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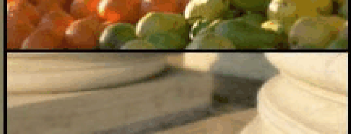

University of Arkansas · System Division of Agriculture
NatAgLaw@uark.edu · (479) 575-7646

An Agricultural Law Research Article

Negotiation *Winters*: A Comparative Study of the Montana Reserved Water Rights Compact Commission

by

Merianne A. Stansbury

Originally published in PUBLIC LAND & RESOURCES LAW REVIEW
27 PUB. LAND & RES. L. REV. 131 (2006)

www.NationalAgLawCenter.org

Negotiating *Winters*: A Comparative Case Study of the Montana Reserved Water Rights Compact Commission

Merianne A. Stansbury*

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The Indian people have a continuous prayer that all the three elements will survive; the air and the water and the earth will continue to be pristine so that we as a people can live and go on in time. It is up to each and every individual, not only in this room, but in this nation to do their part to see that this happens . . . . Our prayer today is that the streams throughout the Reservation will not become a battleground, will not be something that we will have to fight for for the rest of time.[1]

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* J.D., expected May 20, 2006, from the University of Montana. I would like to thank Professor Raymond Cross for the inspiration to write this article and for help in developing my thesis. I would also like to thank the staff and editors of the Public Land and Resources Law Review for their support over the past two years and their fantastic revision and cite-checking skills.

1. Pat Pierre, Transcript of Water Rights Negot. Meeting, *The Confederated Salish & Kootenai Tribes and the Montana Reserved Water Rights Compact Commission*, 10-11 (Polson, Mont., May 3, 2000) (transcript on file with author).

I. INTRODUCTION

Water has always been a contentious issue in the West. Some of the most controversial disagreements have occurred over the nature and extent of Indian reserved water rights. In 1908, the Supreme Court held in *Winters v. U.S.* that the federal government reserved water for Indian tribes when it entered into treaties creating Indian reservations.[2] The Court concluded that it was illogical to think the federal government could have reserved land for the tribes without reserving the necessary water with which to farm that land. Thus began the many struggles by tribes throughout the country to secure sufficient water to sustain life for the present and future.[3] Most tribal water rights are quantified through litigation and adjudication, processes that have lasted decades and which will continue on for many decades to come.[4]

Like many other western states, Montana has adopted a statewide adjudication process to quantify existing water rights in each major river basin. The 1973 Water Use Act[5] (the Act) was intended to enhance state control over water development and simplify the water rights record keeping system. However, by 1977, the basin-by-basin adjudication process still remained inefficient.[6] In response to such findings in an Interim Committee on Water study, the 1979 legislature made significant revisions to the Act. As part of those amendments, the legislature created the Reserved Water Rights Compact Commission (the Commission) to facilitate quantification of federal and tribal reserved water rights claims. The Act declared the legislative intent to be, "to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state."[7] Since 1979, the Commission has completed four federal non-Indian compacts and five tribal compacts, including the controversial, yet successful, Chippewa Cree Tribe of the Rocky Boy's Reservation Compact (Rocky Boy's Compact).[8]

Section II of this article explains the origins, purposes, and functional structure of the Commission, focusing on the Commission's authority to negotiate settlements with Indian tribes. Section III compares the negotia-

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

3. John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. Denv. Water L. Rev. 355, 376 (2005).

4. Some basin adjudications, like that on the Big Hole River in Wyoming, have taken more than ten years and have cost millions of dollars. The Big Hole adjudication has been ongoing since the early 1980s and an estimated $50-80 billion has been spent. The tribal water rights have still not been quantified. Chris Tweeten, Panel Remarks, *Rethinking Water Law Adjudication* (29th Annual Public Land Law Conference, Missoula, Mont., Oct. 6, 2005) (DVD on file with U. of Mont. Sch. of Law's *Public Land and Resources Law Review*).

5. Mont. Code Ann. § 85-2-101-907 (2005).

6. Penelope G. Wheeler, *Indian Water Rights in the West: A Montana Case Study* 22 (unpublished M.S. thesis, U. of Mont. 1992) (on file with U. of Mont. Lib.).

7. Mont. Code Ann. § 85-2-701.

8. The complete text of completed compacts can be found in Mont. Code Ann. § 85-20-601.

tion process with the adjudication approach to resolving water rights disputes. It analyzes the costs and benefits of both approaches, concluding that negotiation and settlement is the more efficient approach to resolving Indian reserved water rights claims. Section IV examines two actual negotiation processes: that resulting in the completed compact with the Chippewa Cree Tribe of the Rocky Boy's Reservation (Rocky Boy's Compact), and the ongoing, troubled negotiations with the Confederated Salish & Kootenai Tribes of the Flathead Reservation (Salish & Kootenai Tribes or the Tribes). Section V concludes that negotiation is the best strategy for quantifying tribal reserved water rights claims in Montana and suggests that other states may look to the Reserved Water Rights Compact Commission as a model for such quantification.

II. HISTORY AND STRUCTURE OF THE COMMISSION

A. *Why a compact commission?*

Senate Bill 76 was introduced in January 1979, proposing to amend the Water Use Act of 1973. The original concept of the bill proposed the creation of a system of state water courts that would adjudicate all water rights claims, including those of the Indian tribes.[9] Individual tribes, inter-tribal organizations, the National Congress of American Indians, and the federal government all testified in opposition to the bill. The tribes questioned, in particular, the state's jurisdiction over its water rights claims and wanted the specific exclusion of tribal water rights from the adjudication process, at least until the jurisdictional questions were answered.[10] The tribes suggested negotiation as a means of determining tribal reserved water rights if outright exemption was impossible. However, the tribes did not want their claims adjudicated in the state water court if negotiations failed.[11]

The bill also faced strong opposition from the agricultural community. Ranchers and others feared that Indian rights would displace historical water usages, and thought their long-held water rights would be nullified in "a great federal water grab" on behalf of the Indians.[12] Although the United States Select Committee on Indian Affairs held hearings in August, 1979 to try to alleviate these concerns, it failed to quash the conflict.[13]

Although unclear from the legislative history, it appears that the Montana legislature took the tribes' suggestions to heart. The final bill contained provisions for a negotiation process that the original bill had lacked. Adopted House-proposed amendments included: 1) a statewide adjudication process of all water rights claims, including tribal reserved rights; 2)

9. Wheeler, *supra* n. 6, at 23.
10. *Id.* at 24.
11. *Id.*
12. *Id.* at 26-27.
13. *Id.* at 27.

suspension of adjudication in basins where Indian rights were negotiated; 3) guidelines for initiating negotiations; 4) a procedure for initiating negotiations; and 5) creation of the Commission.[14]

B. *Functional structure of the Compact Commission*

The Compact Commission is composed of nine members appointed for four-year renewable terms. Four members are appointed by the governor, two are appointed by the President of the Senate, two members are appointed by the Speaker of the House, and one is appointed by the Attorney General.[15] Technical analysis and legal and historical research are provided by a multi-disciplinary staff of nine professional and technical members, including attorneys, hydrologists, an agricultural engineer, a soils scientist, a digital geographer, and an historical researcher.[16] The commission must commence negotiation proceedings by written notice and request designation of a tribal or federal representative to conduct negotiations.[17]

Claims of the tribes and federal agencies are suspended from adjudication while negotiations are in process.[18] Negotiated settlements must be ratified by the Montana Legislature and the Tribal Councils, and also approved by the appropriate federal authorities.[19] Settlements are then entered into a final basin decree issued by the Montana Water Court, barring any objections.[20] The statutory deadline for legislative and tribal approval of negotiated settlements is July 1, 2009. If any outstanding tribal water rights remain unsettled by compact at that time, or if negotiations have failed,[21] claims must be filed with the Department of Natural Resources and Conservation (DNRC) within six months and will then be treated as are all other filed claims in a basin adjudication.[22]

III. NEGOTIATION VS. ADJUDICATION

In the early 1980s, soon after its creation, the Commission initiated the negotiation process with several tribes despite pending litigation and uncertainty of its jurisdictional authority.[23] Commission members believed that if the tribes successfully obtained a federal forum for their water rights,

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14. Mont. Code Ann. § 85-2-701-08.

15. *Id.* at § 2-15-212(2)(a)-(d).

16. *Id.* at § 2-15-212(4); Mont. Dept. of Nat. Resources and Conservation, *Montana's Reserved Water Rights Compact Commission*, http://www.dnrc.mt.gov/rwrcc/about_us/commissioners.asp (last accessed April 24, 2006).

17. Mont. Code Ann. § 85-2-702(1).

18. Mont. Dept. of Nat. Resources and Conservation, *supra* n. 16.

19. *Id.* Sometimes, U.S. Departments of Justice and Interior approvals are sufficient; however, congressional approval is required when federal authorization or federal appropriations are needed to implement parts of the settlement. *Id.*

20. Mont. Code Ann. § 85-2-702(3).

21. *Id.* at § 85-2-704.

22. *Id.* at § 85-2-702.

23. Wheeler, *supra* n. 6, at 27.

state water users might have to relinquish their rights due to much later priority dates. Negotiation provided an opportunity to protect existing water users with junior rights, while adjudication would only resolve the amount of water a tribe is allocated under *Winters*.[24] This section examines the respective pros and cons of adjudication and negotiation and suggests that negotiation is the most effective way to resolve Indian reserved water rights claims in the west.

A. *Benefits and costs of adjudication versus negotiation*

Several commentators have addressed the use of negotiated settlements to resolve federal and tribal reserved water rights claims. They offer four general reasons why negotiated settlements are preferable to litigation.[25] First, adjudications are long, drawn-out processes that may take decades to complete.[26] Second, adjudications cannot provide alternative sources of water required to settle Indian claims without significantly harming existing water users. Settlement, on the other hand, enables tribes to contract with private parties for alternative water supplies.[27] Third, settlements can provide funding for implementation of reserved rights while adjudication merely allocates a particular amount of water to tribes.[28] The final reason is that negotiated settlements provide some flexibility lacking in adjudication to resolve issues outside merely the amount of water allocated, such as implementation and post-quantification regulation.[29] However, there are many other costs and benefits of each approach that are of particular use in evaluating the effectiveness of negotiated settlements by the Commission.

There are considerably more benefits to negotiation of tribal water rights than to adjudication of those rights. Two primary benefits to adjudication, and, conversely, two costs of negotiation, are: 1) adjudication creates legal precedent; and 2) it quantifies the rights of all parties to the adjudication of a particular basin in relation to all others.[30] Critics of negotiation argue that the public value of establishing precedent through litigation is substantial because no future parties can rely on the outcome to resolve similar issues.[31] Moreover, negotiation sets tribal rights apart from non-Indian water rights in the same basin, preventing existing water users from participating

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24. *Id.*

25. *See* Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 Ariz. L. Rev. 195 n.19 (1994).

26. The Big Hole River adjudication in Wyoming began in the early 1980s and is still ongoing today. Tweeten, *supra* n. 4. However, negotiated settlements can also be lengthy in time.

27. McGovern, *supra* n. 25, at n.19.

28. *Id. See also* John A. Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 Nat. Resources J. 63, 69 (1988) (stating the typical stream adjudication "leave[s] unanswered all but the issues of bare title to water rights").

29. McGovern, *supra* n. 25, at n.19.

30. Barbara Cosens, *Water Dispute Resolution in the West: Process Elements for the Modern Era In Basin-Wide Problem Solving*, 33 Envtl. L. 949, 968-69 (2003) [hereinafter *Process*].

31. *Id.* at 968.

in the quantification process. However, according to one commentator, negotiation of water disputes only lacks "precedent" in the narrow legal definition of the term."[32] She claims that negotiated settlements do set precedent for future disputes. This is demonstrated by the fact that negotiation of water rights in basins with multiple jurisdictions has had greater success in establishing mechanisms for joint administration and dispute resolution than litigation, mechanisms that can be useful for future resolution of water rights claims.[33]

Negotiation, on the other hand, has multiple benefits that adjudication does not. As noted above, negotiation provides flexibility that adjudication lacks. Adjudication merely allocates a specified amount of water for Indian use; it does not address particular needs or circumstances of the particular tribe.[34] Another benefit to negotiation is that all interested parties can participate. "Historically, regardless of the forum, water development and allocation decisions were made by a narrow group of interests representing the legal rights to use water."[35] Negotiation allows at least the possibility for participation by more interests,[36] such as federal agencies and the public. A related benefit is that of public participation. For example, the Montana compact process allows the public to comment at the beginning and end of negotiations, and periodically throughout the process.[37] Moreover, between negotiation sessions the Commission members and staff meet with members of the public and interested organizations about issues being discussed.[38] The adjudication process does not allow for such public involvement.

Another notable benefit of negotiated settlements is the creation of a forum for joint management and dispute resolution methods involving multiple jurisdictional authorities.[39] The rule in the West is that multiple jurisdictions share water sources, each with its own institutions and processes for administration and dispute resolution. A one-time resolution of issues between jurisdictions is insufficient to address the seasonal and annual variability of the water supply.[40] Adjudication typically occurs in one jurisdiction and requires that one or more government entity relinquish control over distribution of its own water rights where negotiation gives each jurisdiction a voice in the process and responsibility for the outcome.[41] Through local government participation, a negotiated settlement can provide each

32. *Id.*
33. *Id.* at 969.
34. McGovern, *supra* n. 25, at 198.
35. *Process*, *supra* n. 30, at 967.
36. *Id.*
37. Bonnie G. Colby et al., *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West* 61 (U. Ariz. Press 2005).
38. *Id.*
39. *Process*, *supra* n. 30, at 964.
40. *Id.* at 962.
41. *Id.* at 963.

jurisdiction with some control over administration of the quantified rights and future dispute resolution, rather than forcing one or more jurisdiction to give up its authority.

Finally, negotiation allows parties to devise solutions that account for changing needs and values that existing law does not contemplate. Adjudication of water rights is based on chronological priority; it does not account for drought or seasonal and annual variations in water supply.[42] Negotiated settlements, however, allow the parties to take this information and allocate water on a yearly basis to fit the fluctuations in supply. The final agreement can create the institutions necessary to address future changes. Moreover, negotiation creates the opportunity for prospective action. Adjudication only deals with disputes present at the time of the adjudication, and further litigation can only deal with disputes as they arise. Negotiation allows the parties to anticipate future disputes and to design institutions for resolving them promptly.[43]

IV. CASE STUDY: *CHIPPEWA CREE TRIBE OF THE ROCKY BOYS RESERVATION VS. CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION*

Quantification of tribal water rights produces many common conflicts. The first is that the resource involved often has great symbolic and cultural significance to the tribes.[44] It may be difficult for the tribal leadership to negotiate what the tribe may often see as a fundamental value.[45] A second, related conflict is the perception that existing uses of water are being threatened, and associated fears that cultural values and community existence are also being threatened.[46] On the other side of the table, prior appropriation requires that more junior rights be removed from the water distribution list during shortages or drought until senior rights are fulfilled. The fact that Indian reserved water rights under *Winters* may be expanded over time while the tribe's senior priority date remains intact can cause non-Indian water users to feel insecure about their water supplies.[47] Although these conflicts are common in many efforts to quantify Indian reserved water rights, each reservation is unique and any quantification of those rights must consider peculiar characteristics.

This section examines two attempts by the Commission to quantify tribal water rights: the successful Rocky Boy's Compact and the ongoing Confederated Salish and Kootenai Tribes of the Flathead Reservation negotiations. Part A sets forth background information on the Rocky Boy's Reser-

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42. *Id.* at 964-65.
43. *Id.* at 965.
44. Folk-Williams, *supra* n. 28, at 63.
45. *Id.* at 64.
46. *Id.* at 65.
47. *Id.* at 66-67.

vation and the final settlement components. Part B describes the background of the Flathead Reservation and the current state of negotiations. Part C discusses the two major, interrelated legal issues and compares their relative impacts on both the Rocky Boy's Compact and the ongoing Salish Kootenai negotiations.

A. *Rocky Boy's Reservation*

1. *Background*

Unlike many other tribes, the Chippewa Cree was not party to any treaty.[48] Congress created the Reservation in 1916 when considering legislation to open the Fort Assiniboine military reservation to settlement.[49] The Department of Interior (DOI) was charged with characterizing the military reservation land by its suitability for agriculture, coal development, or timber production.[50] In response to petitions by the leaders of the Chippewa and Cree Tribes in the area, Congress amended the proposed legislation to reserve 56,035 acres of land in the Milk River basin.[51] The DOI survey had not identified any of this land as suitable for agriculture, an unfortunate twist of fate that would affect the water rights quantification process described below.[52]

Over the next several decades, water supply and quality problems plagued the Reservation. The tribes entered into several settlements with the federal government to remedy their water shortage, including further land acquisitions, none of which were beneficial to the tribe.[53] The acquired lands are in an arid region and are water deficient. They are sometimes afflicted with drought, sometimes flooding, and water supply is either insufficient for everyone or is so limited that no single water user can benefit.[54] Moreover, the drinking water supply for the Reservation and surrounding areas is highly contaminated.[55] Many residents of the area are not served by a drinking water system and must have their water delivered. Three systems are currently in violation of the Safe Drinking Water Act's Surface Water Treatment Rule, and other systems will soon be out of com-

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48. Dan Belcourt, Presentation, *Regaining a Lost Heritage: How Tribal Authority Can Reclaim Water Resources* (29th Annual Public Land Law Conference, Missoula, Mont., Oct. 6, 2005) (DVD on file with U. of Mont. Sch. of Law's *Public Land and Resources Law Review*).

49. Barbara Cosens, *The 1997 Water Rights Settlement Between the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Reservation: The Role of Community and the Trustee*, 16 UCLA J. Envtl. L. & Policy 255, 269 (1997) [hereinafter *Water Rights Settlement*].

50. *Id.* at 268-69.

51. Belcourt, *supra* n. 48. The reservation has expanded to about 120,000 acres. *Id.*

52. *Water Rights Settlement, supra* n. 49, at 269; "Agricultural land is limited and water supply consists of high spring runoff and very low stream flows during the remainder of the year." *Id.* at 260.

53. Belcourt, *supra* n. 48; *see also Water Rights Settlement, supra* n. 49, at 269-71.

54. *Water Rights Settlement, supra* n. 49, at 272.

55. *See* Mont. Dept. of Nat. Resources and Conservation, *Rocky Boy's/North Central Regional Water System*, http://dnrc.mt.gov/cardd/ResDevBureau/regionalwater/rockyboys.asp (last accessed April 24, 2006).

pliance if they do not upgrade. The Chippewa Cree knew that negotiating a water rights compact would be the culmination of the tribe's century-long struggle to obtain a permanent homeland and to secure enough water for current and future needs of the Reservation.[56]

The Chippewa Cree had many reasons for agreeing to negotiate their water rights rather than litigate them in the state-wide adjudication process. One was to keep the decision making power within the tribe and out of the hands of a state judge.[57] Additionally, a negotiated settlement could give the tribe certain elements that it could not obtain otherwise, such as the right to market and lease water off the Reservation, an issue that remains unsettled in courts of law.[58] A third reason was to obtain a paper right to "wet water," something the tribe had never seen on the Reservation.[59] The tribe also wanted to secure economic benefits by attaining a package of rights upon which to promote fisheries, irrigation, and other economic development through water storage.[60] Finally, the tribe saw negotiation as an avenue to improve relations among the tribe, the state, and off-Reservation water users.[61]

The Chippewa Cree had many goals to achieve through the negotiation process. The tribal vision was to obtain: 1) a long-term water supply; 2) the funding to increase water storage capacity and delivery; and 3) the jurisdiction to administer its own rights.[62] To attain this vision, the tribe wanted to engage in a unified effort with the state and federal governments. The negotiation team did not always have a good relationship with the Commission during negotiations, but all parties shared the common goal to get water to the Reservation and to off-Reservation users.[63] Another goal was to develop an impartial forum in which to resolve future water disputes.[64] A fourth goal of the tribe was to avoid any impact to off-Reservation users. The relationship between the Chippewa Cree and off-Reservation landowners and water users had always been one of mistrust;[65] the tribe sought to improve relations by keeping the impacts of its water right to a minimum. Finally, the tribe sought to approach the negotiations from a watershed ba-

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56. Belcourt, *supra* n. 48. For a brief history of the Chippewa Cree Tribe's struggle to obtain land, *see Water Rights Settlement*, *supra* n. 49, at 267-71.

57. Belcourt, *supra* n. 48.

58. *Id.*

59. *Id.* The primary reason for lack of wet water is financial inability to develop it.

60. Belcourt, *supra* n. 48.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* For a discussion how this goal was implemented, see *Water Rights Settlement*, *supra* n. 49, at 276-81.

65. *Water Rights Settlement*, *supra* n. 49, at 256 (stating, "[S]everal hundred citizens expressed concern that the process could not effectively consider their needs. A few expressed the desire for termination of the reservation and their belief that government representatives were part of an undefined conspiracy").

sis.[66] It knew that it needed the support of off-Reservation users to make the settlement work, and it needed a win-win settlement.[67]

2. Settlement components

Negotiations began in 1982. The Tribal Council of the Chippewa Cree delegated authority to the negotiation team on all aspects of the negotiations.[68] The team submitted a settlement proposal, which was subject to public comment. In 1997, the Tribal Council passed a resolution supporting the compact. Congress approved the compact in 1999, and in 2003, the Montana Water Court approved the decree.[69] The Rocky Boy's Compact is a prime example of how complex and time-consuming the negotiation process can be.

Generally, the Compact contains provisions common to other compacts between the State and the tribes. Section III of the Compact identifies each watershed drainage from which the Reservation shall get its water and quantifies the source and volume of water for storage and diversion of both surface and groundwater in that drainage.[70] The Compact then identifies the priority date, period of use, points and means of diversion, and purposes of the water right for each drainage. The Compact also contains provisions for "additional development of water."[71]

Unique to the Rocky Boy's Compact are several components relating to the implementation of the water right. To resolve the drinking water problem, the compact creates the North Central Montana Regional Water System to import water from Lake Elwell, located fifty miles west of the Reservation.[72] Additionally, the settlement allocates water as a block for each tributary during times of shortage, rather than relying on traditional priority dates under the prior appropriation doctrine. So long as the Tribe and the off-Reservation users use water within their respective allocations, both the Tribe and the off-Reservation users agreed not to assert priority over the others' water.[73] This reduces the potential for conflicts during dry seasons because it is simpler to determine whether water use is within a specific allocation than to determine whether there is sufficient water to satisfy all claims.[74] Finally, the compact provides for a Compact Board to resolve future disputes among users, both on and off the Reservation. The Compact Board consists of one Tribal appointee, one State appointee, and a third

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66. Belcourt, *supra* n. 48.
67. *Id.*
68. *Id.*
69. *Id.* These approvals are all statutorily required by Mont. Code Ann. § 85-2-702.
70. Mont. Code Ann. § 85-20-601.
71. *Id.*
72. *Water Rights Settlement*, *supra* n. 49, at 277. Congressional approval was needed for this provision, which would draw water from a Bureau of Reclamation project available for contracting.
73. *Id.* at 278.
74. *Id.*

member chosen by the other two.[75] The purpose of this provision is to resolve the question of jurisdiction and to ensure that both the State and the Tribe have a say in resolution of each dispute.[76] Overall, the Rocky Boy's Compact is one that benefits all water users within and without the exterior boundaries of the reservation, ensuring that the Tribe has sufficient water to meet its needs while protecting existing off-Reservation water users.

B. *Flathead Reservation*

1. *Background*

In contrast to the Rocky Boy's Reservation, the Flathead Reservation is water-rich. The Flathead Reservation was established by the Hellgate Treaty in 1855. It reserved to the tribe the "exclusive right of occupancy," the "exclusive" right to take fish in streams within the Reservation boundaries, and the right to fish in the usual and accustomed places off-Reservation.[77] An estimated 600,000 acre-feet per year of water is available on the Reservation.[78] Its major water sources include the Flathead River, Flathead Lake, the Jocko River, and the Little Bitterroot River. Several other streams originating in the Mission Range provide additional water sources.[79]

In 1909, construction began on the Flathead Indian Irrigation Project as a joint effort between the Bureau of Indian Affairs and the Bureau of Reclamation. "Land was not productive without water and allotted tracts were too small to be dry-farmed effectively."[80] In 1924, the Bureau of Indian Affairs assumed full responsibility for the project. Upon initiation of the project, agricultural land became more important than that used for grazing activities. Present uses on the Reservation are primarily irrigation and power generation.[81]

2. *The current state of negotiations*

Negotiations on the Flathead began in the early 1980s. However, they were abandoned throughout the late 1980s and 90s[82] while the Compact Commission negotiated other compacts for tribal and federal reserved water rights. Negotiations resumed in 2000.

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75. *Id.* at 282.

76. *Id.*

77. John Carter, Presentation, *Regaining a Lost Heritage: How Tribal Authority Can Reclaim Water Resources* (29th Annual Public Land Law Conference, Missoula, Mont., Oct. 6, 2005) (DVD on file with U. of Mont. Sch. of Law's *Public Land and Resources Law Review*).

78. *Id.*

79. Laura Wunder, *Water Use, Surface Water, and Water Rights on the Flathead Indian Reservation: A Review* 5 (unpublished M.S. thesis, U. of Mont. May 3, 1978) (on file in U. of Mont. Lib.).

80. *Id.* at 31.

81. *Id.* at 32.

82. Carter, *supra* n. 77.

Several problems have plagued these negotiations from their inception. On June 31, 2001, the Salish & Kootenai Tribes submitted a written proposal to the Commission outlining their vision for the negotiation process. Unlike other tribal compact negotiations in Montana, this proposal did not request joint administration of water rights within the Reservation boundaries, but rather "a Reservation-wide Tribal water administration ordinance which guarantees due process and equal protection under a prior appropriation system to all people who use water on the Flathead Reservation."[83] To this end, the Tribes asserted that all the waters "on and under" the Reservation belong, not to the State of Montana as declared in the Montana Constitution, but to the United States as trustee for the Tribes as declared in the Hellgate Treaty and federal case law.[84] Because of this trustee relationship, the Tribes asserted the sole authority to administer water rights of both Indian and non-Indian residents on the Reservation.

Additionally, the proposal seeks to include in the quantification the Tribes' aboriginal rights to water located off-Reservation. The Tribes claim consumptive and non-consumptive water rights deriving from "time immemorial use and habitation of a vast aboriginal territory in Montana and elsewhere."[85] The Tribes assert that quantification of these aboriginal, off-Reservation rights must occur in order to finally resolve all Tribal reserved water rights in the state.

Negotiations on a full compact were postponed in 2002 in order to reach an interim agreement for the administration of water rights.[86] The state was hesitant to agree with the Tribes' assertion that all the water on the Reservation is owned by the federal government in trust for the tribes.[87] The parties set aside the proposal to develop an interim agreement so that issuance of new water rights permits could resume.[88] In late 2002, the Tribes announced their intention to do their own inventory of Reservation water while the State of Montana wanted a joint inventory process.[89] Finally, in June of 2005, the parties decided to abandon the interim agreement and to again work towards a full settlement agreement.[90] Despite all the stops and

83. Confederated Salish & Kootenai Tribes, *A Proposal for Negotiation of Reserved and Aboriginal Water Rights In Montana* 3 (Jun. 2001) (on file with author) [Hereinafter *Proposal*].

84. *Id.* at 4-5.

85. *Id.* at 7.

86. Michael Jamison, *Meeting Focuses on Short-Term Fix, but Sides Remain at Odds Over Long-Term Details*, Missoulian (July 18, 2002).

87. John Strommes, *Flathead Reservation: Commission Digs in Heels on Water Rights*, Missoulian (Nov. 9, 2001); *See also* Jamison, *supra* n. 86.

88. For more on why issuance of new permits had been suspended, *see infra* n. 108 and accompanying text.

89. Associated Press, *Indian Intentions Threaten Water Talks*, Missoulian (Dec. 20, 2002); *see also* Transcript, *Water Rights Negot. Meeting between the United States, CSKT, and the State of Mont.* (Polson, Mont., Dec. 18, 2002) (transcript on file with the author).

90. *State and Confederated Salish & Kootenai Tribes Agree to Suspend Interim Agreement Process*, Indian Water Resources News, http://www.waterchat.com/News/Indian/05/Q2/ind_050622-01.htm (Jun. 20, 2005).

starts, all parties remain optimistic that the Commission will reach a compact before it sunsets in July of 2009.[91]

C. Legal Issues Affecting Negotiations: the PIA standard and Ciotti

1. *Too much PIA?*

In *Arizona v. California*,[92] the U.S. Supreme Court established the standard for quantifying tribal water rights based on the purpose of the Reservation. Where one of the purposes is agriculture, the applicable standard for determining the amount of water to be allocated is "practicably irrigable acreage" (PIA).[93] The PIA standard applies to future irrigation of reservation land, not present irrigation practices and current consumptive uses.[94] The focus of the standard is the original purpose of the reservation. When the original purpose was to promote agricultural production, the PIA standard is applied by determining how many acres of the reservation could be reasonably irrigated.[95] After determining the PIA standard applies, then it must be determined "whether it is economically feasible to irrigate the reservation land and how much is feasibly irrigable."[96] However, PIA analysis does not consider actual present water use on the reservation. Although the PIA standard has been rejected by a few states,[97] it remains the accepted method of tribal water rights quantification.

In the case of the Rocky Boy's Reservation, the amount of PIA land was very low. As already mentioned, the DOI survey of reservation lands in 1916 did not classify any of the reservation lands as suitable for agriculture.[98] Therefore, the Rocky Boy's Reservation would not be left with enough water "to develop, preserve, produce, or sustain food and other resources of the Reservation, to make it livable."[99] This presented a unique opportunity for the Commission and the Chippewa Cree Tribe when negotiating the Rocky Boy's Compact to develop creative ways of achieving a livable reservation, something a court had never done.[100] One of these solutions was

91. *Id.*

92. 373 U.S. 546 (1963).

93. *Id.* at 600.

94. *State ex rel. Greely v. CSKT*, 219 Mont. 76, 90-91, 712 P.2d 754, 762-63 (1985).

95. Elizabeth Weldon, *Practically Irrigable Acreage Standard: A Poor Partner for the West's Water Future*, 25 Wm. & Mary Envtl. L. & Policy Rev. 203, 204 (2000).

96. *Id.* at 207.

97. *See generally In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 35 P.3d 68 (Ariz. 2001) [hereinafter *Gila V*]. For further critiques of the PIA standard, *see* Weldon, *supra* n. 95; *see generally* Galen Lemei, *Abandoning the PIA Standard: A Comment on Gila V*, 9 Mich. J. Race & L. 235 (2003)

98. *Water Rights Settlement*, *supra* n. 52 and accompanying text.

99. *Greely*, 219 Mont. at 93 (quoting *Arizona*, 373 U.S. at 599-600).

100. *See Water Rights Settlement*, *supra* n. 49, at 260 ("[A] court has never considered the appropriate measure of a reserved water right when the PIA standard leaves a tribe with too little water to irrigate sufficient land for even its current needs and when water supply is insufficient to provide a reliable source for drinking water for anticipated population growth"). *Id.*

the importation of water from Lake Elwell; another was the block allocation of water during shortages. Since the negotiating parties had to resort to consensus building in developing these solutions, it was likely easier to obtain the approval of the Montana Legislature, Congress, and the Montana Water Court than if the PIA claim had been larger and the parties had less room to negotiate. In the case of Rocky Boy's Reservation, what appeared to be a cursed lack of PIA was really a blessing in disguise that facilitated the Chippewa Cree Tribe's fulfillment of its water needs.

In contrast, the amount of PIA land on the Flathead Reservation is potentially very high. Low average annual precipitation makes irrigation necessary for crop growth.[101] The most suitable lands for agriculture are located around Flathead Lake, on the eastern portion of the Reservation, and in the Jocko River Valley.[102] As noted above, the estimated water supply is 600,000 acre-feet per year. Litigation of the water right could result in an award of nearly all the water on the Reservation to the Tribes,[103] leaving little to no water for other non-Indian users living on the Reservation. This makes negotiation particularly important for non-Indian water users living on the Reservation: "If courts resolve the issues, nontribal water users 'may end up with the short end of the stick.'"[104]

Moreover, a large PIA award that substantially reduces non-Indian water users' water supply will be very difficult to pass through the Montana Legislature and Congress. Montana legislators will not be very thrilled to approve a compact that would negatively impact their constituents. Additionally, the high cost of administering water transfers or leasing programs, or any other alternative, is not likely within the congressional budget.[105] One form of mitigation of this substantial impact considered by the parties in past negotiations is the potential for off-reservation leasing or transfers of tribal water rights to non-Indian users on the reservation. However, Congressional approval is necessary before the tribes can transfer any property rights. Therefore, approval on the federal side is also brought into question. A potentially high and devastating PIA award is thus a key incentive for successful negotiations so as not to jeopardize non-Indian water users and/or approval of a final compact.

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101. Wunder, *supra* n. 79, at 8.

102. *Id.* at 16.

103. *See CSKT v. Stults*, 2002 MT 280, ¶ 63, 312 Mont. 280, ¶ 63, 59 P.3d 1093, ¶ 63 (Nelson, J., concurring) ("For all any of us know, there may be no water left to appropriate on the Flathead Reservation, because the Indians own it all."). *Id.*

104. Strommes, *supra* n. 87.

105. Federal representative to the Flathead negotiations Chris Kenney noted in a past negotiation session that "the United States doesn't have any money." The ability of the federal government to bring financing to the table is not feasible. Chris Kenney, Transcript, *Water Rights Negot. Meeting* 6 (Polson, Mont., July 17, 2002) (transcript on file with author).

2. *Quantification to occur before new permits – Ciotti I-III*

Recent case law addresses the issue of whether the DNRC has the authority to issue new use or change in diversion permits on the Flathead Reservation pending tribal reserved water rights quantification. During the Chippewa Cree Tribe's negotiations, the Montana Supreme Court had not suspended water allocation pending quantification of tribal rights. However, in 1996, a year before the Rocky Boy's Compact was ratified, the Montana Supreme Court decided *Ciotti*,[106] the first in a line of cases restricting the State's ability to issue new use permits prior to final quantification of the Tribe's rights.

Ciotti I involved a Salish & Kootenai Tribes' petition to enjoin the DNRC from issuing new use permits and change of diversion permits to non-Indians living on the Reservation. The Montana Supreme Court first recognized the distinction between reserved water rights and state appropriative rights. Then it addressed the burden of proof required for any new use applicant. Existing law at the time required the applicant to show that the new use or change in diversion will not "unreasonably interfere with a planned use for which water has been reserved."[107] The Court held that this burden could not be met until it is known how much water is reserved and how much is available for appropriation.[108] Therefore, the Tribes' water right must be quantified before DNRC could grant any new permits.

This was a huge win for the Tribes but was not the end of the controversy. The Montana Legislature responded in the next legislative session by removing the requirement that the proposed use will not interfere with other planned uses of a reservation.[109] It replaced this requirement with a new requirement to show that water is "legally available" for appropriation.[110] The basic requirement that proposed uses not adversely affect existing water rights remained in place. Additionally, to the legislature's detriment, the definition of "existing water right" was amended to include "federal non-Indian and Indian reserved water rights created under federal law."[111] The Tribes again challenged the DNRC's authority to issue new use permits under the new statute. The Court, faced with two differing rules of construction, held that it is preferable to sustain a statute's constitutional validity and that to do that, the words "legally available" are interpreted "to mean there is water available which, among other things, has not

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106. *In the Matter of the Application for Beneficial Water Use Permit*, 278 Mont. 50, 923 P.2d 1073 (1996) [hereinafter *Ciotti I*].

107. *Id.* at 60, 923 P.2d at 1080 (citing Mont. Code Ann. § 85-2-311(1)(e) (1995)).

108. *Id.* at 58, 60, 923 P.2d at 1078-79.

109. *CSKT v. Clinch*, 1999 MT 342, ¶ 2, 297 Mont. 448, ¶ 2, 992 P.2d 244, ¶ 2 [hereinafter *Ciotti II*].

110. *Id.* at ¶ 14. Determination if water is "legally available" requires analysis of three factors, including identification of "existing legal demands." The term "legally available" is not otherwise defined in the statute.

111. *Id.* at ¶ 16.

been federally reserved for Indian tribes."[112] Therefore, the court held that DNRC cannot determine whether water is legally available for appropriation because the DNRC cannot determine whether new permits would affect existing water rights until the Tribes' rights are quantified.[113]

Despite this second win for the Tribes, the issue was still not dead. The dissent in *Ciotti II* noted the implications the decision may have for appropriations of groundwater, which was not at issue in either of the *Ciotti* decisions.[114] Indeed, the Tribes filed another suit when the DNRC processed an application for groundwater diversion for a non-Indian water user.[115] The court cited to two federal[116] and one state[117] court decision that held groundwater is included in the reserved water rights doctrine. In very strict terms, the court held that the prior decisions in *Ciotti I* and *Ciotti II* are applicable to groundwater: "We cannot say it more clearly: the DNRC cannot process or issue beneficial water use permits on the Flathead Reservation until such time as the prior pre-eminent reserved water rights of the Tribes have been quantified."[118]

The impact of these decisions is significant. Because the Tribes' water rights must be quantified before any new use permits are issued, existing users and new non-Indian residents of the Reservation have a legitimate fear of losing their water or not receiving sufficient water for their own needs. The more public fear, the greater the public outcry at the negotiation sessions and heightened tension between Indians and non-Indians living on the Reservation. Additionally, these decisions will have an impact on the negotiation sessions themselves. Because of *Ciotti I-III*, the Tribes have amassed much greater bargaining power in favor of their proposal for a sole-tribal administration of water rights on the Reservation. This may result in even greater tension between the Tribes and the State. Fear of litigation will most likely be in the minds of the State, rather than the Tribes, as it had been in the past.

The ramifications of a potentially high PIA award and the *Ciotti* line of decisions are substantial and interrelated. If the State agrees with a high PIA claim, then non-Indian water users will have potentially no water and

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112. *Id.* at ¶ 28.

113. *Id.*

114. *Id.* at ¶ 32 (Rodeghiero, J., dissenting) ("The majority's holding apparently precludes DNRC from issuing permits for groundwater use . . . even though uncertainty exists as to whether groundwater is included within the reserved water rights doctrine").

115. *CSKT v. Stults*, 2002 MT 280, 312 Mont. 420, 59 P.3d 1093 [hereinafter *Ciotti III*].

116. *U.S. v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974) (so much water is reserved as is necessary to accomplish the purpose of a reservation and the water reserved is not limited to surface water but may include groundwater); *Cappaert v. U.S.*, 426 U.S. 128, 143 (1976) ("[T]he U.S. can protect its water from diversion whether the diversion is of surface or groundwater").

117. *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 195 Ariz. 411, 989 P.2d 739 (1999) (the significant question is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation).

118. *Ciotti III* at ¶ 37.

any compact will likely be denied approval. If the parties decide to litigate, the water court could rely on Justice Nelson's statement in *Ciotti II* to award the Tribes all the water on the Reservation, leaving any mitigation of this award out of the picture. Further, if no agreement is reached by 2009 when the Commission is expected to dissolve, the parties must submit to general adjudication, again risking the loss of water for non-Indian users. In any event, these two issues clearly do not provide the setting for a win-win settlement of the kind ratified for the Rocky Boy's Reservation.

V. CONCLUSION

"I initially thought [the Commission] was the dumbest thing I'd ever seen, but the genius of the system is now apparent."[119]

Since 1973, when the legislature enacted the Water Use Act, there have been no final basin adjudications in Montana. Since 1979, however, there have been five tribal rights compacts and five non-Indian federal compacts negotiated.

It is very clear that negotiation remains the only chance for a fair and reasonable allocation of water resources that will benefit both Indian tribes and non-Indian water users. Fear of litigation ordinarily drives parties to seek settlements, and constructive, mandatory negotiations will help facilitate successful out-of-court settlements. Negotiation provides flexible and creative avenues for solving the complex problems presented by quantification of tribal reserved water rights. To quote the Montana Water Court: "[t]he compacting alternative provided the settling parties with the flexibility they needed to craft a settlement that reflected the unique conditions on the Reservation and the changing needs of the Chippewa Cree Tribe."[120] Without the mandated negotiation process, the Chippewa Cree would not be able to meet its needs for a sustainable, livable reservation. With the negotiation process, non-Indian water users on the Flathead Reservation will most likely maintain their existing water supplies. The Montana Reserved Water Rights Compact Commission can serve as a model for other states in quantifying tribal water rights across the country, minimizing disputes, and avoiding the zero-sum solutions presented by litigation.

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119. Tweeten, *supra* n. 4.

120. *In re the Adjudication of Existing and Reserved Water Rights to the Use of Water, Both Surface and Underground, of the Chippewa Cree Tribe of the Rocky Boy's Reservation within the State of Mont.*, http://dnrc.mt.gov/rwrcc/pdfs/MemoOpinion_WC2000-01.doc No. WC-2000-01, 42 (Mont. Water Ct., June 12, 2002).