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The Montana Reserved Water Rights Compact Commission

Marcia Beebe Rundle

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THE MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

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NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY

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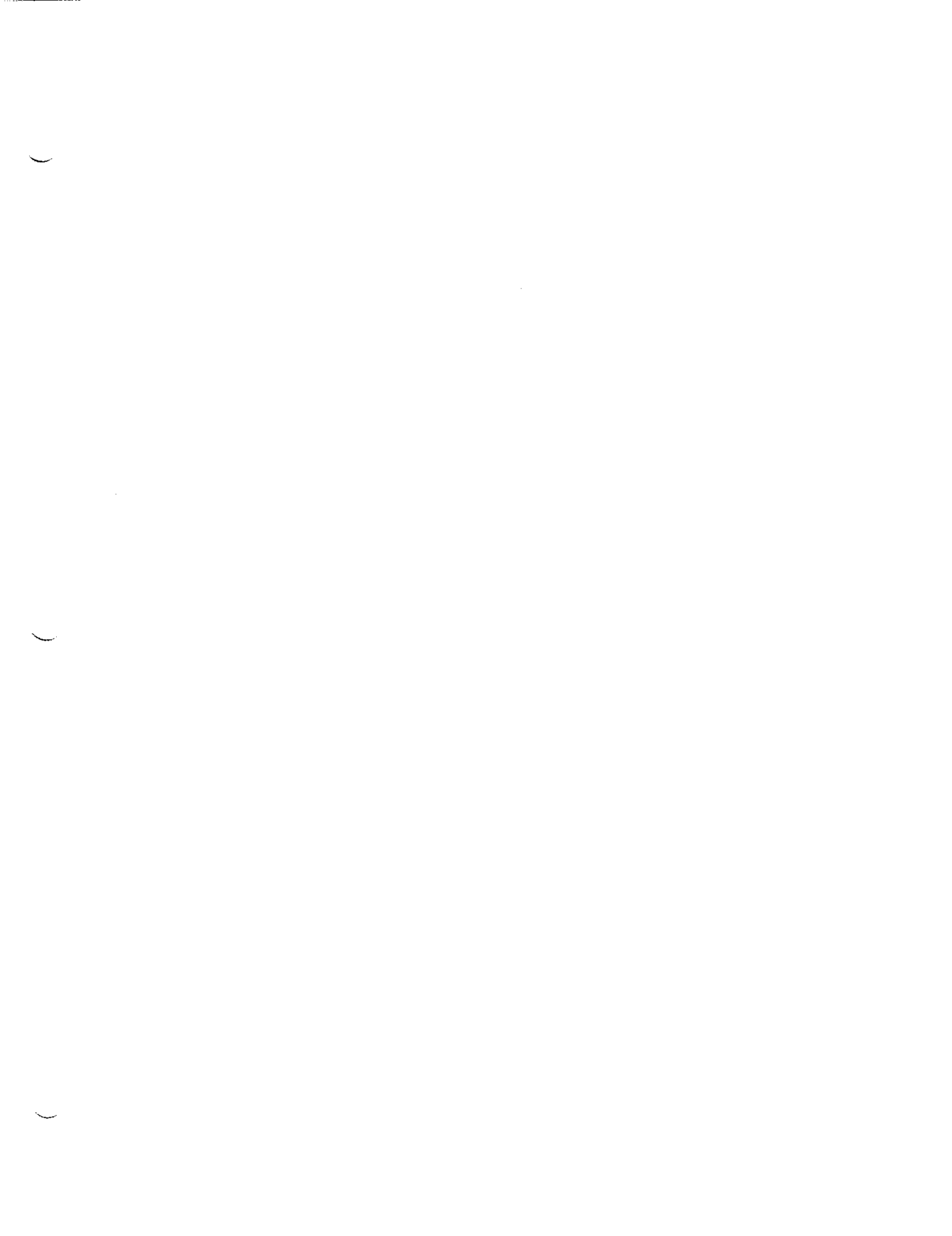
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I. Montana Reserved Water Rights Compact Commission

A. Summary

In 1979, the Montana Legislature began a general adjudication of all water rights in the state through passage of Senate Bill 76. That legislation repealed parts of the 1973 Water Use Act, mandated that claims for all water rights be filed within a specified time limit, and established a water court system to adjudicate all water rights. While the legislation was under consideration, seven federal suits were filed in federal district courts in Montana, seeking adjudication of tribal and federal reserved rights in that forum.

After unified opposition to the legislation from the federal agencies and the tribes, the Legislature suspended the filing requirement for reserved water rights and provided an opportunity for those rights to be established through negotiations instead of through litigation. It established the Montana Reserved Water Rights Compact Commission solely for the purpose of conducting those negotiations on behalf of the state.

In 1985, the Commission successfully concluded a compact with the Assiniboine and Sioux Tribes of the Fort Peck Reservation. That compact was ratified by the Legislature and the Tribal Council in April and became state law when it was signed by the Governor on May 15, 1985. Pursuant to the terms of the compact, the tribe adopted a tribal water code which, in 1986, became the first tribal water code to be approved by the federal government.

Thus, over a period of approximately five years, the reserved water rights for the second largest of the seven Indian reservations in the state were quantified without resort to litigation. In addition, the parties institutionalized communications between the governments, created a structure to resolve disputes over water uses, and established a process for cooperative management and joint leasing of shared water resources.

In the past, relationships between the state and tribal governments and between the tribal and non-tribal citizens of Montana have varied from indifference to mutual distrust to outright hostility. Resolution of disagreements or differences between the governments or between tribal and non-tribal citizens was most often referred to Congress or deferred to the courts. Because watersheds do not honor political boundaries, competing water uses and competing jurisdiction over water planning and water development created long-term controversies between the respective governments. The Fort Peck-Montana Compact is a significant departure from that past.

The benefits of the Compact for the State and the Fort Peck Tribes in the areas of water management and water planning are obvious. Not as obvious, but perhaps of greater significance, are the benefits from improved relationships between the state and tribal governments. Through recognition of tribal sovereignty, through quantification of tribal water rights by negotiations, and through agreement on institutions and policies that require continuing working relationships, the state of Montana has initiated a new era of cooperation between tribal and non-tribal citizens.

B. References

1. Montana Statutes

The Fort Peck-Montana Compact, 1985, Montana Laws, Ch. 735.

Senate Bill 76, 1979, Montana Laws, Ch. 697.

The Montana Water Use Act, 1973, Montana Laws, Ch. 452.

2. Tribal Enactments

Tribal Water Code, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Resolution No. 993-86-5, May 15, 1986, amended by Resolutions No. 1552-86-9, 1553-86-9, and 1554-86-9, September 22, 1986.

3. Reports and Other Materials

Horsman, A.L., A Selective Review of Water Use and Related Issues on the Blackfeet Indian Reservation, 1873-1946 (1975).

Horsman, A.L., A Selective Review of Water Use and Related Issues on the Fort Peck Indian Reservation, 1878-1946 (1975).

Hundley, Jr., Norris, The "Winters" Decision and Indian Water Rights: A Mystery Reexamined, Western Historical Quarterly, Jan. 1982, pp. 17-42.

4. Cases

Assiniboine and Gros Ventre Tribes v. U.S., No. CV 85-213-GF (1985).

Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 1982, cert. denied, 102 S.Ct. 1612 (1982).

Conrad Investment Co. v. U.S., 161 F. 829 (9th Cir. 1908).

Montana v. Blackfeet Tribe of Indians, 105 S.Ct. 2399 (1985).

Montana v. Crow Tribe, 819 F.2d 895 (9th Cir. 1987; aff'd., 108 S.Ct. 685 (1988).

Montana v. U.S., 450 U.S. 544 (1981).

Territory of Montana v. Drennan, 1 Mont. 41 (1868).

Winters v. U.S., 207 U.S. 564 (1908).

C. Historical Background

In Montana, as throughout the West, two methods of resolving water rights disputes have traditionally been pursued: the self-help method and the litigation method. For example, in 1868, Michael Drennan of Deer Lodge County, Montana Territory, enlisted the first method when his neighbor, one Patrick Dalton, diverted water from Washington Gulch and thereby deprived Michael of the water

that he had been using to work his mining claim. Employment of the self-help method in this first recorded water rights dispute in Montana resulted in an indictment for assault with a deadly weapon and the first "Pat and Mike" story in the Territory of Montana. (Territory of Montana v. Drennan, 1 Mont. 41 (1868).)

Irish miners were not the only ones to consider the self-help option. Birch Creek is a small stream that forms the southern boundary of the Blackfeet Reservation in Montana. Early in the 1900's, when non-Indians diverted virtually all of the flow of Birch Creek for farming operations, the federal agent, Mr. Monteath, requested permission to use gun powder to blast out the diversion dam and release water for use by the Blackfeet Indians. (Notice, Indian Agent to the Commissioner of Indian Affairs, September 30, 1904.) Permission was denied. The self-help method was rejected in favor of the litigation method. The subsequent case, Conrad Investment Co. v. U.S., 161 F. 829 (9th Cir. 1908), resulted in an injunction against the company in favor of the Blackfeet Tribe.

However, what these two cases illustrate is that neither the self-help method nor the litigation method secured very satisfactory results. In the case of Pat and Mike, Pat was wounded and Mike presumably was jailed after the court found that the shooting was not a defensible act under the circumstances. In the other case, although the injunction was issued in favor of the Blackfeet Indians, the annual report written for the Blackfeet Agency three years later noted that the Conrad Investment Company was still taking almost all of the flow of Birch Creek for its own use. (Annual Report, Blackfeet Agency to the Commissioner of Indian Affairs, 1911.)

Finally, perhaps the best evidence coming out of the state of Montana that litigation does not necessarily provide either the certainty or the finality that is generally cited as the goal of litigation is the case within which the United States Supreme Court first articulated the reserved water rights doctrine: Winters v. U.S., 207 U.S. 564 (1908). In the Winters decision, the U.S. Supreme Court recognized the existence of

reserved water rights for the Assiniboine & Gros Ventre Tribes of the Fort Belknap Reservation in Montana.

However, although the Court decreed a specific amount of water to the Fort Belknap Tribes, disputes have continued over the implications of the decree and the amount of water available for the reservation from the Milk River. Since the first district court injunction in 1906, Indian Agents have consistently protested that upstream diversions continue to impact the Tribes' water rights. The controversy returned to federal district court during the 1985 drought. The suit was dismissed after the Tribes and the Bureau of Reclamation reached an interim agreement that provided additional stored water for the Fort Belknap Reservation. (Assiniboine and Gros Ventre Tribes v. U.S., No. CV 85-213-GF, 1985).

Yet, during the following irrigation season the Bureau of Indian Affairs published a notice advising all persons taking water upstream on the Milk River or from the tributaries that illegal diversions would be referred to the Department of Justice for prosecution. (Public Notice, Great Falls Tribune, May 27, 1987). Thus, eighty years after the Winters decision, significant legal and technical issues concerning the reserved rights for the Fort Belknap Reservation are still not resolved.

In 1979, the state of Montana chose to adopt a radically different approach when it created the Compact Commission and mandated that the federal reserved water rights within the state be resolved through a process of negotiations rather than through litigation.

D. Legal and Factual Context

Montana state law recognizes a wide variety of beneficial uses for the waters of the state, including "agricultural, stockwater, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power and recreation uses." (85-2-102(2)(a) Mont. Code Ann. 1987). The scope of the state water rights held by thousands of individuals and private and public entities for these purposes will be established by adjudication in the state water courts.

Roughly 850,000 people live on the nearly 93 million acres of land that constitute the state of Montana. State citizens have filed over 200,000 claims to water rights in eighty-five water adjudication basins. However, the security of the state rights will not be known definitely until the scope of the reserved rights is determined by the negotiations. Any users contemplating a substantial investment in a water system must first consider whether and to what extent federal reserved rights may preclude them from securing the water they need to operate the system.

There are federal reserved water rights in all but eleven of the water adjudication basins. Four federal agencies that manage 29 million acres of lands in Montana are currently in negotiations with the Compact Commission. The United States Fish and Wildlife Service claims reserved water rights for five of the dozens of national wildlife refuges within the state. The National Park Service claims water rights for Yellowstone National Park, Glacier National Park, and three smaller units of the National Park System. The National Forest Service claims rights for 17 million acres of land and the Wild and Scenic Flathead River system. Finally, the Bureau of Land Management claims reserved rights for the Wild and Scenic Missouri River.

The following Indian tribes live within the state of Montana on seven reservations established by treaty and by Congress: the Confederated Salish and Kootenai Tribes; the Crow Indians; the Northern Cheyenne Indians; the Assiniboine and Sioux Tribes; the Blackfeet Indians; the Chippewa Cree Indians; and the Assiniboine and Gros Ventre Tribes. In 1983, 46,136 members were enrolled in these tribes; the combined acreage of the seven reservations is over 8.2 million acres.

Quantification of the federal water rights held by four federal agencies and seven Indian reservations not only will provide possibilities of new water development for the tribes and agencies, but also for other water users in Montana.

E. Program Milestones

- 1979 The Compact Commission was created by the Montana State Legislature and the original nine members were appointed.
- 1980 Tribes and federal agencies were invited to negotiate; the first tribal governments established negotiating teams.
- 1985 Negotiations concluded with the Assiniboine & Sioux Tribes of the Fort Peck Reservation and the resulting Compact was ratified by the Legislature and the Tribal Council.
- 1987 The first three members were appointed to the Fort Peck-Montana Compact Board.
- 1987 The Montana Legislature extended the authority of the Compact Commission for an additional six years, to 1993.
- 1987 The Montana Legislature directed the Commission to concentrate its efforts, to the extent practicable, on resolving disputes in the Milk River basin, where water shortages have resulted in chronic water management problems.

II. Administration of Negotiations

A. Commission Membership

The Compact Commission is composed of nine permanent members. Four are members of the state legislature, four are appointed by the Governor, and one is appointed by the Attorney General of Montana. The Commission members are solely responsible for the policy adopted by the Commission, subject to the Legislature's prerogative to reject or ratify a proposed compact.

The compact alternative was developed by a joint subcommittee of the legislature that included prominent legislators who were particularly experienced in water issues. Four of the members of that subcommittee were subsequently named to

the Commission, including Senator Jack Galt, the current chair of the Commission, and Representatives Audrey Roth, Daniel Kemmis, and William Day, who each served for several years before resigning. The success of the negotiations depends largely on the commitment, knowledge and skills of the members of the Commission and on the leadership exercised by the chairmen and vice-chairmen.

Henry Loble was elected as chair in 1979 by the members of the Commission and served in that capacity for the first four years after the Commission was established. Under his leadership, the Commission established communications with all the tribes and federal agencies and was successful at bringing all but one of the tribes and agencies into the process. A compact was negotiated to the final stages with the Assiniboine and Sioux Tribes of the Fort Peck Reservation. In 1983, Mr. Loble resigned from the Commission and was elected state district court judge.

W. Gordon McOmber, now lieutenant governor of the state of Montana, served as the second chair of the Commission from 1983 through 1986. Under Mr. McOmber's leadership, the Commission established management policies and structured the Commission to make more efficient use of the time, skills and experience of the Commission members. During his tenure, the Fort Peck-Montana Compact was successfully negotiated and ratified. Mr. McOmber resigned as chair in 1986 but continues as a member of the Commission.

Current chair, Senator Jack Galt, a Martinsdale rancher, is one of two original members of the Commission still serving. He was elected vice-chair in 1979 and served in that capacity until his election as chair in 1985. Senator Galt is the Republican National Committeeman from Montana. He is the chairman of the Water Policy Committee of the Montana Legislature. He also serves on the State Water Plan Advisory Committee and is the Montana representative on the Water Policy Committee of the Western Legislative Conference.

Assistant Attorney General Chris Tweeten is the current vice-chair of the Commission. Prior to his appointment to the Commission by the Attorney General, he served as head of the Indian Jurisdiction Project in the Attorney General's office and, in that capacity, as advisor to the Commission.

Senator Joe Mazurek, Helena attorney, has served in the Montana Senate since 1981 and currently chairs the Judiciary Committee. Representative Gary Spaeth, Red Lodge attorney, has served three terms in the Montana House of Representatives and is currently on the Water Policy Committee of the Legislature. Representative Dennis Iverson, rancher from Whitlash, has served in the Montana House since 1979. He served as chairman of the Environmental Quality Council of the Legislature for six years. He is currently a member of the Water Policy Committee of the Legislature.

Everett Elliott, the other original member still serving on the Commission, is a former Pondera County Commissioner. Carl Davis, Dillon attorney, is a former Beaverhead County Attorney and served as a delegate to the Montana Constitutional Convention in 1972. Gene Etchart, Vandalia rancher, is a former president of the Montana Stockgrowers' Association and served as a member of the advisory council to the Public Land Law Review Commission. He has received the Department of the Interior's Conservation Service Award.

B. Relationship to Other State Agencies

Pursuant to a Memo of Understanding, the Governor's Office, the Department of Natural Resources and Conservation, and the Attorney General's Office are consulted on proposals, technical issues and legal strategies. By statute, the Commission is attached to the Governor's Office for administrative purposes. The budget for the Commission is administered within the budget of the Department of Natural Resources and Conservation.

C. Commission Structure

Because the nine members are prominent citizens with other full-time responsibilities, the

Commission is structured to utilize their time as efficiently as possible. The Commission is divided into negotiating teams for each federal and tribal entity, with four or five members on each team. Each Commission member serves as chair of at least one negotiating team, and as vice-chair of at least one other team. Each member serves on two tribal teams and on at least one federal team.

The negotiating teams are responsible for reviewing staff technical work, developing recommendations for the Commission, and meeting with the tribes or agencies. Commission members participate directly in the negotiating sessions and in formal and informal meetings with the federal and tribal entities. Commission members also participate in public hearings, in presentations before legislative committees, and in meetings with interested organizations. Policy decisions are made by the Commission at regularly scheduled meetings, based on recommendations of the Commission's negotiating teams and on technical information developed by the staff.

D. Commission Staff

The Commission is served by a technical staff of six, including an attorney/program manager, an agricultural engineer, a hydrologist, a remote sensing specialist, a research specialist, and a secretary. Technical information developed by the staff includes legal analysis, historical research, hydrologic and geographic investigations, engineering feasibility and design, analysis of aerial photography, and processing of satellite images and other digitized information.

E. Commission Budget

The current operating budget of the Commission for each fiscal year of the 1988-89 biennium is \$229,767. Almost three-quarters of the budget is devoted to personnel costs. Non-personnel expenditures include equipment purchases, data acquisition, communication expenses and travel for Commission members and staff.

The annual budget of the Commission is appropriated by the state legislature from state general funds and state resource indemnity trust funds. No federal, local or private funds are used for the activities of the Commission.

III. The Fort Peck-Montana Compact

A. Summary

Following four years of sporadic negotiations and five final months of intense discussions, the State and the Assiniboine and Sioux Tribes of the Fort Peck Reservation reached agreement on the provisions of the Fort Peck-Montana Compact. The compact was ratified by the Legislature and the Tribal Council in April. The compact was signed by the Governor on May 15, 1985. Pursuant to the terms of the compact, the tribe adopted a tribal water code which, in 1986, became the first tribal water code to be approved by the federal government. The implementation of the compact has been highly successful to date.

B. Quantification

The compact established that the Fort Peck Tribes have the right to divert 1,050,472 acre-feet of water each year or to consume 525,236 acre-feet of water per year. Of this amount, no more than 950,000 acre-feet per year may be diverted or 475,000 acre-feet per year may be consumed from surface water. The compact specifies that the Tribes may satisfy part of the reserved water right from groundwater. The priority date of the Tribal Water Right was established as May 1, 1888, the date of the reservation of specific lands for the Fort Peck Tribes.

The compact established who may use the Tribal Water Right and that all uses would be pursuant to a tribal code approved by the Tribal Council and the Department of the Interior. All uses of water by the Tribes, Indians on the Reservation, non-Indian successors-in-interest to Indian allottees on the reservation, persons within the Fort Peck Irrigation Project, and persons authorized by the Tribes to use water by a transfer or by a water marketing agreement are

counted as uses of the Tribal Water Right. The aggregate of all of these uses may not exceed the amount of water recognized as a Tribal Water Right.

The compact provides that the Tribal Water Right may be used on the reservation without regard to whether the purpose for which it is used is recognized as a beneficial use under Montana law. However, no uses of the Tribal Water Right may be wasteful.

The Tribal Water Right may be used off the reservation, under procedural conditions and substantive criteria agreed upon in the compact. Off the reservation, all uses of the Tribal Water Right must be beneficial uses as defined by valid Montana law at the time of any proposed use. Further, all persons using the Tribal Water Right, including the Tribes, must comply with state law regulating the construction or operation of facilities using or transporting water off the reservation. Each use of the Tribal Water Right must also comply with all provisions of state law regulating transportation of water outside the state.

Sources of water from which the Tribal Water Right may be used are specified in the compact. A diversion schedule was established for water uses from the mainstem of the Missouri River, including Fort Peck Reservoir. The schedule of monthly diversions was developed by the Tribes, the State, and the Army Corps of Engineers to assure minimum impacts on the historical operating regime of the mainstem Missouri dams and yet provide flexibility to the Tribes.

C. Protection of Existing Uses

Existing uses of water by Indians on the reservation and future domestic uses of water and stockwater ponds up to 20 acre-feet are protected with a priority date of 1888. Future uses of the Tribal Water Right are subordinated to existing non-Indian uses of water on the reservation and to all future domestic uses of water by non-Indians and stockwater ponds up to 20 acre-feet.

Changes in existing non-Indian uses will be allowed pursuant to the state administrative review procedures, provided that any change must satisfy all requirements of state law and three special provisions of the compact that protect the Tribal Water Right.

D. Marketing

The compact authorizes the Tribes to market water off the reservation and to market jointly with the State. The parties agreed to petition Congress to enact explicit marketing authority for the Tribes. As long as the State markets jointly with the Tribes, any proposed marketing opportunity will meet the provisions of Montana law in effect at the time of the proposed transfer. If the State declines to market with the Tribes, the proposed transfer will be subject to the terms of the compact.

The Tribes may also enter into leasing arrangements with water users on the streams that flow through or adjacent to the reservation. While all existing water users are protected, a future appropriator of water under state law may wish to enter into such an agreement with the Tribes rather than take a chance that the Tribes may exercise the Tribal Water Right on those water sources and preempt his use.

The compact established a limit on the amount of water the Tribes may transfer off the reservation equal to the limit on the State's authority to lease water under state law. As the statutory limit on the State's authority increases, the amount that the Tribes can market also increases. If the State's statutory authority is repealed, the Tribes would be subject either to limitations established in federal law or to limitations in state law that would apply to any state appropriative right.

E. Instream Flows

Within the five years after ratification of the compact, the Tribes may establish instream flows to maintain fish and wildlife resources in the streams that flow on or adjacent to the reservation. The instream flows will be counted

as a consumptive use of the Tribal Water Right and cannot be changed without the agreement of the State.

F. Administration

The administration of water rights on the reservation is divided among the United States, the Fort Peck Tribes and the State. The United States will continue to administer the water diverted for use by the Fort Peck Irrigation Project.

The compact provided that the Tribes will administer and enforce all uses of the Tribal Water Right in accordance with a water code to be adopted within a year after ratification of the compact. The Tribes agreed to report existing uses of the Tribal Water Right to the State within six months after approval of the code. Thereafter, the compact provided that the Tribes will send quarterly notices to the State as new uses of the Tribal Water Right are permitted by the Tribes.

The State will continue to administer and enforce all state appropriative rights on the reservation, and agreed to report all existing and future appropriative rights to the Tribes on a quarterly basis.

Neither the Tribes nor the State will authorize uses of groundwater on the reservation if those uses will significantly degrade the quality of water established for instream flows or degrade the quality of or permanently deplete the quantity of an aquifer beneath the reservation.

G. Dispute Resolution

The compact established the Fort Peck-Montana Compact Board to resolve disputes between users of the Tribal Water Right and users of state appropriative rights. The compact specified that the board will consist of one representative from the Tribes, one representative from the State, and one neutral member chosen by the other two. The powers of the board were specified in the compact. Decisions of the board are appealable and may be enforced by a federal or state court,

or by a tribal court, if all parties to the dispute agree to the jurisdiction of the tribal court.

IV. Implementation of the Compact

A. Adoption of Tribal Water Code

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, through the Tribal Executive Board, enacted the Fort Peck Tribal Water Code by resolution on May 15, 1986. The initial provision of the code states that the purposes of the enactment are

(1) to provide for the orderly resolution of disputes between persons authorized to use the Tribal Water Right, (2) to regulate and administer all diversions and uses of water under the Tribal Water Right within the Reservation except for diversions or uses received from the Fort Peck Irrigation Project, and (3) to implement the Fort Peck-Montana Compact.

Chapter 1, Section 101, Fort Peck Tribal Water Code, Resolution No. 993-86-5, 1986.

The code established a Water Resources Control Commission and authorized it to adopt rules and regulations as necessary to implement the objectives and purposes of the code. All rules or regulations proposed by the Commission are submitted to the Tribal Executive Board for approval.

The code also established the position of Water Administrator which is responsible for the enforcement and administration of the policies and water permits issued pursuant to the code. The Administrator is responsible for implementation of the permit process established in the code, for collection of water resources data necessary to accomplish the objectives of the code, for investigation of water uses affecting the water

sources on the reservation, and making recommendations to the Water Resources Control Commission concerning management of water during shortages.

The code specified procedures under which new uses of the Tribal Water Right will be permitted by the Tribes and procedures under which transfers of the Tribal Water Right will be allowed. The code also provided for hearings and appeals of decisions of the Water Resources Control Commission.

B. Reciprocal Reporting

Since the adoption of the Tribal Water Code, the Tribes have been conducting an inventory of the existing uses of the Tribal Water Right. When that inventory is completed, those uses and all new uses for which permits have been issued under the code will be reported to the State.

On March 10, 1986, the State submitted the initial report of state permits that had been issued to water users on the water sources specified in the compact. Subsequent reports have been submitted on a quarterly basis as agreed upon in the compact.

C. Fort Peck-Montana Compact Board

Shortly after the ratification of the compact, the Assiniboine and Sioux Tribes appointed Tom Stetson as the tribal representative on the Fort Peck-Montana Compact Board. Mr. Stetson of Stetson Engineering, Inc. represented the Tribes as technical advisor during the negotiations.

At approximately the same time, Governor Ted Schwinden appointed Larry Fasbender as the state representative on the Board. Mr. Fasbender, a former legislator and former member of the Compact Commission, is the director of the Montana Department of Natural Resources and Conservation.

In July of 1987, Mr. Stetson and Mr. Fasbender chose Margery Hunter Brown as the third member of the Board. Ms. Brown is the chair of the Montana Human Rights Commission, a professor of law at the University of Montana School of Law, and director of the Indian Law Clinic at the University.

The initial meeting of the Board was held on November 6, 1987. The Board is in the process of establishing rules and procedures. Funds have been appropriated by the State and the Tribes to support the activities of the Board.

D. Integration into the Adjudication

State law specifies that compacts ratified by the Legislature will be entered into preliminary decrees. Preliminary decrees are then to be opened for objection by other parties to the decree. The Fort Peck-Montana Compact has been filed in state water court in the appropriate water adjudication basins. Preliminary decrees have not yet been issued in any of the affected basins. After those decrees are issued, the water court will set hearings on any objections that are filed. If any objections to the compact are filed and are sustained by the court, the compact may be voided by the water court, but it may not be modified except with the written consent of the Tribes and the State.

E. Congressional Approval of Marketing

The compact specified language that would be submitted to Congress by the State and the Tribes to explicitly authorize the Fort Peck Tribes to market water. The language has since been modified in response to questions from Senator John Melcher of Montana. The parties will continue to seek Congressional approval of this provision of the compact.

V. Negotiations Overview

A. Benefits and Costs of Negotiations

The objective of the Compact Commission is to conclude compacts with tribal governments and federal agencies to establish by agreement the specific quantity of water that each entity is entitled to utilize for the primary purposes for which the Indian or federal lands were reserved. The primary benefit of this alternative form of resolution of reserved water rights is the avoidance of the financial, political, and social costs of protracted litigation.

Litigation of complex federal reserved water rights disputes simply costs more than can be justified under the circumstances that exist in the state of Montana. Significant costs are incurred in the development of information for litigation. The technical evidence for federal reserved water rights litigation is site specific and requires detailed scientific study and engineering analysis. Negotiations offer the parties the opportunity to agree as to what amount of information they will each accept as a sufficient basis for agreement on the technical issues and as to methods by which the information will be acquired.

Because of the importance of these issues to the tribes, the federal agencies, and the states, and because of the complexity of the federal issues involved, litigation over reserved water rights is rarely concluded until appealed to the United States Supreme Court. Multiple appeals through the state and federal court systems consume a great deal of time and require a significant investment of revenues, something neither the Tribes, the federal government, nor the state of Montana have in abundance at this time.

Moreover, a listing of the financial costs of litigation does not begin to identify all the costs to the citizens of the state. The state and the tribal governments in Montana have recent experience with protracted litigation, not on water rights issues but on other matters, including regulation of hunting and fishing on the Crow Reservation (Montana v. U.S., 450 U.S. 544, 1981), regulation of lakeshore development on the Flathead Reservation (Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 1982, cert. denied, 102 S.Ct. 1612, 1982), tax revenues associated with oil development on the Blackfeet Reservation (Montana v. Blackfeet Tribe, 105 S.Ct. 2399, 1985), and tax revenues associated with coal development on the Crow Reservation (Montana v. Crow Tribe, 819 F.2d 895 (9th Cir. 1987; aff'd, 108 S.Ct. 685 (1988)). Current relationships between the State and the Blackfeet Tribe, the Confederated Salish and Kootenai Tribes, and the Crow Tribe are not especially harmonious.

In contrast, the negotiated resolution of the reserved water rights of the Assiniboine and Sioux Tribes of the Fort Peck Reservation was concluded in less than five years and cost the Montana less than \$1 million in state revenues. Equally important, the Tribes and the State have established mechanisms through which they are beginning to resolve together the water allocation and management issues that affect their respective jurisdictions.

In the most basic terms, cooperative management of water resources on the Fort Peck Reservation means that tribal and state administrators talk to each other about common problems and search for practical solutions to the problems at the appropriate level within the bureaucracies. Sometimes that means that the Tribal Water Administrator consults with the local field office of the Department of Natural Resources and Conservation. Sometimes it means that the tribal attorney consults with state attorneys. Other times it means that when the Tribal Chairman is in Helena he visits with the Director of the Department of Natural Resources or with the Governor. All of these events have become routine since the ratification of the Fort Peck-Montana Compact.

Besides development of working relationships, the State and the Fort Peck Tribes created an opportunity for shared development of the water resource through provisions for joint marketing. Opportunities may exist for sharing the economic benefits of water development on other reservations as well. For example, state and federal agencies and tribal governments are currently evaluating proposals for rehabilitation of the Milk River Irrigation Project that, if completed, will benefit tribal and non-tribal water users alike.

Both tribal and non-tribal citizens have economic interests in maximization of the beneficial use of water in the state. Roughly 95% of the water used consumptively within the state of Montana is used by irrigated agriculture. To a significant degree, therefore, the health of the economy of the state depends on the continued certainty of water for agricultural uses both on and off the

reservations. Moreover, unemployment on the seven Indian reservations in Montana ranges from 33% to 70%. To the extent that negotiated settlements of tribal water rights include present or future water development or marketing agreements, compacts can bring very tangible economic benefits to the reservations and to the State as a whole.

B. Obstacles to Negotiated Settlements

The most significant obstacle, one which can be expected to remain in varying degrees, is the legacy of decades of conflict between tribal and non-tribal interests in Montana. Ongoing conflicts over taxation, land ownership, environmental regulation, law enforcement, water rights and water uses all contribute to the skepticism of many about the negotiations process. The result is that the state and tribal representatives to the negotiations, as well as observers and advisors, remain cautious about making and accepting commitments.

While all the state and federal agencies with direct involvement in the negotiations officially support the process, some individuals remain skeptical that the Commission can resolve the complex legal issues that are involved through negotiations. Some individuals also worry that the federal agencies and tribes have superior financial resources and are developing a superior technical information base that the state cannot duplicate with current expenditures.

Not only does the past create obstacles to negotiations--so does the future. The fact that neither the tribes nor the State can be totally certain how much water will be needed in the future or the uses for which it will be needed causes considerable caution. The uncertainty of the future and the permanent nature of these settlements generate strong motivations to protect all possible options. It is not surprising if participants sometimes want to delay decisions, because these issues are very important and the future costs of bad decisions may be great. Therefore, compacts will be successfully concluded only when a negotiated settlement can be structured to serve critical interests of each participating government.

The unique nature of the Commission negotiation process has itself presented significant challenges. In 1983, a proposed compact was rejected by the Commission after objections were raised by other state agencies and it became questionable whether legislative ratification of the compact could be secured. This obstacle resulted from a lack of clarity about the relationship between the Commission and the other state agencies, lack of a formal agreement about the roles that each entity would play in the negotiations, and lack of an accepted method of communications among the state entities. A Memo of Understanding executed in 1984 established agreement on the procedures for state agency participation and consultation and clarified the relationships between those agencies and the Commission. From the perspective of the Commission, this obstacle has been removed; however, some federal participants continue to express concern about the issue.

Again, from the perspective of the state, this obstacle exists to a much greater degree within the federal bureaucracy because of the conflicting responsibilities of the Bureau of Indian Affairs, the Bureau of Reclamation, the Office of Management and Budget, the land management agencies and the Department of Justice. Perhaps it is unavoidable that, when people negotiate on behalf of bureaucracies, it is difficult for the participants to have confidence that the other bureaucracy is committed to the process or that the other negotiators have the legal authority and the political ability to assure commitment on a given issue.

A related obstacle, one that is exacerbated because of the deliberate pace of negotiations on these issues, is the lack of continuity on the Commission, on the tribal councils, and within the federal and state bureaucracies. With each new administration, the personnel, and to some extent, the policies change for some of the negotiating entities. The intent of the statutory provision that the Compact Commission members serve for life, unless they resign, was to provide maximum continuity on the Commission. However, the reality is that after eight years only two of the original nine members are still active on the Commission.

A final obstacle for negotiations conducted within the context of the state-wide general stream adjudication is the difficulty of concluding compacts within a relatively short time-frame, because of the number of negotiating entities and the limited staff resources available. The recent mandate of the legislature that the adjudication focus on the Milk River basin has been helpful by reducing the number of entities with whom the Commission is actively negotiating. In addition, the organization of the Commission into negotiating teams has facilitated more efficient use of the time and energy of the Commission members.

Because the members of the Commission are citizens with other full-time responsibilities, it is not easy to rapidly develop a consensus on complex legal and technical issues. However, the composition of the Commission of nine independent and experienced citizens is also the most effective means of assuring diverse political input to Commission decisions and the best way to assure political acceptance of compacts.

C. Prognosis

The Montana Legislature has now extended the Commission until 1993. Judging from the past, some personnel changes can be expected on the Commission. If the success of the program continues and more compacts are concluded within this time-frame, or sufficient progress toward completion of agreements is made, the Legislature may extend the program further.

In the past year, the Water Policy Committee of the Legislature has contracted with the Denver law firm of Saunders, Snyder, Ross & Dickson, for an evaluation of the Montana adjudication system. The report to the Water Policy Committee is due in October of 1988. The Compact Commission is under review as part of the adjudication. Jack Ross, a partner in the firm, stated recently in a speech to the Montana Water Development Association that using the Compact Commission to arrive at negotiated settlements of tribal water rights "makes a whole lot more sense than anything (else) that's been done in the west." (News article, Great Falls Tribune, March 30, 1988.)

Many of the most supportive individuals are those who have had direct involvement in the process. Larry Fasbender, the Director of the Montana Department of Natural Resources and Conservation and president of the Missouri Basin States Association, has been supportive of the Commission's negotiations. Mr. Fasbender and Attorney General Mike Greely both submitted testimony to the last session of the Montana Legislature supporting the extension of the Commission.

In addition, representatives of the Confederated Salish & Kootenai Tribes, the Assiniboine and Gros Ventre Tribes, the Chippewa Cree Tribes, the Crow Tribe, the Blackfeet, the Northern Cheyenne Tribe, and the Bureau of Indian Affairs have testified before the Legislature in support of negotiations. Supporting testimony has also been given by representatives of the Sweetgrass County Conservation District, the Environmental Information Center and the Montana Water Development Association.

In conclusion, the future of the negotiations process in Montana will depend on the progress that is made in the next four years and the extent to which tribal governments, federal and state agencies, private entities, and the Montana Legislature remain convinced that the benefits of negotiations outweigh the costs of litigation of reserved water rights.