RESERVED WATER RIGHTS COMPACT COMMISSION

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March 3, 2014

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

Dear Chairman Vincent and Committee Members,

Please find enclosed analysis and documents relating to the proposed CSKT Compact requested by the Committee at the January meeting. Most of the questions concerned the off-Reservation instream flow rights and the water rights associated with the Flathead Indian Irrigation Project (FIIP). I have addressed those issues in turn, and have concluded with questions raised on other subjects.

1. Off-Reservation rights

The Committee requested legal precedent on off-reservation aboriginal treaty rights under Stevens treaty language similar to that found in Article III of the Treaty of Hellgate. The Supreme Court precedent supporting the existence of such rights and outlining their scope is described at pages 2-3 of the letter I submitted to Chairman Vincent on December 16, 2013. The Supreme Court has yet to address the question of whether the Article III "in common" language equates to a water right to sustain fisheries. Two lower court cases that do address the "in common" language warrant mention.

At the state level, the Snake River Basin Adjudication (SRBA) Court determined that Article III of the Nez Perce Treaty provided the Tribe with neither an enforceable share of the fish harvest nor a water right to sustain the fishery.[1] The SRBA court (which is similar in function to the Montana Water Court) distinguished between "exclusive" and "in common" rights in the treaty language. The court's determination has been criticized for being inconsistent with Supreme Court precedent including *U.S. v. Winans* and *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, both of which recognized an enforceable property right under the Article III "in common" language.[2] The holdings of both cases are discussed in detail in my December 16, 2013 letter. The Tribe appealed the SRBA court's decision, but the case settled before the Idaho Supreme Court issued a decision.

At the federal level, the Ninth Circuit Court of Appeals determined that the identical language in Article III of the Yakima Nation's Treaty with the United States created a property interest that required a federal district court to order the release of water sufficient to sustain a fishery.[3]

[1] *In re. SRBA, No., 39576*, Subcase No. 03-10022 (Idaho Dist. Ct., Nov. 10, 1999).
[2] [2] *U.S. v. Winans*, 198 U.S. 371, 381 (1987); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).
[3] *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist*., 763 F.2d 1032 (9th Cir. 1985).

Incidentally, the U.S. District Court for the District of Montana also found this language to be sufficient to grant the CSKT intervenor status in the Atlantic Richfield/Northwestern Energy litigation involving the former Anaconda Smelter and Milltown Dam sites.

2. Flathead Indian Irrigation Project (FIIP) water rights

Chairman Vincent inquired about the legal basis for Tribal ownership of the FIIP water rights. The Compact's provision for Tribal ownership of the FIIP rights was agreed to in exchange for the terms of the FIIP Water Use Agreement, which were designed to protect Project deliveries. Another key provision of the Agreement was the Flathead Joint Board of Control's (FJBC) commitment to withdraw its filed claims to Project rights from the statewide general stream adjudication.

With the dissolution of the FJBC, the parties have no ability to require that the successors in interest to the FJBC claims relinquish those claims, whether they are the individual irrigators, the irrigation districts, or some other entity. The State does, however, hold the position that recognition of Tribal ownership of the Project water rights is a legally defensible and practical way to ensure continued irrigation deliveries and their protection from the Tribes' senior and legally recognized instream flow water rights on the Reservation. Ownership of the FIIP rights is contested between the BIA and the FJBC (or its successors in interest). If a settlement is not achieved, the Tribes will file claims to these rights separate from those filed on their behalf by the BIA.

Chairman Vincent requested existing caselaw that might guide a court trying to resolve this legal conflict. While there is limited precedent applicable to BIA irrigation projects, I have referenced several cases pertaining to projects managed by the Bureau of Reclamation.

The question of who owns the water rights to project water is a complex one and does not have a definitive answer, being dependent on the type of project and the facts of a given situation. Several cases stand for the proposition that beneficial ownership of Federal Reclamation Project rights resides in the water users even though the federal government or another entity holds title to the water rights. For example, the Supreme Court has long held that recipients of Reclamation water hold beneficial ownership to that water, despite the fact that the water is diverted, stored, and distributed by the federal government.[4]

The Supreme Court has focused the ownership inquiry on the purpose for which the project was created, holding that as the Reclamation Act was designed to comport with state law and the project waters were intended to benefit state water users, those users thereby obtained beneficial ownership of the water.[5] Beneficial ownership notwithstanding, recipients of Reclamation Project water are subject to certain overriding federal interests that not only include restrictions contained in the Reclamation Act, but also federal environmental laws and the federal trust responsibility to tribes.[6]

In the State of Montana, state water project rights are held by the State and delivered under contractual obligation to individual users. BIA administered projects represent yet another model for water delivery, and one which varies greatly depending on the history and legal

[4] See e.g. *Ickes v. Fox*, 300 U.S. 82 (1937); *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Nevada v. U.S.*, 463 U.S. 110 (1983). See also *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106 (2006).
[5] *Nebraska v. Wyoming*, 325 U.S. at 613-614.
[6] See e.g. *Pyramid Lake Paiute Tribe of Indians*, 354 F. Supp. 252 (D.C. 1972).

underpinnings of the individual project. The enabling legislation under which BIA projects were developed is more diverse and lacks the deferential approach to state water law that characterizes the Reclamation Act. These projects, moreover, are subject also to the federal trust responsibility, even if their purpose was to further the goals of allotment. In addition to the other tribal compacts that have recognized tribal ownership and administration of project water rights,[7] caselaw also recognizes tribal ownership of project rights, even where such projects deliver water to non-members.[8]

a. Tribal sovereignty and jurisdiction in relation to FIIP claims

As to the basis for Tribal ownership claims of Project rights, Chairman Vincent inquired whether the *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana. v. Namen* provided the legal underpinnings for such claims. As I indicated during the hearing, *Namen* pertains more to the undiminished nature of the Reservation and to a tribe's ability to regulate non-member activities on the reservation than it does to ownership of water rights. *Namen* held that the Treaty of Hellgate conveyed ownership to the Tribes of the southern half of Flathead Lake, and with it endowed the Tribes with the right to regulate the riparian rights of non-members who owned land in fee simple bordering the Lake, and that this ownership, and the integrity of the Reservation itself, had survived allotment.[9]

By contrast, *Atkinson Trading Co., Inc v. Shirley*, represents a limitation of tribal jurisdiction over non-members, standing for the proposition that a tribe lacks civil authority to impose a lodging tax on non-members.[10] This holding was derived primarily from *Montana v. U.S.*, which constituted the first major limitation on tribal jurisdiction over non-members on the reservation. *Montana* determined that the Crow Tribe had no ability to regulate hunting and fishing within the reservation on land owned in fee by non-members.[11] The Court in *Montana* held more generally that absent very explicit legal criteria, tribes lack civil jurisdiction over non-members on a reservation. This is not the case on the Flathead Reservation with regard to regulation of hunting and fishing4,[12] and these cases do not provide direct support for or against Tribal ownership of the Project water rights.

The source of the Tribes' ownership claims to the Project Rights are the Tribes' claims to reserved rights under the Treaty of Hellgate and the *Winters* doctrine. Because the State has no power to compel either irrigation districts or individuals to withdraw their claims to Project water, it will ultimately be up to the Water Court to determine the proper ownership of these rights, whether they are quantified through the Compact or through the filing of the Tribes' claims. The Compact's recognition of Tribal ownership of the Project rights is supported both by the practice followed in other compacts and by caselaw. Under the Compact, Tribal ownership of the Project rights is the mechanism used to protect those rights from call by the Tribes' senior instream flow rights, and to allow the recognition of a uniform 1855 priority date for the Project itself. Under an adjudicated outcome, it matters little who retains ownership of the Project water

[7] The Fort Peck, Fort Belknap, Crow, and Blackfeet Compacts all recognize the irrigation project rights as being part of the tribal water right.
[8] *Fort Hall Water Users Ass'n v. U.S.*, 921 P.2d 739 (1995); *State Dept. of Ecology v. Yakima Reservation Irr. Dist.*, 850 P.2d 1306 (1993).
[9] *Namen*, 665 F.2d 951, 963 (1982).
[10] 532 U.S. 645 (2001).
[11] 450 U.S. 544 (1981).
[12] See *State v. Shook*, 67 P.3d 863 (Mont. 2002); *Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation v. State of Mont*., 750 F.Supp.446.

rights (from the perspective of ensuring continued irrigation deliveries) as they have already been determined to be subordinate to Tribal instream flow rights with a time-immemorial priority date.[13]

The cases cited above address the primary inquiries raised by the Committee during the January 6, 2014 hearing. Before concluding, I would like to follow up on the issue of additional treaties relevant to the CSKT. Representative Williams asked about the Judith River Upper Missouri Treaty of 1855 referenced by Mr. Myers during his public testimony. I have confirmed with Mr. Myers that the treaty to which he referred is the Blackfeet Treaty of Ft. Benton, dated October 17, 1855. While this treaty does reference the Salish and Kootenai Tribes, I do not believe that its provisions abrogate any of the substantive rights recognized in or retained by the Tribes under the Treaty of Hellgate. I would be happy to provide the Committee with a copy of the materials provided to the Commission by Mr. Myers or to answer any additional questions on that treaty during the meeting on March 18, 2014. Finally, Senator Fielder requested information regarding the definition of "Flathead Reservation" contained in the Compact. I have attached my email response for the Committee's review.

Please do not hesitate to inform me if you have further questions or wish for additional information prior to March 18.

Sincerely,

Melissa Hornbein
Staff Attorney
Montana Reserved Water Rights Compact Commission

C: Chris Tweeten
John Tubbs

[13] See *Joint Board of Control of Flathead, Mission and Jocko Irr. Districts v. U.S.*, 832 F.2d 1127, 1131 (9th Cir., 1987).