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 of the Trustee

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I. INTRODUCTION

Established on September 7, 1916 "for Rocky Boy's Band of Chippewas and . . . other homeless Indians,"[1] the Rocky Boy's Reservation is home to over 3,000 Tribal members. The Reservation's annual population growth rate is in excess of three percent.[2] The Reservation has an estimated seventy percent unemployment. Forty-nine percent of the population lives below

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1. Act Providing for the Opening of the Fort Assinniboire Military Reservation, Pub. L. No. 261, 39 Stat. 739 (1916).

2. MSE-HKM Engineering, Municipal, Rural and Industrial Water Supply System Needs Assessment, Rocky Boy's Indian Reservation 21-26 (prepared for Bureau of Reclamation) (Jan. 1996) (manuscript on file with Author) [hereinafter "Muncipal, Rural and Industrial Water Supply System"].

the poverty line.[3] Although economically dependent on agriculture and ranching, the Reservation's irrigable land receives only twelve inches of precipitation per year.[4]

Water right settlement negotiations began in 1992 among the Chippewa Cree Tribe of the Rocky Boy's Reservation, the State of Montana and the United States as part of the state-wide adjudication of water rights. The State held an initial public meeting to inform off-Reservation[5] water users of negotiations at which several hundred citizens expressed concern that the process could not effectively consider their needs. A few expressed their desire for termination of the Reservation and their belief that government representatives were part of an undefined conspiracy.

On January 9, 1997, the Tribal Council of the Chippewa Cree Tribe of the Rocky Boy's Reservation passed a resolution approving the water rights compact between the Tribe and the State of Montana, thus settling the Tribe's claims to water within the State of Montana. The Compact passed the Montana Senate on a 50-0 vote, and the Montana House of Representatives on a vote of 91-8. Despite Rocky Boy's Reservation location in an area that has experienced fractious race relations for over 100 years, it received the broad-based support of the Tribe, off-Reservation irrigators on all drainages shared with the Reservation, including downstream irrigators on the heavily used Milk River, surrounding communities, local legislators, county commissioners, and rural water users who, as an outgrowth of the Compact, have joined with the Tribe to solve the drinking water quality and supply problems in the region as a whole. On April 14, 1997, Montana Governor Marc Racicot signed the Compact into State law.[6]

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3. *Id.* at 27-28. Unemployment rate obtained from a personal communication with Jim D. Morsette of the Tribal Office.

4. Compact with the Chippewa Cree Tribe of the Rocky Boy's Reservation: Montana Reserved Water Rights Compact Commission (1997) (unpublished paper) (manuscript on file with author)[hereinafter "Commission Staff Technical Report"].

5. Throughout this document the term "off-Reservation" will be used rather than "non-Indian," to refer to water users and other interest groups outside the Reservation boundaries. Off-Reservation water users in Montana often include Native Americans. In fact, one of the senior off-Reservation water users who sought protection of his state-based water right in the Rocky Boy's negotiations is a member of the Chippewa Cree Tribe and was recently elected to Tribal chair.

6. S. 337, 55th Legis. Sess. (Mont. 1997).

The United States Department of the Interior ("Interior") opposed the Compact, despite involvement in the negotiations.[7] Some individuals regarded the federal opposition as a failure of the United States to fulfill its trust responsibilities. Others saw the federal stance as symptomatic of a breakdown in the federal process for participation in negotiations to settle Indian reserved water rights.[8] To most observers it is merely another example of the inability of Interior to effectively participate in the negotiation of Indian water rights settlements under the rigid, and to some, inappropriate guidelines set forth in the Criteria and Procedures for Negotiation of Water Rights Settlements.[9] Furthermore, Congress has not ratified a single Indian Water Rights Settlement during the Clinton administration. The failure of the federal government to effectively participate in and support settlement discussions calls into question its ability to fulfill its role as trustee to the many Indian Tribes still struggling to settle their water rights.[10]

This paper is an exploration of the Compact, the process that led to this historic agreement, and the breakdown in the federal participation.

II.
THE LEGAL MEASURE OF RESERVED WATER RIGHTS ASSOCIATED WITH INDIAN RESERVATIONS

Allocation of water for use on private land and on public land that has not been reserved for a specific purpose is governed, in

7. Letter from James Pipkin, Counselor to the Secretary of the Interior, to Senator Lorents Grosfield, Chairman of the Montana Senate Natural Resources Committee (Feb. 14, 1997) (on file with author).

8. *See, e.g., Senate OKs Chippewa-Cree Water Pact*, GREAT FALLS TRIBUNE, Feb. 25, 1997, at 1B.

9. Discussions of concerns with the federal process are a yearly topic at the Indian Water Rights Settlement Conference sponsored by the Western States Water Council and the Native American Rights Fund. The Criteria and Procedures for Negotiation of Water Rights Settlements set forth in 55 Fed. Reg. 9,223 (1990), were promulgated by Interior under the Bush administration and are still followed under the Clinton administration.

10. As this paper goes to press, new leadership in the Interior Office on Indian Water Rights Settlements has broken this stalemate and federal legislation ratifying the Compact and authorizing $50 million in appropriations has been agreed to by all three parties. The Montana delegation plans to introduce the bill to Congress this year. Nevertheless, the federal process under the Criteria and Procedures remains in place and stands as a barrier to Tribes and off-Reservation water users who seek to manage and share their scarce water resources.

general, by state law.[11] However, the federal government may reserve waters under federal law and, in doing so, exempt them from appropriation under state law.[12] In 1908 the United States Supreme Court held that the federal government reserved water by implication when it reserved land for the Fort Belknap Indian Reservation as water was necessary to fulfill the agricultural purposes of that Reservation.[13]

Federal law determines the volume and scope of reserved water rights.[14] Determinations are made based on the historic documents associated with a treaty, executive order, or statute creating the reservation.[15] The purpose for which the reservation was established determines the quantity of water reserved.[16] Courts generally focus analysis of reserved water rights on either agricultural or fisheries purposes.[17] Although tribes have often

11. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 158 (1935) (holding that the effect of the 1866 Mining Act as amended in 1870, the 1877 Desert Lands Act, and the 1891 Act governing right-of-way for canals and reservoirs for public lands and reservations, was to sever the water right from the public land leaving it available for appropriation under local law.) *See also*, United States v. Rio Grande Irrigation Col, 174 U.S. 690, 706 (1899) (stating with respect to the same Acts that "the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule [of riparian rights], which permitted the appropriation of those waters for legitimate industries."); *Cf.* Federal Power Comm. v. Oregon, 349 U.S. 435, 448 (1955) (Pelton Dam case) (held that the same Acts do not apply to reserved land, only to public land defined as land subject to private appropriation and disposal under public land laws.)

12. Winters v. United States, 207 U.S. 564, 577 (1908).

13. *Id.* at 576.

14. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983); Cappaert v. United States, 426 U.S. 128, 145 (1976); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976); United States v. District Court for Eagle County, 401 U.S. 520, 526 (1971).

15. "To identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances." Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981).

16. United States v. New Mexico, 438 U.S. 696, 700 (1978); *Cappaert*, 426 U.S. at 141; *Winters*, 207 U.S. at 576.

17. *See, e.g.*, Arizona v. California, 373 U.S. 546, 600 (1963) (accepting the conclusion of the Special Master that quantification of the water necessary to irrigate the practicably irrigable acreage on the Reservations is an appropriate method to determine the water necessary for present and future needs); *Winters*, 207 U.S. at 576 (holding that the Fort Belknap treaty of May 1, 1888, was intended to change the habits of the Tribes into "pastoral and civilized people," and thus, reserving water for that purpose). *See also*, United States v. Adair, 723 F.2d 1394, 1410 (9th Cir. 1984) (finding that the continuation of traditional hunting and fishing was a primary purpose of the Reservation and that water was reserved for this purpose); *Walton*,

asserted a "homeland" purpose, courts have either rejected this approach[18] or considered a quantification of reserved water for agriculture to be of a sufficient quantity to take into account future needs and thus implicitly provide sufficient water for a homeland purpose.[19]

However, the major legal and factual difficulty faced by the courts in considering reserved water rights disputes has not been that of purpose, but instead the measure of the water right necessary to fulfill that purpose. For example, in a dispute over allocation of water in the Colorado River between Arizona and California, the United States asserted claims for reserved water rights on behalf of five Indian Reservations.[20] In adopting a "practicably irrigable acreage" ("PIA") approach the Court accepted the findings of the Special Master rejecting Arizona's proposal to quantify reserved rights on a "reasonably foreseeable needs" basis — a standard that would have tied the quantification of the rights to population projections.[21]

The Court had the opportunity to revisit the PIA standard when it granted certioari on the quantification of the reserved water rights of the Shoshone and Bannock Tribes of the Wind River Reservation. However, following recusal of Justice O'Connor from the case, an evenly divided Court simply affirmed the lower court's use of the PIA standard.[22] Thus, the

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647 F.2d at 48 (finding that one purpose of the Reservation was to preserve and replace fishing grounds).

18. *In re* the General Adjudication of all Rights to Use of Water in the Big Horn River System, 753 P.2d 76, 94-97 (Wyo. 1988) (rejecting the finding of the Special Master that treaty language stating "[t]he Indians herein named agree . . . they will make said reservations their permanent home," indicated that a primary purpose of the Reservation was to provide a permanent homeland).

19. *Walton*, 647 F.2d at 47-48 (holding that "one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society" and then concluding that the amount of water necessary to irrigate all practicably irrigable acreage is the appropriate measure of water for that purpose).

20. *Arizona*, 373 U.S. at 595.

21. *Id.* at 600-601. The relevant discussion occurs in the Report of the Special Master to the United States Supreme Court, Dec. 5, 1960, at 262.

22. Wyoming v. United States, 492 U.S. 406, 407 (1989). Interestingly, on the opening of Justice Marshall's papers to the public by the Library of Congress, a draft majority opinion written by Justice O'Connor was discovered. Although the draft opinion accepted the PIA standard for the quantification of reserved water rights for agricultural reservations, Justice O'Connor would have required the addition of a new step in the analysis for those lands that have not been historically irrigated: a determination "of the *reasonable likelihood* that future irrigation projects, necessary to enable lands which have never been irrigated to obtain water, will *actually* be built." The analysis suggested by Justice O'Connor would include an assessment of the likelihood of funding for new irrigation, the needs of the particular reservation,

PIA standard remains the basis on which most parties evaluate their risks should litigation occur.

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.[23] Such is the case on the Rocky Boy's Reservation. Agricultural land is limited and water supply consists of high spring runoff and very low stream flows during the remainder of the year.

III.
RESERVED VERSUS APPROPRIATIVE WATER RIGHTS

Similar to most Western states, Montana follows the doctrine of prior appropriation.[24] A water right exists to the extent of application of water to a beneficial use.[25] In times of shortage, allocation occurs on the basis of priority.[26] The right of the earliest appropriator on a stream is satisfied first. Junior appropriators take the remaining water, if any. This approach leads, eventually, to full appropriation on most streams, and over appropriation in water-short years. Private parties generally initiate

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and the existence of a market for the products of the new irrigation. Wyoming v. United States, U.S. Supreme Court Second Draft Opinion No. 88-309, at 17-18, Justice O. Connor, June 1989 (available in the Manuscript Division of the Library of Congress, papers of Justice Marshall). The draft dissenting opinion argued strongly that the willingness of the Government to fund a particular program should not be the measure of a reserved water right. Wyoming v. United States, U.S. Supreme Court Second Draft Opinion No. 88-309, dissenting opinion of Justice Brennan.

23. Justice O'Connor raised the issue in the unpublished draft opinion in *Wyoming v. United States*, stating:

> The PIA standard is not without defects. It is necessarily tied to the character of the land, and not to the current needs of the Indians living on reservations. For example, an agricultural reservation that has only a small amount of irrigable land may be awarded very limited reserved water rights even if it has a large population.

Wyoming v. United States, U.S. Supreme Court Second Draft Opinion No. 88-309 at 11. However, the question posed in *Wyoming* was whether the quantification was too large and thus exceeded the Tribes' reasonable needs, not whether the PIA quantification was insufficient. Thus, Justice O'Connor did not develop the analysis of the treatment of a resource poor Reservation.

24. MONT. CODE ANN. § 85-2-401(1) (1995); Mettler v. Ames Realty Co., 61 Mont. 152, 160 (1921).

25. MONT. CODE ANN. § 85-2-301 (1) (1995).

26. MONT. CODE ANN. §§ 85-2-401 and 406(1) (1995).

allocation in water short years; senior rights place a "call" on the river to prevent diversion by upstream junior water users.[27]

Reserved water rights are defined by federal, not state, law.[28] The Colorado Supreme Court summarized the basic incompatibilities between reserved and state-based water rights by noting the following attributes of a reserved water right:

> (1) the right may be created without diversion or beneficial use; (2) the priority of the right dates from the time of the land withdrawal and not from the date of appropriation; (3) the right is not lost by nonuse; and (4) the measure of the right is quantified only by the amount of water reasonably necessary to satisfy the purposes of the reservation.[29]

Appropriative and reserved rights are based on two fundamentally distinct policy objectives. The doctrine of prior appropriation seeks to protect, and therefore encourage, development of water.[30] This approach was adopted in the late 1800's when the West was focused on resource exploitation, particularly mining.[31] Necessary to economic development of these arid regions was protection of water development investments.[32] Thus, a policy of "first in time, first in right" arose. Prior appropriation was not designed to promote community through sharing of scarce resources, nor to provide for long-term sustainable use by incorporating planning for future needs. In contrast, the recognition of current and future rights that will accommodate changing need is fundamental to reserved water rights. These rights recognize that a reservation is a finite area in which people intend to settle for generations.

The West has changed since the adoption of prior appropriation law. Water users now view their ranches and communities as the family home for generations to come. Many off-Reserva-

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27. *See, e.g.,* MONT. CODE ANN. § 85-2-406 (1995) (providing for district court supervision of water distribution on petition by a water user).

28. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983); *Cappaert*, 426 U.S. at 145; Colorado River Water Conservation Dist., 424 U.S. 800, 813 (1976); United States v. District Court for Eagle County, 401 U.S. 520, 526 (1971).

29. United States v. Jesse, 744 P.2d 491, 494 (Colo. 1987) (*citing* The National Water Commission, Water Policies for the Future: Final Report to the President and to the Congress, 464 (1973)). Note, however, that "the right is not lost by nonuse" is stated in the 9th Circuit opinion, *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981). This issue has not been addressed by the U.S. Supreme Court.

30. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446-447 (1882); Irwin v. Phillips, 5 Cal. 140, 146 (1855).

31. *Irwin*, 5 Cal. at 146.

32. *Coffin*, 6 Colo. at 446; *Irwin*, 5 Cal. at 146.

tion water users feel that reserved rights that accommodate future needs are inequitable. However, they fail to recognize that the inequity is the result of the state law of prior appropriation, not of the federal law of reserved water rights.

Tribes also see inequities. The clear criteria for quantification of state-based rights may afford greater protection on a practical, daily basis than the vague standards which define unquantified reserved rights. A quantified right is more readily enforced and protected.

In practice, reserved and prior appropriation water rights are only compatible to the extent that the reserved water is developed immediately following creation of a reservation. The right to assert a senior priority date when exercising new, previously unquantified uses long after a reservation was created flies in the face of the most fundamental practical feature of prior appropriation — that junior water users take the river as they find it and can assume all senior rights are accounted for in the observed stream flow.[33] Even though the *Winters* Doctrine arose in 1908, that the United States did not begin actively to assert reserved water rights on behalf of Indian Tribes until the 1960's, and is only now resolving the quantification of many of those rights aggravates, this tension between people.[34] In the intervening period, population growth and water development in the West has exploded.

Because watershed divides were ignored when political boundaries were drawn, reservations and private land owners rely on shared water resources. Thus, the legal distinctions between reserved water rights and state-based water rights become mired in conflict over use, jurisdiction, and concerns of inequity. With the goal of establishing a system in which reserved and state-based water rights can be fully exercised in a shared watershed with minimal conflict, States and Tribes have come to negotiate a means of water allocation and dispute resolution. The following section provides background on the framework established by the State of Montana to encourage negotiated solutions.

33. Arizona v. California, 373 U.S. 546, 600-601 (1963) (adopting the solution of the Special Master to quantification of water reserved for present and future agricultural purposes — i.e. the quantity that is necessary for all practicably irrigable acreage on the reservation); Conrad Inv. Co. v. United States, 161 F. 829, 832 (9th Cir. 1908) (holding that the water reserved by treaty for the Blackfeet Reservation is for both present and future needs).

34. *See, e.g., Arizona*, 373 U.S. at 546.

IV.
MONTANA GENERAL STREAM ADJUDICATION AND FRAMEWORK FOR NEGOTIATION

Montana is a headwater state for the Columbia, Missouri and Hudson Rivers. The State contains twenty-eight percent federal or Tribal land, sixty-nine percent of which is reserved.[35] Of the eighty-five adjudication subbasins[36] in the State, seventy contain claims for reserved water rights.[37] Adjudication of water rights associated with these lands is complicated by various factors: checkerboard non-Indian ownership of fee land within Indian Reservations; private diversions of water within national forests; pre-existing dams within wilderness areas; rivers that form the boundaries to national parks and Indian reservations and as a result, also form the boundaries to private land; and streams that have headwaters in areas of private land ownership before flowing on to a reservation. Many of the attributes of reserved water rights associated with these complex situations have not been defined by any court. States have attempted to quantify reserved water rights in order to provide notice to existing water users of the potential magnitude of development of future senior tribal uses. To attempt this quantification, a state must join the United States in a suit for adjudication of its reserved water rights and the reserved water rights it holds in trust for the benefit of various Indian tribes. Without an express waiver of sovereign immunity by Congress, joinder of the United States in a suit would not be possible.[38] In 1952, as a rider on the Department of Justice Appropriations Act,[39] Congress passed the McCarran Amend-

35. U.S. DEPARTMENT OF COMMERCE, ECONOMIC AND STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1993 219, tbl. 358 (113th ed., 1993).

36. MONT. CODE ANN. § 3-7-102, (1997) identifies four water divisions in the State. Within those four divisions, the Montana Water Court recognizes eighty-five sub-basins for purposes of adjudication.

37. Based on claims filed with the Montana Water Court for purposes of the state-wide general stream adjudication.

38. Thus, the U.S. Supreme Court in United States v. Mitchell, 445 U.S. 535, 538 (1980), stated that:

> [I]t is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain suit.' *United States v. Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' *United States v. King*, 395 U.S. 1, 4 (1969).

39. 66 Stat. 560, §§ 208(a)-(c) (1952).

ment[40] allowing the United States to be joined in a state adjudication of water rights.[41]

The U.S. Supreme Court subsequently held that the McCarran waiver extends to suits to adjudicate reserved water rights.[42] The Court has further held that, although jurisdiction to adjudicate reserved water rights is not exclusive in state court, the policy of McCarran — to avoid piecemeal adjudication — counsels in favor of dismissal of federal litigation in deference to a state adjudication in progress.[43] The Court held that waiver of immunity under McCarran extends specifically to a general adjudication involving "'all of the rights of various owners on a given stream.'"[44]

The Montana Water Use Act[45] established a state-wide general adjudication for all state-based water rights in existence prior to July 1, 1973,[46] and for all federal and Indian reserved water rights.[47] Water appropriations made under State law after July 1, 1973 must adhere to the permit system established by the Water Use Act.[48] All permits issued prior to completion of the adjudication in the basin containing the water source identified by the permit are provisional.[49] The amount of water in a provisional permit may be reduced or modified on finalization of the adjudi-

40. 43 U.S.C. § 666(a)(1994). The relevant text of the McCarran Amendment states that:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United states is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction . . . .

Id.

41. Although a tribe may voluntarily intervene in a state adjudication, McCarran does not waive the immunity of tribes.

42. United States v. District Court for Eagle Co., 401 U.S. 520, 524 (1971).

43. Colorado River Water Conservation District v. United States, 424 U.S. 800, 819 (1976).

44. Dugan v. Rank, 372 U.S. 609, 618 (1963) (*quoting* S. Rep. No. 755, 82d. Cong., 1st Sess., at 9 (1951)).

45. *See generally* MONT. CODE ANN. 85-2 (1995).

46. MONT. CODE ANN. §§ 85-2-211 to 243 (1995).

47. MONT. CODE ANN. §§ 85-2-701 to 705 and § 85-2-228 (1995).

48. MONT. CODE ANN. § 85-2-301 (1995).

49. MONT. CODE ANN. § 85-2-313 (1995).

cation.[50] Concurrent with the initiation of the state adjudication, the United States filed suits in federal district court to quantify the reserved water rights associated with the seven Indian Reservations in the State of Montana.[51] Montana sought dismissal of the federal suits in favor of the state adjudication.[52] The United States Supreme Court held that dismissal of the federal suits without prejudice is appropriate in deference to state adjudication.[53] The Court further held that states have the authority to assert concurrent jurisdiction, pursuant to McCarran, provided that the state proceeding is adequate to adjudicate reserved water rights.[54] The Montana Supreme Court subsequently found the Montana Water Use Act facially adequate to adjudicate federal reserved water rights.[55] It remains to be seen if the Montana adjudication is adequate as applied.[56] Should application of the Water Use Act be found inadequate, the federal cases may be resumed. In the meantime, the settlement of the reserved rights may render the issue of adequacy moot.

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50. *Id.*

51. United States v. Adsit, filed by the United States and consolidated with Northern Cheyenne v. Tongue River Water Users Assn., filed by the Tribe, CV-75-20BLG (Dist. Ct. Mont.), asserting the claims of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation on the Tongue River and the Crow Tribe of the Crow Reservation on Rosebud Creek, dismissed Nov. 29, 1979 ; United States v. Big Horn Low Line Canal, CV-75-34BLG (Dist. Ct. Mont.), asserting the claims of the Crow Tribe of the Crow Reservation on the Tongue, Big Horn and Little Bighorn Rivers and on Pryor, Sage, Tullock and Sarpy Creeks, dismissed Nov. 29, 1979; United States v. Aageson, CV-79-21-GF (Dist. Ct. Mont.), asserting the claims of the Blackfeet Tribe of the Blackfeet Reservation, the Chippewa Cree Tribe of the Rocky Boy's Reservation, the Sioux and Assiniboine Tribes of the Fort Peck Reservation and the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation in the Milk and St. Marys River basins, filed 4-5-79, dismissed Nov. 29, 1979; United States v. Aasheim, CV-79-40BLG (Dist Ct. Mont.), asserting the claims of the Sioux and Assiniboine Tribes of the Fort Peck Reservation on Poplar, Muddy, Wolf, Little Wolf and Tule Creeks, dismissed Nov. 29, 1979; United States v. AMS Ranch, CV-79-22GF (Dist. Ct. Mont.); Asserting the claims of the Blackfeet Tribe of the Blackfeet Reservation on the Marias River, dismissed Nov. 29, 1979; United States v. Abell, CV-79-33M (Dist. Ct. Mont.), asserting the claims of the Salish and Kootenai Tribes of the Flathead Reservation on the Flathead River, dismissed Nov. 29, 1979; dismissals upheld in Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

52. Northern Cheyenne v. Tongue River Water Users, 484 F.Supp. 31 (D.C. Mont. 1979) (dismissing the federal suit) *rev'd sub nom.* Northern Cheyenne v. Adsit, 668 F.2d 1080, 1082 (9th Cir. 1982).

53. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

54. *Id.* at 570.

55. Montana v. Confederated Salish and Kootenai Tribes, 712 P.2d 754, 768 (Mont. 1985).

56. *Id.*

As part of the 1979 amendments to the Montana Water Use Act, the Montana legislature established the Montana Reserved Water Rights Compact Commission ("Commission").[57] The Commission is charged with negotiating water rights "compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state."[58] The Commission is also authorized to negotiate with the federal government for settlement of reserved water rights associated with non-Indian federal reservations.[59] The Commission acts on behalf of the State and its citizens as a whole. It does not represent the interests of individual water users.[60] The policy of the State of Montana is to conduct negotiations with Indian tribes on a government-to-government basis.[61]

Negotiated compacts must be ratified by the State legislature.[62] After ratification, State law requires entry of a compact in the Montana Water Court which then proceeds to consider the rights of individual water users claiming water in the State adjudication and to enter the negotiated water right in a final decree in which it is integrated with other water rights in the basin.[63] At this stage, individual water users may object to the compact. If any objection is sustained, the court may declare the compact void.[64] The court may not alter the terms of a compact without the written consent of the parties.[65] Therefore, it is in the best interest of all parties to fully consider individual water users' rights and interests during the negotiation process. The Commis-

57. MONT. CODE ANN. § 2-15-213(1)(1995).

The Commission consists of:

(a) two members of the house of representatives appointed by the speaker, each from a different political party;

(b) two members of the senate appointed by the president, each from a different political party;

(c) four members designated by the governor; and

(d) one member designated by the attorney general.

MONT. CODE ANN. § 2-15-213(2) (1995).

58. MONT. CODE ANN. §§ 85-2-701(2) and 702 (1995).

59. MONT. CODE ANN. § 85-2-703 (1995).

60. *See* MONT. CODE ANN. § 2-15-212 (1995) (indicating that "the commission is acting on behalf of the governor").

61. This policy has been articulated by Montana Governor Racicot in numerous oral presentations.

62. MONT. CODE ANN. § 85-2-702(2) (1995).

63. MONT. CODE ANN. § 85-2-702(3) (1995).

64. MONT. CODE ANN. § 85-2-233(6) (1995).

65. MONT. CODE ANN. §§ 85-2-234(2) & 85-2-702(3) (1995).

sion's approach to public involvement and the public impact on negotiations is discussed below.

Montana's adherence to a policy of negotiation rather than litigation can be attributed, among other things, to concern for water rights obtained and investments made since creation of a particular federal or Indian reservation, the unique federal attributes of reserved water rights, and the difficulty of integrating the reserved water rights with appropriations made pursuant to State law where private or State interests share a watershed with a reservation. By establishing a clear policy in favor of negotiation, the State of Montana provides a forum to resolve conflicts with practical solutions. Of equal or greater importance, the process of negotiation establishes a dialogue that may open the door to efficient resolution of disputes over water use that arise after the adjudication is complete.

In addition, Indian and federal reservations receive direct benefits from turning undefined water claims into defined water rights. Indian reservations often obtain the means to develop water rights or to receive payment in lieu of development.[66] Non-Indian federal reservations, such as national parks or forests, obtain recognition and quantification of rights that may be difficult to protect without precise definition. This is particularly true in the case of instream flow rights.[67]

V.
THE MONTANA - CHIPPEWA CREE COMPACT

A. *The Rocky Boy's Reservation*

1. The Land Base[68]

The Rocky Boy's Reservation is located in the Bearpaw Mountains with portions extending onto the plains between the mountains and the Milk River in north-central Montana. Historically, the area was part of the large territory north of the Mis-

66. *See e.g.,* MONT. CODE ANN. § 85-20-301 (1995) ("Northern Cheyenne-Montana Compact"); Settlement Act, Pub. L. No. 102-374, 106 Stat. 1186 (1992); Fort Hall Indian Water Rights Act, Pub. L. No. 101-602, 104 Stat. 3059 (1990); Salt River Pima-Maricopa Indian Community Water Rights Settlement Act, Pub. L. No. 100-512, 102 Stat. 2549 (1988).

67. *See, e.g.,* MONT. CODE ANN. § 85-20-401 (1995) ("National Park Service - Montana Compact").

68. Extensive research on the history of the Chippewa Cree in Montana by the Commission staff historian, Joan Specking, is the source for most of the information summarized under "The Land Base" (manuscript on file with the author).

souri and Musselshell Rivers designated for the Blackfeet Nation, including the Piegan, Blood, Blackfeet, and Gros Ventres Tribes, in a treaty negotiated in 1855.[69] Plains Cree Chief Broken Arm was among the signatories to the treaty,[70] although historians have concluded that he was only present as a witness and that the Cree Tribe was excluded from the peace treaty.[71] Out of this larger territory a Reservation for the Blackfeet, Gros Ventre, Piegan, Blood, and River Crow Tribes was established north of the Missouri and Marias Rivers on April 15, 1874.[72]

The United States established the Fort Assiniboine military reservation within the large Reservation on March 4, 1880 to protect the non-Indian citizens in the area and to keep peace among the Tribes.[73] A portion of the Fort later became the Rocky Boy's Reservation. On May 1, 1888, the larger reservation was fragmented into three smaller reservations: the Blackfeet, Fort Belknap for the Assiniboine and Gros Ventre, and Fort Peck for the Assiniboine and Sioux.[74] Fort Assiniboine remained as a separate military reservation. Land not included in the new reservations returned to the public domain and was open to homestead.[75] The military reservation was periodically diminished in size to open land to settlement.[76]

On February 11, 1915, Congress authorized the Secretary of the Interior to survey Fort Assiniboine for disposal.[77] The survey was to identify: (1) land suitable for agriculture to be opened for

69. Treaty with the Blackfoot Indians, 11 Stat. 657 (1855).

70. *Id.* at 662

71. Floyd Sharrock & Susan R. Sharrock, *History of the Cree Indian Territorial Expansion from the Hudson Bay Area to the Interior Saskatchewan and Missouri Plains, in* AMERICAN INDIAN ETHNOHISTORY: NORTH CENTRAL AND NORTHEASTERN INDIANS 307 (1974).

72. Act to Establish a Reservation for Certain Indians in the Territory of Montana, 18 (part III) Stat. 28 (1874).

73. The boundaries of the Fort were established by Executive Order on March 4, 1880 and were found defective and reprinted on June 28, 1881. General Orders and Circulars, 1876-1881, Dept. of Dakota, Vol. 208, General Field Order No. 8, June 28, 1881, RG 94, Adjunctant General Field Office, National Archives, Washington D.C.

74. Act to Ratify and Confirm on Agreement with the Gros Ventre, Piegen, Blood, Blackfeet, and River Crow Indians in Montana, 25 Stat. 113 (1888).

75. *Id.*

76. Executive Order of May 2, 1888, reduced the reservation to 704,000 acres. Executive Order of September 25, 1888. Executive Order of October 9, 1891, turned certain areas over to the Secretary of the Interior for disposal, leaving approximately 220,000 acres. The military reservation was authorized for further reduction by Act of April 18, 1896, 29 Stat. 95 (1896).

77. Act Authorizing Secretary of the Interior to Survey the Lands of the Abandoned Fort Assinniboine Military Reservation, Pub. L. No. 244, 38 Stat. 807 (1915).

settlement; (2) coal land to be opened for settlement with coal resources reserved to the United States; and (3) timber land to be disposed pursuant to the timber laws.[78] On September 16, 1916, in response to petitions by the leaders of the Chippewa and Cree Tribes in the area, Congress amended the 1915 Act to set aside a 56,035 acre portion of the land for the Rocky Boy's Reservation, specifically designating it for the "Rocky Boy's Band of Chippewas and such other homeless Indians in the State of Montana as the Secretary of the Interior may see fit to locate thereon."[79] The Reservation contained none of the land in the former military reservation identified as suitable for irrigated agriculture.[80]

The Reservation has been expanded through acquisition and reservation several times since its creation in 1916. The first addition to the Rocky Boy's Reservation was a 556.83 acre area on the southern boundary, added on May 14, 1935.[81] The land was described as "mountainous and timbered . . . not attractive to homesteaders," but of the type that "can be used beneficially for Indian purposes."[82]

The Indian Reorganization Act, passed on June 18, 1934, authorized acquisition of lands for Indians.[83] Pursuant to this authority, a 156,000 acre area on the western border of the Reservation was designated as a maximum purchase area for addition of land to Rocky Boy's Reservation.[84] In 1938 the Bureau of Indian Affairs ("BIA") purchased roughly 35,500 acres within

78. *Id.*

79. Act Providing for the Opening of the Fort Assinniboire Military Reservation, Pub. L. No. 261, 39 Stat. 739 (1916).

80. General Orders and Circulars, No. 85 Headquarters of the Army, October 22, 1981.

81. Act to Add Certain Public Domain Land in Montana to the Rocky Boy Indian Reservation, Pub. L. No. 55, 49 Stat. 217, 218 (1935).

82. S. Rep. 308 (1935) (quoting letter to the Chairman of the Committee on Indian Affairs from the Secretary of the Interior).

83. Act to Conserve and Develop Indian Lands, Pub. L. No. 583, 48 Stat. 984 (1934).

84. Rocky Boy's Preliminary Project Plan for Land Acquisitions Under the Indian Reorganization Act (1938) (available at the National Archives, Pacific NW Region, Fort Belknap Indian Agency, Land Acquisitions Project Files, 1937-47, Box 396). The actual outlines of the maximum purchase area were not articulated until 1939 in a report accompanying an Act of Congress. *See infra* note 85. However, it appears that the area arose from the recommendations of a group of federal officials who met in Great Falls in 1936 to discuss the needs of Montana's landless Indians. *See* Letter from Superintendent Wooldridge to the Commissioner of Indian Affairs, (Dec. 10, 1936).

this area from private landholders for $288,000.[85] The 1930's were difficult times for farmers and ranchers. Exchanges of letters between landowners and the BIA indicate that there were more willing sellers than appropriations for land purchase.[86] The letters also indicate that much of the land was marginal for agricultural purposes.[87]

On March 28, 1939, Congress withdrew all public domain land within the 156,000 acre maximum purchase area and added it to the Reservation.[88] This amounted to roughly 2000 acres of small, scattered tracts.[89] The Senate Report accompanying this bill states that purchase of additional acreage within the maximum 156,000 acre area would depend on future appropriations.[90]

An exchange of letters between the Assistant Commissioner of Indian Affairs and the representative of Montana's homeless Indians suggests that land acquisition adjacent to the Reservation in the 1930's was intended to (1) allow expansion of the cattle industry for existing residents of the Reservation; and (2) provide land for settlement of homeless Chippewa Cree and other Montana Indians.[91] The United States held the initial purchases in trust for the Chippewa Cree and other homeless Indians. The purchases were only added to the Reservation in response to agreement with the Chippewa Cree Tribe to enroll more landless Indians.[92] In 1958, Congress designated the land for the exclu-

85. S. REP. No. 105, 76th Cong., 1st Sess. (1939). This area was not added to the Reservation until November 26, 1947, when the Assistant Secretary of the Interior signed the proclamation transferring the land in response to an agreement with the Chippewa Cree Tribe to enroll more landless Indians.

86. Rocky Boy's Preliminary Project Plan, *supra* note 82.

87. *Id.*

88. Act to Add Certain Public Domain Land in Montana to the Rocky Boy Indian Reservation, Pub. L. No. 13, 53 Stat. 552 (1939). The maximum purchase area referred to in this Act appears to encompass the same area identified for purchase in 1938. However, because the purchase area boundary was first referred to by Congress in this Act, it is often referred to as the "1939 Boundary." Although never recognized by Congress as anything more than a purchase area boundary, the Tribal Constitution, approved by the Secretary of the Interior, designates this boundary as the "Reservation Boundary." Considerable private land remains within this boundary. This difference in perception caused considerable concern among area ranchers and led to significant delays in negotiations.

89. S. REP. No. 105, 76th Cong., 1st Sess. (1939).

90. *Id.*

91. Letter from Assistant Commissioner of Indian Affairs, William Smith, to Sherman Smith, representative of Montana's homeless Indians (April 13, 1940).

92. *See* Addition of Certain Lands to Rocky Boy's Indian Reservation, Montana, Fed. Reg. Doc. 43-2629, Proclamation of the Assistant Secretary of the Interior, November 26, 1947, adding the land to the Reservation. *See also* Letter from Sherman Smith, representative of Montana homeless Indians, to Senator Wheeler (Mar. 22,

sive use of the Chippewa Cree Tribe of the Rocky Boy's Reservation.[93]

The Tribe and the United States have made several additions to the Reservation since the 1930's. Mineral interests within the purchase area were transferred from the United States to the United States in trust for the Tribe on May 21, 1974.[94] The acquisitions and additions to the Reservation since 1934 contain almost the entire irrigable agricultural base on the Reservation.[95]

2. The Water Supply

In addition to having a limited agricultural land base, the Rocky Boy's Reservation is located in an area of scarce water supply. The region is arid. Annual precipitation averages twelve inches in the Reservation area suitable for growing hay. Snowpack in the Bearpaw Mountains, which receive an average of thirty inches of precipitation per year, contributes to high spring runoff. The two drainages arising on the Reservation are Big Sandy Creek and its tributaries and Beaver Creek. Grazing and growing hay are the primary land uses. Both creeks flow through Reservation and private farm and ranch land before reaching the Milk River. Off the Reservation, individuals hold irrigation claims for approximately 8500 acres in the Big Sandy Creek drainage and 3600 acres in the Beaver Creek drainage.

Beaver Creek has three small storage reservoirs. Two are downstream from the Reservation and one on the Reservation. The reservoirs store spring runoff and, in most years, provide flow year around. As a result, some sprinkler irrigation, if well managed, is considered economically feasible on the Beaver Creek drainage. The upper reaches of Beaver Creek also contain an important trout fishery. Hill County Park follows the Creek for approximately fourteen miles from the Reservation downstream. The Montana Department of Fish, Wildlife and Parks has instream flow rights on this portion of the stream.

1940) (seeking aid in enjoining transfer of purchased land to the Reservation); Letter from the Chippewa Cree Tribe of Rocky Boy's to the Commissioner of Indian Affairs (January 30, 1946) (on file with author) (stating that the Tribe had adopted 25 additional families as requested).

93. Act to Designate the Beneficiary of the Equitable Title to Land Purchased by the United States and Added to the Rocky Boy's Indian Reservation, Pub. L. No. 85-773, 72 Stat. 931, (1958).

94. Pub. L. No. 93-285, 88 Stat. 142 (1974).

95. *Supra* note 4.

Big Sandy Creek follows the bed of the ancestral Missouri River which, prior to glaciation, flowed north and east along the course of the present day Milk River.[96] As a result, Big Sandy Creek is a small stream flowing in the deposits of a very large river. This feature, combined with high snowpack and limited precipitation in the summer and fall, means streamflow on Big Sandy Creek may cease altogether in the late irrigation season of August to September when the stream disappears into its bed of sediments.[97] With the exception of a small reservoir on the Reservation on Box Elder Creek, a tributary to Big Sandy Creek, there are no reservoirs to hold back spring flows and augment late season irrigation. The limited water supply does not justify investment in full service irrigation systems such as pivots.[98] Most farmers get by with flood irrigation, if, and when, water is available.[99] Alternating between drought and flood, water supply is either sufficient for everyone or so limited that no one benefits. Moderate years in which irrigators with senior rights would have the right to irrigate at the expense of junior water users are rare.[100] In late summer when irrigation is impractical, ranchers primarily rely on stream flow to water stock.

B. *The Compact*

1. The Negotiation Process

Negotiations of Indian reserved water rights in Montana involve three parties: the Tribe, the Commission, and the United States as trustee for the Tribe. Each party is governed by its own laws and rules for participation in a proceeding. The initial step in negotiation is to discuss the basic elements of the process and attempt to integrate the constraints each party brings to the table. The most important process elements addressed in the Rocky Boy's negotiations were: (1) exchange and use of information; (2) media contacts; and (3) public participation.

a. Exchange and Use of Information

Quantification of Indian water rights requires collection and analysis of technical data on subjects such as soil composition,

96. Frank Swenson, *Geology and Ground-Water Resources of the Lower Marias Irrigation Project Montana*, USGS WATER SUPPLY PAPER 1460-B (1957).
97. Municipal, Rural and Industrial Water Supply System, *supra note* 2, at 11.
98. Commission Staff Technical Report, *supra* note 4.
99. *Id.*
100. *Id.*

water supply, land status, climate, topography, viable crop types, and the economics of irrigation. In contrast to litigation, which focuses on historic documents concerning the purposes of the reservation and the irrigability of land, the focus in negotiation is prospective. The needs and future plans of the tribe for sustained development or resource preservation and the needs of nearby water users to protect their investments drive the solutions. Thus, settlement also requires analysis of conflicting water use, impacts of new development, and analysis of ideas for solutions to water supply problems.

Each technical variable has a range of possible values. If each party were to collect and analyze its own data, negotiation would become mired in efforts to resolve technical issues rather than focus on the issues of policy that negotiators must address. To avoid this pitfall, the Commission tries to encourage joint efforts at technical work among the parties. Negotiators then discuss issues of policy from a common database.

Parties would not be comfortable with this open exchange of information and ideas if they might subsequently be used against them should negotiations fail. At the initial stage in the process, the Commission's practice is to negotiate a Memorandum of Understanding ("MOU") which includes provisions covering exchange and use of information. The MOU with the Chippewa Cree Tribe and the United States provides that information, including statements and technical data and analysis exchanged in the course of negotiations, are governed by Rule 408 of the Montana and Federal Rules of Evidence preventing use of such information in litigation against the party generating it.[101] Thus, the parties may engage in joint technical work on issues such as water supply and put forward ideas for settlement without concern that their efforts could be used against them should litigation become necessary.

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101. FED. R. EVID. 408 and MONT. R. EVID. 408 (1997) state that:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

b. Media Contacts

Contact with the media can be highly sensitive in negotiations. The MOU requires consultation among the parties prior to initiating contact with the media. In response to concerns raised after contacts were initiated by the press with individual parties following negotiating sessions, the parties developed a custom of preparing a joint press release following each Rocky Boy's negotiation to ensure that a unified interpretation of the meeting was presented. This had the collateral benefit of forcing the parties to review in written form and to reach agreement on the substance of a meeting.

c. Public Involvement

Water rights negotiations occur at the government level. In Montana, private water users do not have a seat at the table. Nevertheless, an open process that invites public scrutiny is essential to the negotiation of a viable compact. Local support is essential to obtaining the required legislative ratification. Furthermore, there must be a high level of local understanding, acceptance, and even ownership for smooth implementation of a compact. Finally, individuals who live within a watershed have the greatest knowledge of water supply. Their help in designing and evaluating solutions is essential to the process. They alone know what solutions they can live with.

In addition, pursuant to Article II, Section 9 of the Montana Constitution, State law requires that meetings of "all public bodies or agencies" of the state must be open to the public.[102] The Commission is considered to be one of the "public bodies" of the state. While other parties may not be subject to similar open meetings laws, the participation of the Commission in negotiations can only take place within the open meetings requirements of State law. The Chippewa Cree Tribe and the United States agreed to open all negotiations to the public. The Commission published and mailed notice to interested individuals one to two weeks prior to each negotiating session.

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102. MONT. CODE ANN. § 2-3-203(1) (1997).

> RIGHT TO KNOW. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

MONT. CODE ANN. § 2-3-203(1) (1997).

The process of public involvement in the Rocky Boy's negotiations evolved from an initial highly contentious public meeting to a close working relationship with individual water users adjacent to the Reservation. As the process evolved, the Commission moved increasingly into the role of facilitator, acting as a conduit between water users and the Tribe, and assisting in the design of solutions. The Commission also took the lead in applying for State grants to fund the solutions agreed to in the Compact. The involvement of water users who irrigate in drainages shared with the Reservation shaped these solutions.[103]

As it became apparent that the solution to the Tribe's drinking water needs lay in the importation of water, a separate process evolved in which the Tribe and rural water systems off the Reservation began working together with State assistance to try to solve the drinking water problems of the region as a whole. The involvement of rural water systems in these efforts is an on-going process and continues to have a substantial impact on efforts to seek Congressional approval for the Compact.

On October 29, 1992, the Commission held an initial public meeting in Havre, Montana to inform the public that negotiations had started, how the public might comment, and that the Tribe had made an initial proposal for settlement. Approximately 250 concerned citizens attended — a large turnout considering less than fifty individuals had filed claims for water on the two drainages that are shared with the Reservation. During the meeting statements from members of the public included requests that the Reservation be terminated, opinions that the Reservation was not legally established, and declarations that government employees had no business "taking" people's water and "giving" it to the Indians.

The Tribe's originally proposed transfer of all State lands within the 1939 purchase area to the Tribe as part of the State contribution to settlement fueled the controversy among local citizens. Ranchers with grazing leases on State land considered this proposal to be a threat to their livelihood. In addition, to provide sufficient water for both drinking water and irrigation

103. It is important to note that the late establishment of the Rocky Boy's Reservation made it possible that the reserved rights would be considered by a court to be junior to many of the early private appropriations in the area. Thus, in this particular negotiation, public support was not only necessary to gain legislative approval, but to ensure that the compact would be acceptable to water users claiming a senior right. Without that support senior water users might raise a valid objection to the Compact in Water Court.

needs, the Tribe's proposal called for dams on most drainages arising on the Reservation. An extremely expensive solution to the Tribe's water needs, the dams would have serious impacts on water users claiming rights senior to establishment of the Reservation. Downstream water users with rights perfected prior to establishment of the Reservation would have likely challenged this solution in Water Court. Because of the late establishment of the Reservation, there was considerable risk that the court would find the off-Reservation claims to be senior and thus void the Compact.

As an outgrowth of that first public meeting, a private nonprofit corporation, Bear Paw Resources Alliance ("BPRA"), was formed by local citizens to monitor and to influence negotiations. Membership in BPRA included water users, landowners, and concerned citizens. The BPRA did not represent the three ranches with senior water rights on Big Sandy Creek and its tributaries. Commission members and staff met frequently with representatives of BPRA. However, to ensure that comment was obtained from all interested water users, to diffuse some of the rhetoric characteristic of early meetings with BPRA, and to focus comment on water-related issues specific to each drainage, the Commission began a process of meeting with individual water users, ranch by ranch.

2. Compact Water Allocation

The Compact allocates to the Tribe 10,000 acre-feet of water from surface and groundwater sources on the Reservation. A portion of the water right reflects a quantification of water necessary to maintain and enhance existing fish and wildlife habitat. Existing stock use is also quantified. Water for new irrigation on land acquired on Big Sandy Creek and its tributaries after 1934 will be made available through expansion of the Tribe's existing reservoir on Box Elder Creek. Water for new recreational uses on the original 1916 Reservation on Beaver Creek, including snow making for the Tribe's ski area in the Bearpaw Mountains, golf course watering, and enhancement of fisheries will be made available through expansion of the Tribe's existing fifty-five acre-feet reservoir on the East Fork of Beaver Creek to a capacity of 665 acre-feet.[104]

104. The federal legislation includes authorization of $4 million for enlargement of East Fork Reservoir, and $13 million for enlargement of the reservoir on Box Elder Creek.

In addition to the allocation of water arising on the Reservation, the Compact includes an agreement between the Tribe and the State to seek an allocation by Congress to the Tribe of 10,000 acre-feet from Lake Elwell, a Bureau of Reclamation project with abundant water available for contracting which is located approximately fifty miles west of the Reservation.[105]

The Compact does not limit the type of use of the Tribal water right and recognizes the jurisdiction of the Tribe to administer its own water. In compacts negotiated to date, Montana has not disputed jurisdiction over tribal water or the discretion of a tribe to put that water to its best use.[106] Nevertheless, because Montana's political boundaries do not follow watershed boundaries, this clean division between State and Tribal jurisdiction on paper can be difficult to implement. Recognizing these difficulties, the State and the Tribe agreed to allocate water as a block, rather than by priority, and established a forum for resolution of disputes arising between water users on and off the Reservation.

Most western states, including Montana, allocate water in times of shortage in order of priority of the date of development.[107] In dry years, junior priority water users must curtail or

105. Memorandum from the Bureau of Reclamation Project Manager in Billings, Montana, to the Regional Director (Nov. 4, 1993) (copy on file with author). The letter says that 389,695 acre-feet of active storage exists in Lake Elwell, also referred to as Tiber Dam. Only 7,948 acre-feet are allocated by contract for irrigation. By agreement with the Montana Department of Fish, Wildlife and Parks, the Bureau of Reclamation releases water from Lake Elwell to maintain a 500 cfs minimum flow to maintain fisheries on the Marias River. The memorandum indicates that the available water in Lake Elwell is probably between 100,000 and 250,000 acre-feet if the minimum flow is to be maintained. It should also be noted that the Blackfeet Tribe has water rights claims on the Marias River upstream from Lake Elwell, but did not express concerns when the Rocky Boy's Compact was presented to the Montana Legislature. The federal legislation agreed to in February, 1998 by the Tribe, the State, and the Departments of the Interior and Justice, includes the 10,000 acre-foot allocation from Lake Elwell.

106. *See, e.g.,* Fort Peck - Montana Compact, MONT. CODE ANN. § 85-20-201 (1995); Northern Cheyenne - Montana Compact, MONT. CODE ANN. § 85-20-301 (1995); *But cf., In re* Big Horn River System, 835 P.2d 273, 279-281 (Wyo. 1992). In a ruling with multiple concurring and dissenting opinions, the Wyoming Supreme Court agreed with the State of Wyoming that the Tribes do not have the right to change the use of their water right without regard to State law, and that the State Engineer, not the Tribal Water Agency, has authority to administer water on the Reservation. It should be noted that, because the Rocky Boy's Reservation was never allotted, the settlement does not address the issue of jurisdiction over non-Indian water rights within Reservation boundaries. Settlement discussions or litigation with the Blackfeet, Crow, and Confederated Salish and Kootenai, will face this issue.

107. MONT. CODE ANN. § 85-2-401 (1995).

cease water use so that senior rights are satisfied. This requires close monitoring of stream flow and coordination of diversion.

To avoid daily administration between the Reservation and off-Reservation water users in dry years, the Compact allocates water as a block for each tributary on which there is both private and Reservation land. The Compact eliminates priority administration between the Tribe and other water users. Provided the Tribe is using water within its allocation, water users off the Reservation agreed not to assert priority over the Tribe's water.[108] Similarly, provided that water users off the Reservation are using water within the amount of their right, the Tribe agreed not to assert priority over state-based rights.[109] It is much simpler to determine whether diversions are within a specified limit than whether there is sufficient water to satisfy all claims in a water-short year, and, if not, whether curtailment of junior uses will provide any benefit to senior water rights. Block allocation minimizes the interaction necessary and, therefore, the potential interference with the jurisdiction of each sovereign to manage its water.

The factors considered in designing the administration between the Tribal water right and state-based rights are similar to those considered in an equitable apportionment.[110] While the U.S. Supreme Court has rejected the concept of "equitable ap-

108. Although most Reservations in Montana were created early in the territory's history and, therefore, carry senior rights, the late creation of the Rocky Boy's Reservation renders its priority date both junior to and senior to rights on shared water sources. It should be noted, however, that the Tribe presented a theory on which it would have the senior right. The Tribe argued that it could "tack" its water right to the early right of the military reservation thereby obtaining an 1880 priority date. Although the Commission did not accept the theory because all irrigated land associated with the military reservation was opened to homestead rather than included in the Indian Reservation, and felt it would subject the Compact to a possible valid challenge in Water Court, the uncertainty provided an incentive to both parties to seek a solution that would avoid the issue of priority by protecting both the Tribe's water uses and that of potentially senior water users.

109. In times of shortage, downstream irrigators may not object to water use on the Reservation as long as such use is within the Tribe's allocation. New storage on the Reservation allows the Tribe to store water during spring run-off, thus reducing the likelihood of shortage in dry years. This approach was acceptable to downstream irrigators.

110. Although priority is a "guiding principle," the following factors are relevant in an equitable apportionment:

> physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.

portionment" in quantification of Indian reserved water rights,[111] negotiation gave the parties the flexibility to revisit this issue. The result is a quantification of the Tribal water right that follows the Court's guidance by falling within the range of possible practicably irrigable acreage outcomes, but administers that water right as a block allocation or apportionment.[112]

The water supply on the Rocky Boy's Reservation fluctuates from season to season and year to year. As a result, the factors considered by the Commission and the Tribe in designing the administration of water between water users on and off the Reservation are similar to those considered by the Supreme Court in an equitable apportionment. Thus, the presence of return flow was considered a mitigating factor in determining the impact of Tribal irrigation on downstream water use. The parties considered the waste resulting from carriage loss[113] in determining whether releases from Tribal reservoirs is an appropriate means to protect senior downstream water users. Coordination of storage on and off the Reservation is used to maximize efficiency. The factors considered in administering the water right as a block were also used to prevent any impact on potential senior water rights.

The measures taken to administer the water allocation as a block and to protect potentially senior water users are as follows. First, to give effect to the allocation by preventing further demands on a short water supply, the drainages are closed to new permits for water use under state law. Second, the Compact calls for release of water from enlarged reservoirs on the Reservation to mitigate impacts on downstream water use. Two ranches off the Reservation currently rely on high spring flows from Box Elder Creek to irrigate. Enlargement of the Tribe's reservoir on Box Elder Creek will allow storage of spring run-off for the Tribe, but will impact spring irrigation on these ranches. The Tribe has agreed to release a pool of stored water for use on the

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Colorado v. New Mexico, 459 U.S. 180 (1982) (quoting Nebraska v. Wyoming, 325 U.S. 589 (1945)).

111. The Court stated that reserved water rights are instead "governed by the statutes and Executive Orders creating the reservation." Arizona v. California, 373 U.S. 546, 597 (1963).

112. It is also important to note that, although negotiation provides considerable flexibility, under State law the Water Court may void the Compact if a valid objection is raised. MONT. CODE ANN. § 85-2-233(6) (1995).

113. "Carriage loss" means loss during conveyance of water due to evapotranspiration and seepage.

ranch closest to the enlarged reservoir. To minimize the amount of release necessary, the State will provide a grant to install a pipeline to replace the existing ditch for conveyance of the water.[114] Without this improvement in conveyance efficiency, a much larger release would be necessary. Release of stored water for the ranch farther downstream would be highly inefficient. Instead, a State grant will allow renovation of the existing diversion and conveyance structure to allow use of water at the lower stream flow predicted to occur once storage is enlarged on the Reservation.

Third, the Compact calls for a release from the Tribe's reservoir to maintain late season water quality for senior downstream stock watering. Irrigation is minimal on Lower Big Sandy Creek. However, ranchers rely heavily on stream flow to water stock. Return flow from use of stored spring runoff to irrigate on the Reservation could actually improve stream flow during late summer, when the unregulated flow of Big Sandy Creek often disappears into its bed of sand and gravel deposited by the ancestral Missouri River.[115] However, soils in the area are locally saline. Ranchers expressed concern that return flows could degrade water quality beyond suitability for stock. Adding to this concern, the Tribe's development plan calls for mixing of saline groundwater with surface water to supplement irrigation, thereby increasing the total salts on the land. Furthermore, to accomplish the groundwater mixing, the Tribe's plan called for temporary storage of surface water in ponds. To mitigate potential impacts on water quality of saline return flow, application of saline water, and saline seep,[116] the Tribe agreed to hold a pool of water in the enlarged reservoir for release at the request of downstream water users in late summer. The water is designated for maintenance of stream flow and water quality and cannot be diverted by water users.

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114. Chippewa Cree Tribal Water Rights Settlement Implementation Projects Fund Grant Application, submitted to the Renewable Resource Grant and Loan Program by the Montana Reserved Water Rights Compact Commission (unpublished, May 1996, copy on file with author). Grant approved in H.R. 6, 55th Legis. Sess. (Mont. 1997) (codified at MONT. CODE ANN. § 85-20-601 (1997)).

115. *See* Swenson, *supra* note 96.

116. The hydrostatic head from such storage has been known to force salts into the groundwater in a phenomena common in the area and known as saline seep. Scott Brown, Rocky Boy Tribe Proposed Irrigation Impact-Groundwater Study, Montana Salinity Control Association (May 1996) (unpublished paper) (on file with author).

Fourth, coordinated use of reservoirs on and off Reservation on Beaver Creek will mitigate impacts on downstream senior water rights. Increased storage and diversion from Beaver Creek on the Reservation could impact downstream irrigators with a senior right to divert from natural stream flow. Yet release of water from the small reservoir on the Reservation to these irrigators would be highly inefficient due to carriage loss, and would prevent realization of the Tribe's development plan. Lower Beaver Creek Reservoir, owned by Hill County and located downstream from the Reservation, had contract water available for irrigation when contracts were renewed in 1996. The State entered an Option to Purchase contract water for release to mitigate impacts from development of the Tribe's right. In effect, this transfers any call for water by senior water users from the Tribe's diversions to Lower Beaver Creek Reservoir.

Fifth, the Compact protects instream flows in Beaver Creek. The Tribe, State and Hill County are mutually interested in maintaining the health of the trout fishery in upper Beaver Creek. The Tribe and the Montana Department of Fish, Wildlife and Parks agreed jointly to study the availability of water to maintain minimum in-stream flows. Pending completion of the study, the Tribe agreed to release water to maintain a critical flow of one cubic feet per second, a release which may be necessary in winter and in late summer of some years to prevent fish kill.

Finally, the Compact provides that any change in water use by the Tribe from the uses specified must be accomplished without impact on off-Reservation water users. The Tribe has discretion to determine what measures to take to prevent impact, including release of water from reservoirs and modification in use of water on the Reservation. In addition, on Beaver Creek the Tribe must use water only within a specified net depletion. Thus, if the new use consumes a larger percentage of the water diverted, the Tribe must reduce its diversion.

3. Dispute Resolution

Jurisdiction over issues arising both on and off a reservation is generally a matter of dispute.[117] State, Tribal, or Federal courts are all jurisdictional possibilities. The U.S. Supreme Court has not considered whether the McCarran Amendment waiver of

117. *See, e.g., In re* Big Horn River System, 835 P.2d at 279, 281, note 106 (Wyo. 1992).

sovereign immunity for the adjudication of water rights extends to administration of that water right.[118]

In general, courts retain jurisdiction over adjudicated water rights. Thus it is reasonable to conclude that Congress addressed both adjudication and administration when it considered the McCarran Amendment.[119] Under this reasoning, the State court would have jurisdiction. Nevertheless, it is also true that a waiver of sovereign immunity will be viewed narrowly, and must be express.[120] Under this argument, the State court might not have jurisdiction. As a practical matter, addressing jurisdictional issues when a dispute arises inhibits timely resolution of the dispute. The irrigation season is short in Montana. The appeals process, whether in federal, State, or Tribal court, is long. To an irrigator with a head gate opening on a dry stream, questions of jurisdiction are simply another barrier to a solution. Negotiation allows governments to avoid jurisdictional issues and to design instead a practical solution that recognizes local needs.

To avoid the issue of jurisdiction and to provide a forum in which both the State and the Tribe have a voice, the Compact establishes a Compact Board to hear disputes. The Board has one Tribal appointee, one State Appointee, and a third member selected by the other two. The Board has jurisdiction to hear disputes concerning interpretation of the Compact or disputes arising between a user of the Tribal water and a user of a state-based water right.

Waivers of sovereign immunity are necessary to bring the State, Tribe, or United States into Compact Board proceedings. The State and Tribe agreed to such waivers. The United States Department of Justice ("Justice") opposes waivers of sovereign immunity in general, and has opposed waiver of sovereign immunity for the United States for Compact Boards in previous Montana settlements.[121] Viewing federal policy allowing waiver of

118. States point to the language in the McCarran Amendment "for the administration of such rights," to support their argument. 43 U.S.C. § 666 (1994). The United States and Tribes assert that law is limited by the phrase "where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law." *Id.*

119. *See, e.g.,* MONT. CODE ANN. § 85-2-406 (1995); Nebraska v. Wyoming, 325 U.S. 589, 655 (1945).

120. *See supra* note 38.

121. The Northern Cheyenne Compact ratified by the State legislature included a waiver of sovereign immunity for the State, Tribe, and United States for Compact Board proceedings. MONT. CODE ANN. § 85-20-301 (1995). Under pressure from the Department of Justice, the State and Tribe agreed to remove the waiver for the

sovereign immunity for the Tribe, but not the United States in its capacity as trustee, as inconsistent, the State and the Tribe did not draft the Compact to reflect the position of the Department of Justice. Instead, the State and the Tribe drafted the Rocky Boy's Compact to allow Congress to determine the appropriate policy.[122] Assuming Justice's stance — to protect the United States from being drawn into suit — is appropriate, the general rule of avoidance of waiver of sovereign immunity should not apply in the special case of trusteeship. The forum for dispute resolution agreed to by the State and the Tribe becomes merely advisory when the trustee cannot be joined. Furthermore, it leaves the Tribe no recourse if the United States as trustee refuses to assist it in a Compact Board proceeding. The State and the Tribe hope Congress will see the validity of their argument for waiver of the immunity of the United States.[123]

D. *The Drinking Water System*

Through efforts to quantify the Reservation water rights, it became clear that the existing domestic water supply on the Reservation is deficient in both quality and supply.[124] When the Indian Health Service developed the system it relied on the fractured volcanic rocks that form the Bear Paw Mountains as an aquifer.[125] The aquifer has proven inadequate. Wells frequently shut down and community water supplies have been periodically turned off.[126] Surface water as an alternative source is not available in reliable enough quantities to satisfy both irrigation and domestic needs.[127] Efforts to solve this problem evolved beyond

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United States from the federal bill ratifying the Compact. Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. Law No. 102-374, 106 Stat. 1186 at 1192 (Sept. 30, 1992).

122. Water Rights Compact, Apr. 15, 1997, Mont.-Chippewa Cree Tribe of the Rocky Boy's Reservation, art. IV, sect. D18), MONT. CODE ANN. § 85-20-601 (1997) (providing: "[t]he parties agree that only Congress can waive the immunity of the United States. The participation of the United States in the proceedings of the Compact Board shall be as provided by Congress.").

123. The federal bill agreed to in February, 1998 by the State, Tribe, Interior and Justice does not expressly waive the sovereign immunity of the United States. It leaves open the possibility that the McCarran Amendment waiver is broad enough to cover the administration and dispute resolution agreed to in the Compact.

124. "Municipal, Rural and Industrial Water Supply System Needs Assessment, Rocky Boy's Indian Reservation." Prepared for the Bureau of Reclamation by MSE-HKM Engineering, January 1996.

125. *Id.*

126. *Id.*

127. Commission Staff Technical Report.

the scope of Compact negotiations and are now being addressed in a separate, though related, process. That process is without precedent in both its character and level of tribal-non-tribal cooperation.[128]

Due to the limited and unreliable nature of the on-Reservation water supply, the Tribe and the State became convinced that alternative sources of supply must be considered if the Tribe was to receive adequate and safe drinking water. The discussion turned to off-Reservation water sources. An off-Reservation irrigator suggested importing domestic water through construction of a rural water supply system as a solution.

Many communities near the Reservation face similar drinking water problems.[129] Because groundwater in the area is both limited and of poor quality, communities have constructed small rural water systems to pipe surface water to households that would otherwise be forced to haul water.[130] Nine municipal systems and fifteen rural water systems in the area serve populations ranging from seventy and 10,500 people.[131] As a result of changes in Safe Drinking Water Act[132] standards, obsolescence, and increases in population or service area, each of the systems faces the need for major modifications or repairs in the next ten years.[133]

To determine if these various rural water and municipal systems could be combined with the Tribe's to achieve safe drinking water, the following questions had to be answered: (1) is there a process for analyzing the feasibility of a large regional rural water system in which both the Tribe and the off-Reservation communities could be represented?; (2) is it technically feasible to serve an area covering roughly 6000 square miles with a single

128. As the area covered by the feasibility study expanded, it grew beyond the focus of the settlement of reserved water rights. The federal bill for ratification of the Compact does not include a regional system. Instead, it includes $1 million for further study of alternatives to import drinking water to the Reservation, including the regional system. A bill seeking authorization for a regional system may be introduced to Congress separately at a later date.

129. Montana Rural Water Systems, Inc. helped identify the problems faced by many of the existing systems. MRWS is a non-profit affiliate of National Rural Water Systems, Inc., and is "dedicated to safe drinking water for all Montanans." It provides technical and planning assistance to small communities and rural areas for development and maintenance of rural water systems.

130. MSE-HKM Engineering, Draft North Central Montana Regional Water System Needs Assessment 3 (May 19, 1997).

131. *Id.* at Table 2.

132. 42 U.S.C. §§ 300f to 300j-26.

133. *Id.* at 26.

regional water system?; and (3) are there economic and water quality benefits to combining the existing systems into a single regional water system?

The Tribe and the off-Reservation systems have found a way to work together. As community and rural water systems began to express an interest in working with the Chippewa Cree to solve regional drinking water problems, the Commission realized that design and implementation of a regional water system was beyond its expertise. More importantly, the Commission, authorized to settle reserved water rights, could not adequately represent the interests of the off-Reservation communities. At a meeting facilitated by the Commission between the Tribe and the off-Reservation systems, an Ad Hoc Committee was formed, consisting of three Tribal members and three system members, to coordinate a feasibility study for a regional water system.

In response to a joint request from Governor Marc Racicot, the Tribe, the Commission, and the feasibility study committee, Senators Burns (R-MT) and Baucus (D-MT) and former Congressman Williams (D-MT) obtained a $300,000 supplemental appropriation to the 1996 EPA budget for the feasibility study.[134] The Ad Hoc Committee, the Montana Department of Natural Resources and Conservation, and the Commission obtained an additional $80,000 in State funding for the feasibility study, and $100,000 for project coordination and other expenses from the 1997 Montana Legislature.[135]

With these resources, the Ad Hoc Committee agreed to select an engineer. The Ad Hoc Committee meets approximately once per month for progress reports on the study. The Committee has begun the process of discussing the ownership, maintenance and construction of the system. The Committee has also begun the process of transmitting information to interested communities and rural water systems to provide them a basis for consideration of whether to pursue the proposed regional system.

The feasibility study was scheduled for completion in the fall of 1997.[136] The unprecedented effort the Tribe and off-Reservation communities have undertaken to determine the feasibility of a

134. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. Law No. 101-134, H.R. Report 104-537, Title III - Independent Agencies, Environmental Protection Agency - Environmental Programs and Management (1996).

135. H.R. 2, 55th Legis. Sess. (Mont. 1997).

136. As of March, 1998, a final draft of the feasibility study had not been completed.

regional system will have benefits regardless of the outcome. Although definitive answers to the questions of technical and economic feasibility will not be available until the feasibility study is completed, the proposed system does appear reasonable when compared to other regional systems authorized by Congress. The Rocky Boy's/North Central Regional Water Supply System proposes to solve the regional problem by utilizing the existing infrastructure. The value of the existing distribution systems, funded primarily through loans, is part of the local contribution to cost and significantly reduces the total amount of new funding necessary.

The Department of the Interior was not satisfied with the focus of the study. Although it may be feasible for the region as a whole, Interior is not convinced that it is the best alternative for service to the Reservation. Among other things, Interior objected to the fact that water sources on the Reservation were rejected as a source at an early stage. These sources were rejected on the basis of inadequate water supply.

Interior also indicated that the importation of water to the Reservation may be beyond the scope of the settlement of reserved water. As discussed above, quantification of reserved water rights is limited by supplies available on the Reservation. Courts have not addressed the situation at Rocky Boy's where need exceeds supply.[137] Without a showing of Congressional intent, tribal need alone would not be likely to give rise to a reserved water right for imported water. However, the State and the Tribe have argued that, in the absence of an adequate supply, there is a trust obligation on the part of the United States to provide water to meet basic needs.[138] The difficulties encountered in federal participation on this issue and on Compact negotiations in general are detailed in the next section.

137. It should be noted that the inadequacy in water supply at Rocky Boy's is the result of a dry climate and limited drainage area, not non-Indian development.

138. Interior has recently reversed this position and recognized the need for imported drinking water. The federal bill includes a statement that imported water is necessary to serve the drinking water needs of the Tribe. In addition, the federal bill will authorize $1 million to look at additional alternatives for supply of drinking water to the Reservation.

VI.
FEDERAL PARTICIPATION

President Bush articulated the Federal Government's policy to negotiate settlement of Indian water rights claims and to establish guidelines to determine appropriate settlement contributions in 1989.[139] The President's statements recognized the difficulty of applying "hard-and-fast rules" to determine settlement contributions in light of complex issues, and committed the Administration to "establishing criteria and procedures to guide future Indian land and water claim settlement negotiations."[140]

Pursuant to President Bush's statements, the Department of the Interior published Criteria and Procedures for federal participation in Indian water rights settlements.[141] The Criteria and Procedures were never submitted for comment to those they most affect, i.e. tribes and states. Interior has recently opened a dialogue with Tribes to discuss the settlement process, but has not indicated a willingness to revisit the Criteria and Procedures or to include states in the dialogue. The Clinton Administration continues to follow the Criteria and Procedures.

Two major weaknesses in the Criteria and Procedures have led to a hiatus in participation and approval of settlements by Interior: (1) participation procedures delay federal decisions on positions until a settlement concept is completed, thus preventing federal input to the formulation of a solution; and (2) the criteria for determining federal settlement contribution focuses on the United States' legal exposure to a resource claim by the Tribe, rather than the need, merit and feasibility of projects associated with a settlement as trustee.

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139. In his statements on signing the "Puyallup Tribe of Indians Settlement Act of 1989," President Bush stated:

> The Administration expects to continue to work toward settlement of legitimate Indian land and water rights claims to which the Federal Government is a party. . . . Indian land and water rights settlements involve a complicated blend of law, treaties, court decisions, history, social policies, technology, and practicality. These interrelated factors make it difficult to formulate hard-and-fast rules to determine exact settlement contributions by the various parties involved in a specific claim. . . . In recognition of these difficulties, this Administration is committed to establishing criteria and procedures to guide future Indian land and water claim settlement negotiations including provision for Administration participation in such negotiations.

George Bush, 1 PUB. PAPERS 771, 772 (June 21, 1989).

140. *Id.*

141. 55 Fed. Reg. 9,223 (1990).

A. *Procedures for Federal Participation in Negotiations*

The Criteria and Procedures provides guidelines for federal participation in negotiations. The Federal Government participates in negotiations through a local federal team composed of representatives of various Bureaus within the Department of the Interior and a representative of the Department of Justice. However, all decisions are made through the Working Group on Indian Water Rights Settlements, composed of Assistant Secretaries and a Counselor to the Secretary in Washington D.C.[142] The Criteria and Procedures requires an evaluation of all positions, assessment of the value of the claim, and allocation of contributions by the local team before the Federal Government may make any representations on likely positions.[143] Considerable effort is spent in considering a settlement's precedential impact on other settlements.

This delay in formulating a federal position decisions is in direct conflict with the dynamic necessary for a successful negotiation in which participation must be active, flexible and timely to be effective. In a negotiation, new avenues for resolving problems are explored on almost a daily basis. Each new settlement concept triggers a re-evaluation of positions thought settled and identifies new issues collateral to the new solution. Negotiators must have the ability and authority to respond substantively to new proposals. Positions and necessary financial contributions to settlement are in flux until a final settlement is reached. A delicate balance between competing interests is achieved. By the time Interior is prepared to respond, there are generally too many interests in compromises already reached for States and Tribes to alter their positions in response to federal feed-back.

In the Rocky Boy's negotiations, the Federal Government delayed comment on specific issues of water allocation on the Reservation for two years because the final cost figures for importing drinking water to the Reservation were unknown.[144] Official federal comments were not made until the Compact was before the State legislature for ratification.[145] At that time Inte-

142. *Id.*

143. 55 Fed. Reg. 9,224 (1990).

144. Written Testimony submitted to the Montana Senate Natural Resources Committee on SB 337, by Chris Tweeten, Chairman, Montana Reserved Water Rights Compact Commission, 1997 Legislative Session.

145. Letter from James Pipkin, Counselor to the Secretary of the Interior, to Senator Lorents Grosfield, Chairman Senate Natural Resources Committee, Montana

rior opposed the settlement.[146] Interior's focus on its role in protecting federal funds rather than its role as trustee caused the Federal Government to miss the opportunity to influence or contribute to the resolution of specific issues concerning water allocation on drainages arising on the Reservation.

B. *Criteria for Federal Contribution to Settlement*

The criteria for determining contributions to settlement provide that "Federal contributions to a settlement should not exceed the sum of . . . calculable legal exposure [and] Federal trust or programmatic responsibilities . . . [that] cannot be funded through a normal budget process."[147] In practice, Interior's primary focus has been on litigation exposure. Valuing a settlement by assessing litigation exposure is a standard approach in civil litigation. Is it cheaper to settle or to litigate? However, this is not an appropriate approach when the settling party is the trustee.[148]

Federal litigation exposure in water settlements is measured, in part, by the value of the resource that the United States allegedly failed to protect. As such, a resource-rich Tribe may settle for as much water as it could possibly need and receive the economic means to develop that water by obtaining the value of the water it gives up. In contrast, a resource-poor Tribe must settle for a water supply already insufficient to meet basic needs and receives insufficient economic means to develop even that supply because it has nothing to give up.

The Rocky Boy's Reservation is land and water poor. Documents and legislative history associated with the original establishment of the Reservation and acquisition of Reservation land

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Legislature, of February 14, 1997, and attachments. See also, Supplemental testimony of Chris Tweeten, Chairman of the Montana Reserved Water Rights Compact Commission, submitted to the Senate Natural Resources Committee, Montana Legislature, February 17, 1997, documenting two years of requests from the Chippewa Cree Tribe and the Compact Commission seeking Interior participation in negotiations. The Montana Legislature meets for ninety days once every two years, thus, several weeks of delay in Compact finalization would have postponed approval by the State to 1999.

146. As noted above, in February 1998 Interior and Justice agreed to federal legislation ratifying the Compact and appropriating funds for its implementation, including water development on the Reservation.

147. 55 Fed. Reg. 9,223 (1990).

148. The role of the "trustee" is referred to in the context of federal policy, not the legal interpretations of that role.

reveals the lack of irrigable land.[149] Even the small quantity of water — 10,000 acre-feet per year — agreed to in the Compact[150] will not be available in dry years. Under the Criteria and Procedures, once a reservation is established in an area with too little water for survival, it cannot be remedied. This outcome gives rise to the question: is it appropriate for the trustee to value its assistance toward Reservation water development in terms of the value of the resource base rather than by the needs of the Reservation and the merits of the project? Interior's focus on legal exposure rather than trustee responsibility prevents a three party exploration of this question. This result is particularly inequitable when the documents associated with the reservation's establishment and expansion indicate federal recognition of the inadequacy of the land and water base.

The focus on litigation exposure caused Interior to focus criticism on the aspect of negotiations addressing the Tribe's drinking water needs at the expense of providing input to efforts to resolve conflicts between water use on and off the Reservation. The State and Tribe concluded early in negotiations that Reservation water supply is inadequate to meet both agricultural and drinking water needs.[151] Furthermore, the wide fluctuations in water supply between years of drought and abundance render Reservation supplies more suitable for agriculture because of its higher tolerance for shortage.

The Department of the Interior initially suggested that the enlarged reservoir in Box Elder Creek be used to meet domestic needs rather than to expand irrigation. Interior believed its proposal cost less and was more readily justified by litigation exposure than the cost of importing drinking water.[152] The State and the Tribe feel that this least-cost approach would be devastating

149. H.R. REP. No. 626, 64th Cong., 1st Sess. (1916) (report on amendment increasing the amount of land to be set aside for the Rocky Boy's Reservation).

150. *Compare*, Fort Peck Compact quantification: 1,050,472 acre feet. MONT. CODE ANN. § 85-20-201 (1995); *with* Northern Cheyenne Compact quantification: 91,330 acre-feet. MONT. CODE ANN. § 85-20-301 (1995); and Fort Hall Settlement quantification: 581,031 acre-feet. Pub. L. No. 101-602, 104 Stat. 3059 (1990).

151. The federal bill negotiated in February 1998 to ratify the Compact states that the Reservation water supply is inadequate to fulfill the drinking water needs of the Tribe.

152. This proposal remained on the table as of August, 1997, despite strong opposition by the State and the Tribe. Letter from David J. Hayes, Counselor to the Secretary of the Interior, to Susan Cottingham and Barbara Cosens of the Reserved Water Rights Compact Commission staff (July 22, 1997). In October, 1997, Interior took this proposal off the table.

to the Reservation. At the present population growth rate,[153] existing Reservation agriculture would eventually need to be retired and the system would eventually become inadequate to serve the Tribe's drinking water needs.[154] In the meantime, the agricultural economic base of the Reservation would have been destroyed.

In response to these concerns, Interior proposed to purchase hay for the Reservation on an on-going basis. Replacing agriculture with an on-going subsidy may be the least expensive means to meet the Tribe's needs, but it is also contrary to (1) the federal policy of Indian self-determination, (2) the federal policy toward development of irrigated lands in the west in general, and (3) the Federal Criteria and Procedures on Indian Water Rights Settlements.

The current federal policy favoring Indian self-determination ended the 1943-61 era policy of termination of federal assistance to Tribes, and repudiated the practice of paternalism.[155] The notion that a tribe should forego its primary source of jobs and self-sufficiency and permanently accept federal assistance in order to have safe drinking water flies in the face of this repudiation.

Cost as the basis for retiring agriculture and replacing it with federal assistance is also contrary to the policies that have governed the relations between the federal government and the predominantly non-Indian western irrigators since the passage of the Reclamation Act in 1902.[156] In passing the Reclamation Act, Congress fully recognized that it was using federal subsidies to

153. *See* Municipal, Rural and Industrial Water Supply System, *supra* note 2.

154. Commission Staff Technical Report, *supra* note 4.

155. *See, e.g.,* "Special Message to the Congress on the Problems of the American Indian: 'The Forgotten American,'" President Johnson, 1 PUB. PAPERS 335, 336 (Mar. 6, 1968) (articulating the new goal for Indian Programs: "A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership and self-help."). Under President Nixon, the greatest progress in the concept of self-determination was made. In his "Special Message to the Congress on Indian Affairs," Public Papers 213 at 564, July 8, 1970, President Nixon rejected the extremes of termination and paternalism and called for self-determination among Indian people. He rejected termination because it ignores the legal obligation of the federal government to tribes and the harmful effects in the cases in which termination has been tried. (at 565-66) He rejected paternalism because it results in "the erosion of Indian initiative and morale." (at 566).

156. Act Appropriating the Receipts from the Sale and Disposal of Public Lands to the Construction of Irrigation Works, Pub. L. No. 161, 32 Stat. 388, ch. 1093 (1902) (codified in scattered sections of 43 U.S.C. §§ 371-498 (1994)).

achieve social goals.[157] Although in light of environmental consequences, the magnitude of those subsidies and their wisdom may be subject to question today,[158] it is inequitable to draw the line on new development of agriculture at the point it crosses into Indian country. Drawing a line in subsidizing an agrarian society in the west that just happens to be at the Reservation boundary speaks poorly for our society.

Trading economic development for drinking water is also contrary to the Criteria and Procedures for Indian Water Rights Settlements. The Criteria and Procedures specifically state that, in addition to seeking release of claims against the United States and appropriate cost share on settlement, the United States' goals of the negotiating settlements include "participat[ing] in water settlements consistent with the Federal Government's responsibilities as trustee to Indians [and seeing that] Indians obtain the ability as part of each settlement to realize value from confirmed water rights resulting from settlement."[159] How can a settlement that either ignores basic drinking water needs or requires relinquishment of all economic value from water to meet those needs be consistent with these goals?

The Department of the Interior's response to these arguments was to suggest that irrigated hay land and appurtenant water rights be purchased off the Reservation to replace retired irrigated land on the Reservation. However, the only parcel for sale large enough to serve the need was over an hour's drive from the Reservation on the Milk River. It was unlikely that the Tribe could employ members to work the land. Furthermore, the Milk River is the site of a major Reclamation Project and forms the northern boundary of the Fort Belknap Indian Reservation. The water rights issues between the Fort Belknap Reservation and

157. *See, e.g.,* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 292 (1958). Congress intended the Reclamation program to benefit "the largest number of people, consistent, of course, with the public good." *See also* Peterson v. United States Department of the Interior, 899 F.2d 799, 802-03 (9th Cir. 1990) ("[w]ith the Reclamation Act, Congress created a blueprint for the orderly development of the West, and water was the instrument by which the plan would be carried out . . ."); United States v. Tulare Lake Canal Co., 535 F.2d 1093, 1119 (9th Cir. 1976) (stating that the Act had the following goals: "to create family-sized farms in areas irrigated by federal projects, . . . to secure the wide distribution of the substantial subsidy involved in reclamation projects and limit private speculative gains resulting from the existence to such projects").

158. Reed D. Benson, *Whose Water is it? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENV. L.J. 363 (1997).

159. 55 Fed. Reg. 9,223 (1990).

other Milk River water users are more complex than those associated with the Rocky Boy's Reservation and are several years from settlement. Had the Chippewa Cree agreed to the purchase of land on the Milk River, they would have bought themselves, as part of their water rights settlement, a major water dispute.

Importantly, settlements achieved in states where water has a high dollar value[160] have misled tribes into believing that water rights settlements can answer more needs than possible given federal budget constraints. In Montana, water has very limited value as a commodity. For example, the refusal of irrigators to renew contracts from Lower Beaver Creek Reservoir that made water available for purchase by the State, was due to the "high" cost of $10.50 per acre-foot.[161] The Tribal water right from on-Reservation sources marketed at this rate would bring in $105,000 per year, or roughly $35 per capita. Tribes in Montana, faced with the reality of a limited market, turn to the federal government with the hope of a settlement equivalent to those reached in areas with high value water. The federal government allocates funds between the many tribes. Problems with the federal Criteria and Procedures aside, it is not likely, under the agenda of a balanced budget, that the expectations of tribes will be realized. Nevertheless, the limited funds available could be allocated in a more equitable manner if need, rather than resource wealth, drove the analysis.

VII.
CONCLUSION

Negotiation of the water rights settlement between the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Reservation brought ranchers and Tribal members to agreement despite generations of mistrust. Yet the United States, as trustee for the Tribe, was unwilling to participate through portions of the process and unable, until October 1997, to accept the final agreement. Why?

Partial answers can be found in the rigid application of the Criteria and Procedures by the Department of the Interior, in the inequity of placing greater value on settlement with Tribes who have more to begin with, in the reality of low value water in areas

160. *See, e.g.*, Salt River Pima - Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549 (1988) ($58.22 million in federal funding, $126 million in local cost share).

161. Personal communication from Hill County Commissioner Kathy Bessette.

of limited population, and the reality of limited federal funds. But to truly understand the problem and offer constructive ideas for change, one must contrast the ranch-by-ranch, drainage-by-drainage process employed by the Commission and the Tribe and the policy or national level decision making of the Department of the Interior. It is the difference between solving problems at the level of community rather than government. The common ground between two ranchers, one Tribal, one non-Tribal, trying to make a living on the same water-short drainage, in a climate with winter temperatures dipping to minus forty degrees Fahrenheit, with children on the same high school basketball team, will generally exceed that between a Tribal Council person and a State or Federal employees who work at the policy level. Local ranchers will also have a better understanding of water supply and water use on that drainage. Finally, the tribal rancher will best understand the differences between the non-Indian and Tribal cultures, because he or she must function in both cultures.

By working at the community level, discussions focused on underlying concerns and interests rather than legal principles. Commission staff, the Tribe, and ranchers were able to design solutions to protect water quality, and improve efficiencies and use of storage, without reducing the 10,000 acre-foot quantification sought by the Tribe. In response to an objection to the proposed Tribal water right, a focus on underlying concerns identified water quality impacts and the timing of water use as the real issues. The actual amount of water sought by the Tribe became a secondary issue. The process of addressing underlying concerns resulted in a high level of local support when the Compact was presented to the legislature for ratification.[162]

Resolution of disputes at the community level places design of solutions in the hands of those who best understand the details of water use and supply on a drainage. It brings to the table Tribal and non-Tribal individuals who face common problems and must live with the solutions to those problems. Finding solutions to water shortage in improved efficiency and coordinated use of storage was only possible because time was devoted to working stream-by-stream and ranch-by-ranch. Ultimately, the answers

162. Testimony in support of SB 337 ratifying the Compact included representatives of: Hill County Commissioners, Milk River Irrigation Districts, Bear Paw Resources Alliance, Montana Stock Growers Assoc., Montana Water Users Assoc., and area Legislators.

lay in the solutions suggested by those who live with the water supply problems on a daily basis.

Re-vamping substantive policy toward Indian water rights settlements is necessary, but insufficient. A fundamental change in process and shift in the locus of decision making needs to occur. Natural resource issues are complex and site specific, with all the variables in the natural, sociological and political worlds at play. Only by focusing our dialogue at the watershed level can we find the unique solutions possible in each particular place. This can be done by shifting the power to design solutions to those who must live with them every day. A clear policy in favor of site specific solutions should diminish the federal concern that a solution in one area may set precedent with inappropriate consequences in another area.

The United States can only truly fulfill its role as trustee by empowering Tribes to seek their own solutions. Only by focusing our discussion of water related issues on the watershed as a whole, rather than limiting our view due to artificial political boundaries, can we find solutions that meet the needs of all interested parties. Only by recognizing that Tribal members, even though governed by a separate sovereign, also participate at the level of the community in which they live, a community that generally crosses the Reservation boundary, can we find common ground.