tribes may Lease, for use on or off the Reservation, any portion of the Tribal Water Right set forth in Article III.C.1.a, b, i, and j provided that either the Tribes or its assignee, on behalf of the Tribes, first comply with the procedures for changing the use of water rights set forth in subsections iii and iv of this Article IV.B.6.a, as applicable.
- ii. The Tribes may make or authorize a Lease of the Tribal Water Right for use within or outside the Reservation; provided that, any Lease shall be for a term not to exceed 99 years, and may include provisions authorizing renewal for an additional term not to exceed 99 years. The off-Reservation use of any portion of the Tribal Water Right is limited to a place of use within the Flathead or Clark Fork River Basins in Montana.
- iii. A Lease of the Tribal Water Right shall not adversely affect a Water Right Arising Under State Law with a priority date before the date of the Lease or an Appropriation Right issued pursuant to this Compact with a priority date before the date of the Lease. Uses of the Tribal Water Right being exercised prior to the date of the Lease shall not be adversely affected by a Lease of the Tribal Water Right, except that the Tribes may allow uses of the Tribal Water Right on Tribally owned land to be adversely affected by

Comment [jw24]: This language was added to make the Parties' intent clear. Concerns were raised during the public comment process that the Tribes might be able to lease their water out of State. This language makes clear that that possibility is precluded by the proposed Compact.

declining to object to the Change in Use application associated with the Lease.

1. If the Lease is for use on the Reservation, the determination of adverse effect shall be made by the Water Management Board pursuant to the process set forth regarding applications for Change in Use authorizations under the Law of Administration.
2. If the Lease is for use off the Reservation, the Lease shall be treated as a change in use. The DNRC shall process each change application pursuant to the provisions of 85-2-302, 307-310 and 314, MCA. Prior to the lessee putting leased water to beneficial use, the Tribes or their assignee, on behalf of the Tribes, must comply with the following provisions of State law as those provisions read on December 31, 2012:

a. Subsections (1)-(3) and (8)-(17) of 85-2-402, MCA;

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b. Subsections (1)-(8) of 85-2-407, MCA, provided, however, that the term of any such Lease may be for up to 99 years, and the DNRC may approve the renewal of such a Lease for a period of up to 99 years; and

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c. 85-2-408, MCA, as limited by the provisions of Article IV.B.6.a.iii.2.

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- iv. In the event that, after the Effective Date, the Montana legislature substantively amends or repeals any of the sections identified in Article IV.B.6.a.iii.2, the Tribes and the DNRC shall meet, no later than 60 days after the effective date of the State legislative action amending or repealing, to determine whether the provisions set forth in Article IV. B.6.a.iii.2 or the new provisions of State law shall govern the process for off-Reservation Leases under this Compact. In the event that the Tribes and the DNRC are unable to agree, the provisions of Article IV. B.6.a.iii.2 shall remain in effect. Any modification to the provisions of Article IV B.6.a.iii.2 agreed to by the Tribes and the DNRC in response to future State legislative action shall be pursuant to and not a modification or amendment to this Compact.

Comment [jw25]: This language was added because 85-2-408 incorporates by reference 85-2-402, and without this language there was a potential inconsistency between this subsection (c) and the provisions of subsection (a).

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- v. The Tribes or any Person using diversion or transportation facilities located off the Reservation in connection with a use of the Tribal Water Right shall apply for and obtain all permits, certificates, variances and other authorizations required by State laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any

equipment, device, facility or associated facility proposed to use or transport water, prior to exercising a use of the Tribal Water Right off the Reservation.

b. Lease of the Tribal Water Right by an Individual Indian Owner.

- i. An Individual Indian Owner may Lease for use on the Reservation his or her allocated portion of the Tribal Water Right.
- ii. If the lessee intends to put the water to beneficial use in a manner different than how the Individual Indian Owner had been using the water prior to the date of the Lease, the Individual Indian Owner or his or her lessee must comply with the provisions of the Law of Administration pertaining to securing Change in Use authorizations from the Water Management Board before the use of water may be changed.
- iii. Any Lease entered into pursuant to subsection b of this section may be for a term not to exceed 25 years, and may include provisions authorizing renewal for an additional term not to exceed 25 years.
- iv. A Lease of the Tribal Water Right by an Individual Indian Owner shall not adversely affect a Water Right Arising Under State Law with a priority date before the date of the Lease or an Appropriation Right issued pursuant to this Compact with a priority date before the date of the Lease. Uses of the Tribal Water Right being exercised prior to the date of the Lease shall not be adversely affected by a Lease of the Tribal Water Right by an Individual Indian Owner, except that the Tribes may allow uses of the Tribal Water Right on Tribally owned land to be adversely affected by declining to object to the Change in Use application associated with the Lease.

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c. Lease of the Flathead System Compact Water Right.

- i. Pursuant to the terms and conditions of this Compact, the Tribes may Lease Flathead System Compact Water for use on or off the Reservation, provided that either the Tribes or its lessee, on behalf of the Tribes, first complies with the provisions of the Law of Administration pertaining to usage of the Flathead System Compact Water Right and, if the Lease is for the use of Flathead System Compact Water off the Reservation, the provisions of subsection iii or iv of this section, as applicable.
- ii. The Tribes may make or authorize a Lease of the Tribal Water Right for use within or outside the Reservation; provided that, any Lease shall be for a term not to exceed 99 years, and may include provisions authorizing

renewal for an additional term not to exceed 99 years. The off-Reservation use of any portion of the Tribal Water Right is limited to a place of use within the Flathead or Clark Fork River Basins in Montana.

Comment [jw26]: This language was added to make the Parties' intent clear. Concerns were raised during the public comment process that the Tribes might be able to lease their water out of State. This language makes clear that that possibility is precluded by the proposed Compact.

iii. If the Lease is for a portion of the Tribes' Flathead System Compact Water right to be delivered wholly from water stored in Hungry Horse Reservoir, the Tribes shall provide notice to the DNRC and the Water Management Board, in advance of the effective date of the Lease, of the terms of the Lease and any modifications thereto or termination thereof. For Leases lasting one irrigation season or less, notice to the DNRC and the Water Management Board shall be provided as far in advance as practicable. For Leases lasting longer than one year, notice shall be provided to the DNRC and the Water Management Board no later than the later of 120 days prior to the date on which the Lease is to take effect or March 31 of the year in which the Lease is to take effect. The point of delivery for a Lease shall be the outlet works at the Hungry Horse Dam. If disputes arise between or among holders of Water Rights Arising Under State Law as to the reasonable transmission and carriage losses from the point of delivery to the place of use of the Lease, the district court pursuant to its powers and duties under Title 85, Chapter 5, MCA, shall calculate such losses.

iv. If the Lease is for the off-Reservation use of a portion of the Tribes' Flathead System Compact Water right to be delivered from a combination of stored water and direct flow water from the Flathead River, or exclusively from direct flow water from the Flathead River, the Lease shall be treated as a change in use as it pertains to the use of the direct flow water. The DNRC shall process each change application pursuant to the provisions of 85-2-302, 307-310 and 314, MCA. Prior to the lessee putting leased water to beneficial use, the Tribes or the lessee must comply with the following provisions of State law as those provisions read on December 31, 2012;

1. Subsections (1)-(3) and (8)-(17) of 85-2-402, MCA;

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2. Subsections (1)-(8) of 85-2-407, MCA, provided, however, that the term of any such Lease may be for up to 99 years, and the DNRC may approve the renewal of such a Lease for a period of up to 99 years; and

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3. 85-2-408, MCA, as limited by the provisions of Article IV.B.6.c.iv.1.

Comment [jw27]: This language was added because 85-2-408 incorporates by reference 85-2-402, and without this language there was a potential inconsistency between this subsection (3) and the provisions of subsection (1).

v. In the event that, after the Effective Date, the Montana legislature substantively amends or repeals any of the sections identified in Article IV.B.6.c.iv.1-3, the Tribes and the DNRC shall meet no later than 60 days

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after the effective date of the State legislative action amending or repealing to determine whether the provisions set forth in Article IV.B.6.c.iv.1-3 or the new provisions of State law shall govern the process for off-Reservation Leases under this Compact. In the event that the Tribes and the DNRC are unable to agree, the provisions of Article IV.B.6.c.iv.1-3 shall remain in effect. Any modification to the provisions of Article IV.B.6.c.iv.1-3 agreed to by the Tribes and the DNRC in response to future State legislative action shall be pursuant to and not a modification or amendment to this Compact.

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- vi. The Tribes or any Person using diversion or transportation facilities located off the Reservation in connection with a use of the Flathead System Compact Water Right shall apply for and obtain all permits, certificates, variances and other authorizations required by State laws regulating, conditioning or permitting the siting, construction, operation, alteration or use of any equipment, device, facility or associated facility proposed to use or transport water, prior to exercising a use of the Flathead System Compact Water Right off the Reservation.

7. Lease of 11,000 Acre-Foot per Year of Water From Hungry Horse Reservoir for Off-Reservation Mitigation.

- a. The Tribes shall make available for Lease off the Reservation 11,000 Acre-foot of the water identified in Article III.C.1.c.i stored in Hungry Horse Reservoir pursuant to the process, and subject to the terms and conditions, set forth in this Article IV.B.7.
- b. The water identified in this Article IV.B.7.a shall be available for the mitigation of net depletions arising from new or existing domestic, commercial, municipal and/or industrial (DCMI) uses of water at any point in the Flathead or Clark Fork Basins in Montana for which the 11,000 Acre-foot per year of water is capable of providing mitigation.
- c. The DNRC, under Title 85, MCA, shall retain the responsibility for determining if, when, where, and how much mitigation water is needed for any proposed new development and if the water identified in this Article IV.B.7.a meets the appropriate mitigation criteria for any given proposed mitigation plan.
- d. The water identified in this Article IV.B.7.a is subject to reduction due to the operation of the "Biological Impacts Evaluation and Operational Constraints for a Proposed 90,000 Acre-foot withdrawal" (State of Montana, September 14, 2011 (Revised Version)) on a pro rata basis along with the rest of the water identified in Article III.C.1.c.i, as set forth in Article III.C.1.c.iii.

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Comment [jw28]: This language was added to make the Parties' intent clear. Concerns were raised during the public comment process that the Tribes might be able to lease their water out of State. This language makes clear that that possibility is precluded by the proposed Compact.

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- e. The mechanism for entering into a Lease for any portion of the water set forth in this Article IV.B.7.a shall be as follows:
- i. Any interested Person may approach the Tribes, through the Tribal Lands Department or successor Tribal department, to negotiate a Lease of a portion of this water;
 - ii. The baseline annual per Acre-foot price for this water shall be set at \$40 as of July 1, 2013. From that date, the baseline price shall be indexed for inflation and consequently adjusted annually on the first day of the month in which the ratification of this Compact by the Montana legislature takes effect under State law (the Adjustment Date) by the percentage change over the previous year in the most recent monthly Consumer Price Index for All Urban Consumers (CPI-U) published by the United States Department of Labor, Bureau of Labor Statistics. The initial price for each Lease of any portion of the 11,000 Acre-feet identified in this Article IV.B.7 entered into during that year shall be the adjusted baseline price. During the term of any given Lease, the annual price per Acre-foot shall continue to adjust annually on the Adjustment Date by the percentage change in the CPI-U since the Adjustment Date of the previous year. The foregoing provisions regarding the adjusted baseline price shall constitute the sole and exclusive price term of each Lease;
 - iii. In the event the United States Department of Labor, Bureau of Labor Statistics discontinues publication of the CPI-U, the Tribes and the State shall jointly identify an alternate inflation index for Leases under this Article IV.B.7. The identification of an alternate inflation index is pursuant to, and shall not be deemed a modification or amendment of, this Compact;
 - iv. Each Lease between the Tribes and an end user shall be for a term of 99 years, with the end user holding an option to renew for an additional 99 years, unless the Tribes and the end user affirmatively agree on an alternate duration not to exceed 99 years. Any Lease including a term of alternate duration may also include an option to renew for a term not to exceed 99 years; and
 - v. The Tribes and each interested end user shall negotiate any and all other non-price terms of the Lease arrangement.
- f. In the event of an impasse between the Tribes and an end user over any non-price term, the end user may file a notice of impasse with the Water Management Board, invoking the Board's authority to resolve any such

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impasse pursuant to the process set forth in this Article IV.B.7.g. Upon receipt of the notice of impasse, the Board shall date stamp it.

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g. Process for resolving disputes over Lease terms.

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- i. Within three days of the filing of a notice of impasse, the Board shall provide notice of the filing to the Tribes, with a copy to the end user, identifying a date certain no sooner than 30 and no later than 60 days from the date of receipt of the notice for the Tribes and the end user each to submit a last, best offer concerning all of the non-price terms.
- ii. No later than the date set by the Board, the Tribes and the end user shall file a last, best offer with the Board in the form of a proposed Lease agreement and shall serve the same on each other. To be filed, the offer must be placed in the custody of the Board within the time fixed for filing. Filing may be accomplished by mail addressed to the Board, but filing shall not be timely unless the papers are actually received within the time fixed for filing. Immediately upon receipt by the Board, the offers shall be date stamped. If the Tribes fail to timely file an offer, the offer filed by the end user shall become the terms of the Lease. If the end user fails to timely file an offer, no Lease shall be concluded.
- iii. The Board shall issue a decision selecting one side's proposed Lease or the other's within no less than 15 and no more than 45 days after the filing of the offer. At any time prior to the Board's decision, the end user may choose to withdraw his or her proposed Lease and decline to enter into the Lease transaction.
- iv. The Board shall provide notice of its decision to both the Tribes and the end user. The Lease shall be concluded on the terms selected by the Board, but must include the price term identified in Article IV.B.7.e.ii of this Compact. The effective date of the Lease shall be ten days after the Board's issuance of its decision.
- v. The Tribes or an end user dissatisfied with a decision of the Board made pursuant to this Article IV.B.7.g may appeal that decision by filing a petition for judicial review with a court of competent jurisdiction within 30 days of the issuance of the Board's decision. The reviewing court shall review the Board's decision for abuse of discretion.
- vi. In the event that a court determines that it lacks subject matter or personal jurisdiction to rule on a petition for judicial review of the Board's decision pursuant to this Article IV.B.7.g, the party filing the petition shall be entitled to petition for judicial review from any other court of competent

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jurisdiction within thirty days from the date of a final court order finding lack of jurisdiction.

C. Administration: Establishment of Flathead Reservation Water Management Board.

1. Establishment of Board. There is hereby established the Flathead Reservation Water Management Board. Upon the Effective Date, the Board shall be the exclusive regulatory body on the Reservation for the issuance of Appropriation Rights and authorizations for Changes in Use of Appropriation Rights and Existing Use, and for the administration and enforcement of all Appropriation Rights and Existing Use. The jurisdiction of this Board does not extend to any water rights whose place of use is located outside the exterior boundaries of the Reservation.

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Comment [jw29]: This sentence was added to make the Parties' intent clear. Concerns were raised during the public comment process that the November 8, 2012 draft Compact was insufficiently explicit on this point.

2. Membership.

a. Voting Members. The Board shall consist of five voting members: two members selected by the Governor of the State, after consultation with holders of Water Rights Arising Under State Law located on the Reservation; two members appointed by the Tribal Council; and one member selected by the other four members. All members shall be appointed within six months of the Effective Date. Should the four appointed members fail to agree on the selection of a fifth voting member within sixty days of the date of appointment of the fourth member, or within thirty days after any vacancy in that fifth position occurs, the following procedure shall be utilized:

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- i.** Within five days thereafter the two members appointed by the Tribal Council shall nominate three individuals to serve as a member of the Board and the two members appointed by the Governor shall nominate three individuals to serve as a member of the Board;
- ii.** Within fifteen days thereafter the two members appointed by the Tribal Council shall reject two of the individuals nominated by the two members appointed by the Governor, and the two members appointed by the Governor shall reject two of the individuals nominated by the two members appointed by the Tribal Council; and
- iii.** Within five days thereafter, the remaining two nominees shall be submitted to the Chief Judge of the Federal District Court for the District of Montana for selection of the fifth member of the Board.

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b. Ex Officio Member. The Board shall also have a sixth, non-voting member appointed by the Secretary.

- c. Term.** Initially, three voting members of the Board shall serve for four years, and two shall serve for two years. One member appointed by the Governor, one member appointed by the Tribal Council and the fifth voting member shall serve for four years. One member appointed by the Governor and one member appointed by the Tribal Council shall serve for two years. The member appointed by the Secretary shall be appointed for four years. At the expiration of the initial two-year appointments, all subsequently appointed Board members shall serve four year terms.
- d. Eligibility.** To be eligible to serve on the Board, an individual must be over 18 years of age and be a Reservation resident. For the purposes of filling a position on the Water Management Board, a Reservation resident is an individual who:
- i. does business within Flathead Indian Reservation boundaries;
 - ii. is domiciled within Flathead Indian Reservation boundaries; or
 - iii. owns and maintains a seasonal residence within Flathead Indian Reservation boundaries.

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An eligible individual must also have education and experience in one or more of the following fields: natural resources management, public administration, agriculture, engineering, commerce or finance, hydrology, biological sciences, water law or water policy.

No elected official of the State of Montana, or any political subdivision thereof, or of the United States, or of the Tribes is eligible for nomination to the Board while holding such elective office. However, a nominee for Board membership shall not be disqualified by reason of the fact that he or she is an employee or contractor of the State of Montana or any political subdivision thereof, or of the Tribes, or of the United States.

No Board member may vote on any application or appeal that the member participated in personally and substantially in any non-Board capacity.

- e. Vacancies.** Subject to the provisions of Article IV.C.2.a regarding the filling of a vacancy of the fifth member of the Board, upon the occurrence of any other vacancy in a Board position, the Tribal Council, if the vacancy is in a position appointed by the Tribal Council, or the Governor, if the vacancy is in a position appointed by the Governor, shall name a new Board member within 30 days of the occurrence of the vacancy. Should Board action be required during the period of any such vacancy, the Department Head of the Tribal Natural Resources Department, if the vacancy is in a position appointed by the

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Tribal Council, or the Director of the DNRC, if the vacancy is in a position appointed by the Governor, shall fill the vacant position on a acting basis until a new appointment is made.

- f. **Compensation and Expenses of the Board.** Each Board member shall receive such compensation for services and reimbursement for expenses for attendance at Board meetings as shall be fixed by the State and the Tribal Council for the Board members appointed by the same. The compensation for the fifth Board member shall be set jointly by the State and the Tribal Council. The expenses of any Federal *ex officio* member shall be covered by the United States.

- 3. **Quorum and Vote Required.** Four Board members appointed pursuant to Article IV.C.2.a shall constitute a quorum. No Board action may be voted upon in the absence of a quorum. All Board decisions shall be by affirmative vote of a majority of the Board, except as set forth in Article IV.C.5.d for the appointment of water commissioners. If a proposal put to a vote of a quorum of Board members ends in a tie vote, the matter being voted on is deemed disapproved or denied.

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4. **Jurisdiction of the Board.**

- a. **Issuance of Appropriation Rights.** Upon the Effective Date, the Board shall have exclusive jurisdiction over the issuance of all new Appropriation Rights on the Reservation. The process for the consideration, issuance or denial of all Appropriation Rights is set forth in the Law of Administration.

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- b. **Authorizations for Changes in Uses.** Upon the Effective Date, the Board shall have exclusive jurisdiction over the issuance of authorizations for Changes in Uses of all water rights on the Reservation. The process for the consideration, issuance or denial of such Change in Use authorizations is set forth in the Law of Administration.

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- c. **Enforcement.** Upon the Effective Date, the Board shall have exclusive jurisdiction to resolve any controversy over the meaning and interpretation of the Compact, and any controversy over the right to the use of water as between the Parties or between or among holders of Appropriation Rights and Existing Uses on the Reservation. The Board shall also have jurisdiction to resolve any controversy over the meaning and interpretation of the FIIP Water Use Agreement between or among the parties to the FIIP Water Use Agreement after the exhaustion of the procedures set forth in Section 83(a) through (d) of the FIIP Water Use Agreement. All controversies cognizable under this subsection shall be heard and resolved pursuant to the Compact and the Law of Administration.

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d. Water Right Ownership Updates. The Board shall not have jurisdiction over water right ownership updates on water rights appurtenant to fee lands, which shall remain with the DNRC as set forth in 85-2-421 through -424, 85-2-426, and 85-2-431, MCA.

Comment [jw30]: This language was added to make clear that the DNRC will retain this responsibility as it pertains to fee lands on the Reservation.

5. Powers and Duties.

- a. **In General.** The Board shall have the power to promulgate procedures, prescribe forms, develop additional materials and implement amendments thereto as may be necessary and proper to exercise its jurisdiction and carry out its assigned functions under this Compact and the Law of Administration. A set of forms for initial use by the Board in the implementation of the Law of Administration is attached hereto as Appendix 37. The Board may amend these forms at its discretion.
- b. **Hearings.** Pursuant to the procedures set forth in the Law of Administration, the Board shall hold hearings upon notice in proceedings before it and shall have the power to administer oaths, take evidence and issue subpoenas to compel attendance of witnesses or production of documents or other evidence, and to appoint technical experts. The Tribes and the State shall enforce the Board's subpoenas in the same manner as prescribed by the laws of the Tribes and the State for enforcing a subpoena issued by the courts of each respective sovereign in a civil action. The Persons involved in the controversy may present evidence and cross examine any witnesses. The Board shall cause all hearings to be recorded, and shall determine the controversy and grant any declaratory or injunctive relief allowed by the Law of Administration, including a temporary order. The Board shall not have power to award money damages, attorneys' fees or costs; however it shall have the power to impose fines pursuant to the terms of the Law of Administration and award any kind of equitable relief. All decisions of the Board shall be in writing, and, together with a written justification for the decision and any dissenting opinions, shall be served personally or by certified mail on all Persons involved in the proceeding before the Board. All records of the Board shall be open to public inspection.
- c. **Employment of Water Engineer.** The Board shall have the authority to employ a Water Engineer to carry out such functions as assigned by the Board pursuant to the Law of Administration, including the supervision of any water commissioners appointed by the Board. As set forth in the Law of Administration, the Engineer shall hold hearings upon notice in proceedings before the Engineer and shall have the power to administer oaths, take evidence and issue subpoenas to compel attendance of witnesses or production of documents or other evidence, and to appoint technical experts. The Tribes and the State shall enforce the Engineer's subpoenas in the same manner as

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prescribed by the laws of the Tribes and the State for enforcing a subpoena issued by the courts of each respective sovereign in a civil action. The Persons involved in the controversy may present evidence and cross examine any witnesses. The Engineer shall cause all hearings to be recorded, and shall determine the controversy and grant any relief allowed by the Law of Administration, including a temporary order. All decisions of the Engineer shall be in writing, and, together with a written justification for the decision, shall be served personally or by certified mail on all Persons involved in the proceeding before the Engineer. All records of the Engineer shall be open to public inspection.

d. Appointment of Water Commissioner(s)

- i. The Board shall have the authority, upon a unanimous vote of all five members of the Board, to appoint one or more commissioners to provide day-to-day administration of water on the Reservation. The compensation for any such commissioner and the identification of the Person(s) responsible for paying costs associated with the appointment of any such commissioner must also be established by a unanimous vote of all five members of the Board as part of the Board action appointing any such commissioner. Any commissioner appointed shall act under the supervision of the Water Engineer.
- ii. Under the jurisdiction of the Board, and as set forth in the Law of Administration, the commissioner(s) shall have the authority to administer and distribute water only on the Reservation and from the off-Reservation portions of the facilities of the Flathead Indian Irrigation Project for use within the FIIP. The authority of any commissioner(s) appointed pursuant to this subsection, as it pertains to portions of the Tribal Water Right used within the FIIP, extends only to the delivery of water to FIIP diversion facilities and shall not extend to the administration of that water in FIIP facilities or on lands served by the FIIP, which shall remain subject to the authority of the Project Operator.

6. Review and Enforcement of Board Decisions.

- a. Decisions by the Board shall be effective immediately, unless stayed by the Board. Persons involved in the proceedings before the Board may appeal any final decision by the Board to a court of competent jurisdiction within thirty days of such decision. An appeal of a final decision of the Board shall be styled as a petition for judicial review of an agency decision pursuant to the rules of procedure of the court from which review is sought. The petition for judicial review shall be filed with the Board and the court and served upon all Persons involved in the proceeding before the Board, as well as the Tribes, the

State and the United States. Service shall be accomplished according to the requirements of the court's rules of procedure.

- b. Unless a petition is filed within thirty days of a final decision of the Board, as provided in Article IV.C.6.a, any decision of the Board shall be recognized and enforced by any court of competent jurisdiction on petition by any Person before the Board in the proceeding in which the decision was made.
- c. A court of competent jurisdiction in which a timely petition is filed pursuant to Article IV.C.6.a, or in which a petition to confirm or enforce is filed pursuant to Article IV.C.6.b, may order such temporary or permanent relief as it considers just and proper subject to the limited waivers of immunity set forth in Article IV.C.7.
- d. An appeal may be taken from any decision of the court in which a timely appeal is filed pursuant to Article IV.C.6.a, or in which a petition to confirm or enforce is filed pursuant to Article IV.C.6.b, in the manner and to the same extent as from orders or judgments of the court in a civil action.
- e. In any petition to confirm or enforce the Board's decision, the Board shall file with the court to which appeal is taken the record of the proceedings before the Board within the time and in the manner provided by the court's rules of procedure.
- f. The court shall conduct the review on the record made before the Board. In considering the petition, the Board's legal conclusions shall be reviewed for correctness and its factual findings for abuse of discretion.
- g. In the event that a court determines that it lacks subject matter or personal jurisdiction to rule on a petition for judicial review of a Board decision, the party filing the petition shall be entitled to petition for judicial review from any other court of competent jurisdiction within thirty days from the date of a final court order finding lack of jurisdiction.

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7. Public Meetings and Records

- a. Notwithstanding any other provisions of law, the Board is a public agency for purposes of the applicability of State and Tribal right to know laws.
- b. All regular and special meetings of the Board, including all hearings conducted by the Office of the Engineer or the Board, shall be open to the observation of the general public pursuant to State and Tribal open meeting laws. Where there is a conflict of laws, the law that provides for greater openness to the public applies.

- c. Where no more specific notice provisions are set forth in the Law of Administration, notice of any meeting, including an agenda, shall be provided to the public in a manner and on a timeframe consistent with the criteria set forth in State and Tribal law. Where there is a conflict of laws, the law that provides for earlier notice shall apply.
- d. The Board shall keep the following records:
 - i. minutes of all meetings;
 - ii. recordings of all hearings conducted by the Board or the Office of the Engineer;
 - iii. all documents filed with or generated by the Board or the Office of the Engineer;
 - iv. any other records required by applicable provisions of Federal, State or Tribal law, provided that if there is a conflict of laws, the law that provides for more expansive record retention shall apply.
- e. All Board records are public records and shall be made available to the public for inspection under such reasonable terms and conditions as the Board shall establish.

8. Waiver of Immunity. The Tribes and the State hereby waive their respective immunities from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States, in order to permit the resolution of disputes under the Compact by the Board, and the appeal or judicial enforcement of Board decisions as provided herein, except that such waivers of sovereign immunity by the Tribes or the State shall not extend to any action for money damages, costs, or attorneys' fees. The Parties agree that only Congress can waive the immunity of the United States. The participation of the United States in the proceedings of the Board shall be as provided by Congress. The Parties agree to seek congressional approval of waiver language for the United States that is materially consistent with the terms of the waivers provided by the Tribes and the State in this subsection.

D. Amendments to the Law of Administration. The Board may not amend the Law of Administration. No amendment by the Tribes or the State of the Law of Administration shall be effective unless and until the other makes an analogous amendment. Any such amendment is pursuant to, and shall not be deemed a modification of this Compact.

E. Water Rights Database. The Board shall cause all Appropriation Rights and Changes

in Use authorized by the Board and all uses of water registered pursuant to the Law of Administration to be entered into the DNRC water rights database in a format agreed to by the Board and the DNRC.

ARTICLE V - DISCLAIMERS AND RESERVATION OF RIGHTS

A. No Effect on Water Rights of Other Tribes or on other Federal Reserved Water Rights.

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

B. General Disclaimers.

Nothing in this Compact shall be construed or interpreted:

1. To preclude the Tribes, Tribal members, and Allottees, or the United States, from applying to the Water Management Board for an Appropriation Right under the Law of Administration on the same basis as any other Person;
2. As a precedent for litigation of aboriginal or reserved water rights;
3. As precedent for interpretation or administration of future compacts between the United States and the State, or between the United States and any other state, or between the State and any other state;

4. As precedent for negotiation, interpretation or administration of any existing or future Compact, negotiated settlement, judicial settlement or other form of accommodation of water rights involving Indian tribes or individual Indians;

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5. To preclude the possession, acquisition or exercise of Water Rights Arising Under State Law by the Tribes or Allottees or members of the Tribes;

Deleted: a water right

Deleted: outside of the Flathead Indian Reservation

6. To limit in any way the right of the Parties or any other Person to litigate any issue or question not resolved by this Compact;

7. To authorize the taking of any water right that is vested under State, Tribal or Federal law;

8. To create or deny substantive rights through headings or captions used in this Compact;

9. To address or prejudge how the Tribal Water Right may be treated or interpreted in any interstate or international water apportionment proceeding;

10. To constitute a waiver of sovereign immunity by the Tribes or the State except as expressly set forth in this Compact;

11. To constitute a waiver of sovereign immunity by the United States except as expressly set forth in 43 U.S.C. 666 or as otherwise provided by Congress;

12. Except as expressly provided herein and as may be required by Congress, to modify the obligations of any agency of the United States;

13. To limit or prohibit the Tribes, their members or Allottees, or to limit the United States in any capacity, from objecting in any general stream adjudication in the Montana Water Court to any claims to water rights on or off of the Flathead Indian Reservation;

14. To prevent the Montana Water Court from adjudicating any properly filed claims or objections to the use of water within the Flathead Indian Reservation;

15. To limit or prohibit the Tribes, their members or Allottees, or the United States in any capacity, from filing an action in a court of competent jurisdiction to prevent any Person or Party from interfering with the Tribal Water Right;

Deleted: person

16. To affect or determine the applicability of any State, Tribal or Federal law not subject to this Compact, including, but not limited to environmental and public safety laws, on activities of the Tribes, their members or Allottees or the United States;

17. To prejudice or predetermine any right that Tribal members or Allottees have to obtain the use of a portion of the Tribal Water Right under the provisions of this Compact and the Law of Administration;

18. To affect the capacity of any Tribal member or Allottee to lease his or her land;

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19. Except for the recognition in this Compact of the FIIP Water Use Agreement as an agreement among the Tribes, the Flathead Joint Board of Control and the United States, appended hereto as Appendix 3, to make the State of Montana a party to the FIIP Water Use Agreement or the obligations arising under it other than as specifically identified by this Compact;

Deleted:

20. To make any owner of a Water Right Arising Under State Law, except for the Tribes, the Flathead Joint Board of Control and the United States, a party to the FIIP Water Use Agreement.

Deleted: To, except through the voluntary process set forth in Article III.G.3,

21. To empower the Water Management Board to assess a fee for the use of water.

22. To confer any jurisdiction on the Water Management Board over any water right whose place of use is located outside the exterior boundaries of the Reservation.

23. To modify in any way, by virtue of the Flathead Joint Board of Control's signatory status on consensual agreements entered into pursuant to Article III.G.3, the legal relationship between the Flathead Joint of Control, or any irrigator served by the FIIP, and the Tribes or the United States.

Comment [jw31]: These provisions was added to make the Parties' intent clear. Concerns were raised during the public comment process that the November 8, 2012 draft Compact was insufficiently explicit on these points.

C. Other Rights Reserved.

1. Nothing in this Compact is intended, nor shall be interpreted or applied, in any manner to alter, limit, or diminish the right of the Tribes to take all steps they deem necessary or prudent before any court or adjudicative forum, any legislature or legislative entity, or any State or Federal administrative agency, including but not limited to the Federal Energy Regulatory Commission, to protect any interests in Water Rights Arising Under State Law that the Tribes may acquire or seek to acquire and which are associated with the Federal Energy Regulatory Commission license for the Kerr Hydroelectric Project, FERC Project No. 5 (32 FERC # 61,070, July 17, 1985, as amended) or any other hydroelectric facility located on the Reservation subject to FERC jurisdiction.

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2. The Parties expressly reserve all rights not granted, recognized or relinquished in this Compact, including but not limited to the right to the continued exercise by members of the Tribes of Tribal off-Reservation rights to hunt, fish, trap and gather food and other materials, as reserved in Article III of the Hellgate Treaty of July 16, 1855 (12 Stat. 975).

D. Obligations of the United States Contingent.

1. Notwithstanding any language contained herein and except as authorized under Federal law, the obligations of the United States under this Compact shall be contingent upon ratification and necessary authorization by Congress.
2. The expenditure or advance of any money or the performance of any work by the United States or the Tribes pursuant to this Compact which requires appropriation of money by Congress or by the Tribes is contingent on such appropriation being timely made.
3. The Tribes and the State recognize that this Compact has not been finally approved by United States as of the date of execution by the Tribes and the State, and that ratification by the Tribes or by the State in no manner limits or restricts the discretion of the United States in the negotiation of all matters related to this Compact.

E. Obligations of the State Contingent. The expenditure or advance of any money or the performance of any work by the State pursuant to this Compact which requires appropriation of money by the Montana Legislature or allotment of funds shall be contingent upon such appropriation or allotment.

ARTICLE VI - CONTRIBUTIONS TO SETTLEMENT

A. State Contribution to Settlement. The Parties agree that the State contribution to settlement shall be \$55 million. The agreement to, expenditure, or advance of any State contribution which may require authorization and appropriation of money by the Montana legislature or allotment of funds is contingent on such appropriation or allotment being made pursuant to Article V, Section 11(4) of the Montana Constitution.

Deleted: negotiated by the State, the Tribes, and the United States as part of the negotiations on the federal legislation contemplated by Article VIII.B.

Comment [jw32]: This language was modified to reflect the proposed State contribution set forth in Governor Bullock's budget and to specifically identify the constitutional basis for the Legislature's appropriation authority.

B. Federal Contribution to Settlement. The Parties agree that the Federal contribution to settlement shall be negotiated by the Tribes, the State, and the United States as part of the negotiations on the Federal legislation to ratify and effectuate the Compact.

ARTICLE VII - FINALITY

A. Ratification and Effectiveness of Compact.

1. The terms of the Compact may not be modified without the consent of all the Parties following the first ratification by any Party.

2. Notwithstanding any other provision in the Compact, the Tribes reserve the unilateral right to withdraw as a Party if:
 - a. Congress has not ratified this Compact and authorized appropriations for the Federal contribution to the settlement within four years from the date on which the ratification of the Compact by the Montana legislature takes effect under State law. This is a continuing right until Congress ratifies the Compact;
 - b. Appropriations are not made in the manner contemplated by the Federal legislation ratifying this Compact;
 - c. The Parties do not reach agreement on the State contribution to the settlement;
 - d. The State has not authorized appropriations for the State contribution to the settlement within five years from the date the Compact is ratified by the United States; or
 - e. Appropriations are not made by the State in the manner contemplated by any agreement for contributions to settlement made pursuant to Article VI.A.
3. The Tribes may exercise their right to withdraw from the Compact under Article VII.A.2 by sending to the Governor of the State and to the Secretary by certified mail a resolution of the Tribal Council expressing the Tribes' intent to withdraw and specifying a reason for withdrawal and a withdrawal date not sooner than one hundred and twenty days from the date of the resolution. On the date designated in the resolution for Tribal withdrawal, the Compact shall become null and void without further action by any Party, and the Parties agree to resume negotiation in good faith for quantification of the water rights of the Tribes and entry of a decree in a court of competent jurisdiction.
4. Notwithstanding any other provision in the Compact, the State reserves the unilateral right to withdraw as a Party to the Compact if:
 - a. Congress has not ratified this Compact within four years from the date on which the ratification of the Compact by the Montana legislature takes effect under State law. This is a continuing right until Congress ratifies the Compact;
 - b. The Tribes have not ratified this Compact within five years from the date on which the ratification of the Compact by the Montana legislature takes effect under State law;
 - c. Congress requires a State contribution to settlement that exceeds the contributions described in Article VI.A; or

- d. Congress does not authorize and appropriate the Federal share of funding agreed to pursuant to Article VI.B.
- 5. The State may exercise its right to withdraw under Article VII.A.4 by sending to the Chair of the Tribal Council and to the Secretary a letter delivered by certified mail from the Governor of the State expressing the State's intent to withdraw and specifying a reason for withdrawal and a withdrawal date not sooner than one hundred and twenty days from the date of the letter. On the date designated in the letter for State withdrawal, the Compact shall become null and void without further action by any Party, and the Parties agree to resume negotiation in good faith for quantification of the water rights of the Tribes and entry of a decree in a court of competent jurisdiction.

B. Incorporation into Decrees.

- 1. Within one hundred eighty (180) days of the date the Compact is ratified by the Tribes, the State, and the United States, whichever is latest, the Tribes, the State, and/or the United States shall file, in the general stream adjudication initiated by the State, pursuant to the provisions of 85-2-702(3), MCA, a motion for entry of the proposed decree set forth in Appendix 38 as the decree of the water rights held by the United States in trust for the Tribes, Tribal members, and the Allottees of the Tribes, as well as those Water Rights Arising Under State Law set forth in Article III.D.4.a.i and Article III.D.5, of which the Tribes are becoming co-owners pursuant to this Compact, and such other provisions of the Compact as are related to the determination of these water rights and their administration. If the Montana Water Court does not approve the proposed decree submitted with the motion within three years following the filing of the motion, the Compact shall be voidable by agreement of the State and the Tribes. If the Montana Water Court approves the proposed decree within three years, but the decree is subsequently set aside by the Montana Water Court or on appeal, the Compact shall be voidable by agreement of the State and the Tribes. Any effect of the failure of approval or setting aside of the decree on the approval, ratification, and confirmation by the United States shall be as provided by Congress. The Parties understand and agree that the submission of the Compact to a State court or courts, as provided for in the Compact, is solely to comply with the provisions of 85-2-702(3), MCA, and does not expand the jurisdiction of the State court or expand in any manner the waiver of sovereign immunity of either the United States or the Tribes in the McCarran Amendment, 43 U.S.C. 666, or other provision of Federal law.
- 2. Consistent with 3-7-224, MCA, setting forth the jurisdiction of the chief water judge, for the purposes of 85-2-702(3), MCA, the review by the Montana Water Court shall be limited to the contents of Appendix 38, and may extend to other sections of the Compact only to the extent that they relate to the determination of water rights and

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Comment [jw33]: This language was added to interface better with the proposed decree set forth as Appendix 38.

Deleted: Article III, and

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their administration. The final decree shall consist of the contents of Appendix 38, and such other information as may be required by 85-2-234, MCA. Nevertheless, pursuant to 85-2-702(3), MCA, the terms of the entire Compact must be included in the preliminary decree without alteration for the purpose of notice.

Deleted: Article III and such other provisions

Deleted: the Compact as are related to the determination of existing water rights and their administration as displayed in

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C. Disposition of State and Federal Suits.

1. On issuance of a final decree by the Montana Water Court or its successor, and the completion of any direct appeals therefrom, or on expiration of the time for filing any such appeal:

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- a. the United States, the Tribes, and the State shall execute and file joint motions pursuant to Rule 41(a), Fed.R.Civ.P., to dismiss without prejudice any and all claims of the Tribes, Tribal members, and Allottees and any and all claims made by the United States for the benefit of the Tribes, Tribal members, and Allottees in *United States v. Abell*, No. CIV-79-33-M (filed April 5, 1979). The case may only be resumed if either the State or the Tribes exercise the rights each holds under Article VII.A;
- b. the Tribes and the State shall execute and file joint motions to dismiss without prejudice the case entitled *Confederated Salish and Kootenai Tribes v. Bud Clinch, Director, Montana Department of Natural Resources and Conservation, and the Montana Department of Natural Resources and Conservation*, Montana First Judicial Court, County of Lewis and Clark, Cause No. BDV-2001-253, Montana First Judicial District Court, Lewis and Clark County, Montana; and
- c. The Decree shall be filed by the Parties as a consent decree in *Abell*, or in Federal court as a new proceeding after the dismissal of *Abell* conditional on agreement by the Parties to seek the necessary State, Tribal, and Federal legislation to implement the remaining provisions of the Compact, if it is finally determined in a judgment binding on the State that the State courts lack jurisdiction over, or that the State court proceedings are inadequate to adjudicate some or all of the water rights asserted in *Abell*.

Deleted: Tribal Water Right Claims. ¶
¶
Except for those

Deleted: Arising Under State Law identified in Article III C.1.k.ii, Article III C.1.ii, and Article III.F, and in Appendix 25, which shall be as finally decreed by the Montana Water Court or as permitted by the DNRC, the

Deleted: of this Compact

Comment [Jw34]: This language was added to make clear that the Compact does not preclude the Tribes or their members or Allottees from purchasing any existing state law-based water rights in the future or applying to the Board for a new water right in the same manner as anyone else on the Reservation. This language does not allow the Tribes to assert new claims to federal reserved water rights in the future.

D. Settlement of Water Rights Claims.

1. The water rights and other benefits confirmed to the Tribes in this Compact are in full and final satisfaction of and are intended to be in replacement of and substitution for all claims to water or to the use of water by the Tribes, Tribal members, and Allottees and the United States on behalf of the Tribes, Tribal members, and Allottees existing on the Effective Date, except for any Appropriation Rights or Water Rights Arising Under State Law held by the Tribes, their members, or Allottees as of the Effective Date or acquired thereafter, which shall be satisfied pursuant to their own terms.

2. In consideration of the water rights and other benefits confirmed to the Tribes, Tribal members, and Allottees in this Compact, and of performance by the State and the United States of all actions required by this Compact, and on entry of a final order issuing the decree of the Tribal Water Right held in trust by the United States as quantified in this Compact and displayed in Appendix 38, the Tribes and the United States as trustee for the Tribes, Tribal members, and Allottees hereby waive, release, and relinquish any and all claims to water rights or to the use of water existing on the Effective Date.

Deleted: 32, and except for water rights, benefits and uses confirmed in this Compact

E. Settlement of Tribal Claims Against the United States. Waiver of claims against the United States by the Tribes, their members and Allottees shall be as provided by Congress.

Comment [jw35]: The language below was deleted to make the scope and extent of the Tribes' waiver of claims more clear: The Tribes are agreeing to give up *all* claims to water they could have brought as of the Effective Date of the proposed Compact in exchange for the water rights and other benefits being recognized in the proposed Compact.

F. Binding Effect. After the Effective Date and the entry of a final decree by the Montana Water Court of the Tribal Water Right, or if necessary the Federal court in *Abell*, the Compact's terms shall be binding on:

Deleted: of this Compact except for those Water Rights Arising Under State Law identified in Article VII.D.1, which shall be as finally decreed by the Montana Water Court or as permitted by the DNRC

1. The State and any Person using, claiming or in any manner asserting any right under the authority of the State to the use of water in the State; provided that, the validity of consent, ratification, or authorization by the State is to be determined by State law;
2. The Tribes and any Person using, claiming or in any manner asserting any right to the use of the Tribal Water Right, or any right arising under any doctrine of reserved or aboriginal water rights for the Tribes, Tribal members, and Allottees, or any rights arising under Tribal law; provided that, the validity of consent, ratification or authorization by the Tribes is to be determined by Tribal and, if applicable, Federal law; and
3. The United States and any Person using, claiming or in any manner asserting any right under the authority of the United States to the use of water in the State; provided that, the validity of consent, ratification or authorization by the United States is to be determined by Federal law.

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Comment [jw36]: This language was added to reflect the theoretical possibility that the Montana Water Court might be found in the future to lack jurisdiction over the Tribes' water rights. As is reflected in the proposed Compact, however, it is the intent of the Parties to seek final approval of this settlement before the Montana Water Court.

ARTICLE VIII – LEGISLATION/DEFENSE OF COMPACT

A. State Legislation. The State and the Tribes agree to seek ratification of the Compact by the Montana legislature and any additional State legislation necessary to effectuate the Compact.

B. Federal Legislation. The State and the Tribes agree to seek ratification of the Compact by Congress and any additional Federal legislation necessary to effectuate the Compact.

C. Tribal Legislation. The State and the Tribes agree to seek ratification of the Compact by the Tribes and any Tribal legislation necessary to effectuate the Compact.

D. Defense of the Compact. The Parties agree to defend the Compact after its Effective Date from all challenges and attacks and in all proceedings pursuant to Article VII.B and C, and agree that no provision of the Compact shall be modified as to substance except as may be provided in the Compact, or by agreement among the Parties.

IN WITNESS WHEREOF the representatives of the Confederated Salish & Kootenai Tribes, the State of Montana, and the United States, have signed the Compact on the ____ day of ____, 201__.

To: Stan Jones, RWREC

From: Bill Schultz

Stan -

Please add to the
record of the 2/26/13
full commission mtg.

Cherry

RECEIVED

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D.N.R.C.



February 25, 2013

Mr. Chris Tweeten, Chairman
Montana Reserved Water Right Compact Commission
1625 Eleventh Avenue
PO Box 201601
Helena, MT 59620-1601

Dear Mr. Tweeten:

My name is Gordon Zimmerman and for the past 10 years I have had the pleasure to serve as President of Community Bank, Inc. in Ronan, MT. Our institution has served the Mission Valley since 1910 and has consistently supported the economic activities of the Salish & Kootenai Tribe (Tribe) as well as the non tribal residents for over 100 years.

I write today in **support** of the Montana Reserved Water Right Compact Commission's (Commission) scheduled February 26, 2013 "Action Item" to approve the "Proposed Water Rights Compact" (Compact).

Since the Commission's formation in 1979 and since its focus on this particular Compact in 2009, untold financial resources have been expended by Federal, State, Tribal and local officials in bringing this Compact to a vote. While this Compact is not exclusively beneficial to any one group, all have agreed that this compromise is preferred to years of continued delays and protracted litigation.

The Mission Valley is slowly emerging from the Great Recession and recent commercial economic development is encouraging. Agricultural trends are positive as well, with the majority of operators seeing improvements in land and product values. The proposed Compact also provides economic benefit through funding of needed repairs and improvements to the existing water delivery channels. Continued delays or further litigation by fringe groups will only serve to jeopardize this economic recovery, replacing clarity and consensus with unknown water rights potentially dictated by parties outside of our community. This point is made clear when reviewing the attached February 19, 2013 letter from the United States Department of the Interior.

I wish to thank the Federal, State, and Tribal governments who have invested significant time and resources in bringing this Compact to the Commission for this critical vote. While these negotiations have been lengthy and at times difficult, all parties have put the success of this Compact above personal agendas.

I respectfully request that the Commission **vote to approve** this Compact for submittal to the 2013 Montana State Legislature. Now is the time for action – now is the time for delivery of a clear Compact negotiated in good faith by all parties.

Thank you for your time and consideration on this matter.

Best Regards,

A handwritten signature in black ink, appearing to read 'Gordon Zimmerman', written over a horizontal line.

Gordon Zimmerman
President

cc:

Mr. Joe Durglo, Chairman, Confederated Salish & Kootenai Tribal Council

February 25, 2013

Montana Reserved Water Rights Compact Commission
POB 201601
Helena, MT 59620-1601

Dear Commission,

I would like to take a moment to introduce myself and my wife. We are Paul and Carlisa London, owners and operators of the Polson RV Resort and the Polson KOA campground. We have lived in Polson for 14 years. We purchased the Polson KOA in February of 2000, and in 2008 we began developing the Polson RV Resort. We have both been involved with our local chamber of commerce since 2000, and Paul has been on the board of directors. Paul is a member of Polson's Beautification Committee, Polson's Streetscape Committee and regularly attend the Polson City Council meetings. Paul has also been on the Glacier Country Board of Directors since 2003. We strongly support our local community and region. Our business is dependent upon tourism. We have guests come from all over the world. We also have a gift store that is supported by our guests and the local community.

We support the agreement on compacting. It's time to move forward and create some certainty to our future. With the time and energy invested by both the state and tribe, it would be a major disappointment not to come to an agreement now. We appreciate the time and energy that the committee members have put into this agreement. You have helped bring this situation to a good resolution for everyone and we commend you for that.

Coming together on this compact agreement will be huge for business. It gives us all the opportunity to move forward and promote more businesses coming here, which in turn creates jobs, sells houses and so on.

Thank you for your time and support on this important issue.

Sincerely,

A handwritten signature in cursive script that reads "Paul & Carlisa London". The signature is written in black ink and is positioned above the typed name and address.

Paul and Carlisa London
Polson RV Resort, LLC
200 Irvine Flats RD
Polson, MT 59860



United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Northwest Region
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February 19, 2013

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Confederated Salish & Kootenai Tribes of the Flathead Nation
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Chris Tweeten, Chairman
Montana Reserved Water Rights Compact Commission
P.O. Box 201601
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Walt Schock, Chairman
Flathead Joint Board of Control
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Dear Sirs:

As you know, for the past four years, Federal, State, Tribal and local officials have been actively negotiating to resolve all of the water right claims of the Confederated Salish & Kootenai Tribes of the Flathead Reservation that will be litigated in the Montana general stream adjudication. The negotiators have completed drafts of all of the key settlement documents and are discussing them with their respective decision makers and the public.

I wish to express my appreciation for the effective and respectful manner that each party has exhibited during the course of the negotiations. I recently had the opportunity to brief Department of the Interior officials about this negotiation, and I highlighted the productive engagement of all parties and the high quality of our drafted documents. In those briefings, I was also able to begin the effort within the Department for principals' review of the proposed agreements. As I have previously noted, the Department and this Administration have stated their continued commitment to seek to resolve tribal water right claims through settlement.

I also appreciate the parties' recognition of the need to continue to make progress in these negotiations, and I wish to reinforce this message. From the federal perspective, a failure or significant extension of the negotiations would leave unresolved several critical water resource

needs and conflicts on the Reservation that, with or without settlement, will have to be addressed in the near future.

Specifically, failure or delay of the negotiations should not be equated with a long-term extension of the status quo for irrigation water deliveries on the Reservation. Should negotiations lapse, I anticipate that the federal government will need to address in tandem at least two critical issues in the near-term with the Tribes and others: 1) the adequacy of the current interim instream flows, and 2) the need to implement efficiencies and other measures within the federal Flathead Indian Irrigation Project (FIIP) to conserve water and improve operations.

In the 1980s, the courts conclusively determined that the Tribes, by the terms of the 1855 Hellgate Treaty, are entitled to on-reservation instream flow water rights with a time immemorial priority date. The courts further confirmed that the Tribes' instream flow water rights are senior to the water rights for the FIIP and, in a strict priority situation, have to be met before water deliveries to FIIP irrigators. The federal government, as trustee for the Tribes and the entity ultimately responsible for the federal FIIP, is bound by these court decisions determining the senior priority of the Tribes' instream flow rights. At the time of these court decisions, the Tribes and BIA developed and implemented interim flows for some of the critical streams on the Reservation. Those interim flows have been in place since then, but they were not intended as the full measure of flow needed to meet the Tribes' instream flow water right and were not established for all streams entitled to protected flows.

In recent years, several factors have emerged which indicate that the current interim flows will likely need to be adjusted and expanded in the near future if there is not a settlement. In fact, the level of adequate flows for fishery purposes was extensively discussed in the negotiations. Through these discussions, and to meet the high demand in the negotiations for certainty, the Tribal government and its experts, working with state and federal technical experts, developed a greatly enhanced and scientifically supported body of data and knowledge on what science-based flows for fish and irrigation deliveries for crops should be on the Reservation. Similarly, recent consultations under the Endangered Species Act focused on the need for improvements in flows and in FIIP operations to reduce impacts of flows on fish.

With this recently acquired information indicating that current interim flows on the Flathead Reservation are ripe for reconsideration, the federal government will have to consider all options for ensuring that the Tribes' judicially confirmed rights are protected and that the ESA is complied with. Of course, the current proposed settlement charts a course for implementing a new improved instream flow regimen that I believe provides the needed level of improvements. But without settlement we will have to chart an alternative course for needed improvements (such as considering whether to increase the interim instream flows), which I anticipate could commence as early as this year.

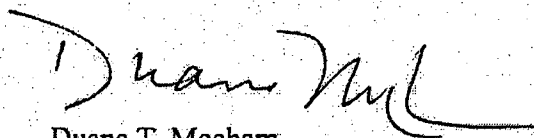
Any actions increasing flows to better meet the Tribes' reserved instream flow water rights and to comply with the ESA would necessarily have an impact on the water supply available for FIIP and non-FIIP irrigation water diversions on the Reservation. To accommodate a corresponding

decrease in the FIIP irrigation water supply, the Bureau of Indian Affairs (BIA), which has ultimate responsibility for FIIP, would need to consider all available options. BIA has indicated to us that, as a first step, BIA would convene the Tribes, the Flathead Joint Board of Control, and the Cooperative Management Entity to work through solutions that adjust Project water supplies and water duties (through, for example, the implementation of individual farm turnout allowances and the elimination of extra-duty deliveries), implement conservation and measurement requirements and address structural improvements to FIIP to prevent entrainment of ESA-listed fish species. Further, unlike the provisions under the proposed settlement, there likely would be no federal or state funding in a non-settlement situation to meet these new requirements, thereby requiring that costs be met by operation and maintenance assessments. Finally, it is important to note that BIA retains ultimate responsibility for and ownership of FIIP; while much less desirable than settlement, we believe that an alternative pathway to improving FIIP operations is currently available and could be implemented in the near-term without waiting for the completion of the Montana general stream adjudication.

In conclusion, I would like to stress that the federal negotiation team remains committed to the negotiations and is not at this time advocating pursuing alternatives to achieving full settlement. Nonetheless, I felt it was important to objectively describe the importance and need for action in the near future and to describe options that are available to address these issues if the effort to settle the Tribes' water right claims fails or is significantly delayed.

Sincerely,

For the Regional Solicitor



Duane T. Mecham
Attorney

cc:

Fain Gildea, Dep Dir, US DOI Secretary's
Indian Water Rights Office