

The Confederated Salish and Kootenai Tribes – State of Montana Water Compact

[by a Harvard graduate student]

## The Confederated Salish and Kootenai Tribes – State of Montana Water Compact

### Summary

Between 2000 and 2020, the Confederated Salish and Kootenai Tribes (CSKT), the State of Montana, the United States negotiated to quantify the Tribes' water rights across western Montana, including on the Flathead Reservation. This effort, which originated in the 1970s, when the State of Montana adopted a constitution that included a new system for administering water rights, resulted in the first quantification of the CSKT's rights under to its original 1855 treaty with United States. The resultant compact clarifies the Tribes' water rights on- and off-reservation and provides the Tribes with sovereignty over the administration of its on-reservation rights. At the same time, the compact protects non-Indian water rights from call by the Tribes' senior claims. At present, the CSKT-Montana Compact is awaiting final review by the Montana Water Court. If approved, it will become law.

### Issues and Stakeholders

#### Stakeholders

- The Confederated Salish and Kootenai Tribes
- The State of Montana
  - The Montana Reserved Water Rights Compact Commission
  - The Montana State Legislature
  - The Montana Supreme Court (and lower state courts)
  - The Governor of Montana (first Brian Schweitzer, then Steve Bullock)
- The United States federal government
  - The Department of the Interior
    - The Bureau of Reclamation
    - The Bureau of Indian Affairs
    - The United States Geological Survey
  - The Congress and President of the United States
- Other irrigators (non-tribal)
  - The Flathead Joint Board of Control (representing on-reservation irrigators)
  - State-law based water rights holders (off-reservation)

#### Issues

##### **The Flathead Indian Irrigation Project Water Rights (On-Reservation)**

*Variables: Water Quantity, Governance, Assets, Values and Norms*

*Stakeholder Types: Federated state/territorial/provincial government, Sovereign state/national/provincial government, Industry/Corporate Interest, Community or organized citizens*

The Flathead Indian Irrigation Project, built by the federal government over the first half of the twentieth century, provides extensive irrigation to tribal and non-tribal water users on the Flathead Reservation. While ostensibly built on behalf of the tribe, the future allocation and governance of irrigation project waters is contested. Non-tribal irrigators (many represented by the Flathead Joint Board of Control) feared that they would lose their water rights to the Confederated Salish and Kootenai Tribes. Non-tribal irrigators utilized a significant portion of the project's waters.

### **FIIP Irrigation Deliveries**

*Variables: Water Quantity, Governance, Assets, Values and Norms*

*Stakeholder Types: Federated state/territorial/provincial government, Sovereign state/national/provincial government, Industry/Corporate Interest, Community or organized citizens*

In addition to dividing the rights, the compact would have to incorporate a sub-agreement with the Flathead Joint Board of Control on a schedule for delivering the Flathead Indian Irrigation Project's waters to its Tribal and non-tribal users.

### **The Flathead System Water Rights (On-Reservation)**

*Variables: Water Quantity, Governance, Assets, Values and Norms, Ecosystems*

*Stakeholder Types: Local/township/county/city government, Federated state/territorial/provincial government, Sovereign state/national/provincial government, Community or organized citizens*

The fundamental purpose of the water compact was to quantify the tribes' water rights. Central to this effort are the tribes' claims to the Flathead River, Flathead Lake, and the South fork of the Flathead River (including the Hungry Horse Reservoir). The state is responsible for a significant amount of infrastructure in the Flathead System and carries obligations to other commercial, municipal, and industrial water users in the region.

### **Non-Consumptive Rights (On-Reservation)**

*Variables: Water Quantity, Governance, Assets, Values and Norms, Ecosystems*

*Stakeholder Types: Local/township/county/city government, Federated state/territorial/provincial government, Community or organized citizens*

Another component of the negotiations focused on on-reservation instream flow rights, minimum reservoir pool levels for Flathead Indian Irrigation Project reservoirs, wetlands, high mountain lakes, and other non-consumptive rights on the Flathead Reservation.

### **Instream Flow Rights (Off-Reservation)**

*Variables: Water Quantity, Governance, Assets, Values and Norms*

*Stakeholder Types: Local/township/county/city government, Federated state/territorial/provincial government, Industry/Corporate Interest, Community or organized citizens*

Under the Hellgate Treaty (and later legal interpretations of this treaty, notably in *Winters v. United States*), which created the Flathead Reservation, the Confederated Salish and Kootenai Tribes are guaranteed instream flow rights to sustain traditional off-reservation fishing grounds. The tribe had extensively documented these claims, and communities across northwest Montana feared that if the tribes' claims were recognized, non-tribal water users would lose their existing rights. These rights include non-consumptive claims on the Kootenai River, Swan River, the Lower Clark Fork River, the North Fork of Placid Creek, and many other bodies of water.

### **State-Law Based, Non-Irrigation Rights (Off-Reservation)**

*Variables: Water Quantity, Governance, Assets, Values and Norms, Ecosystems*

*Stakeholder Types: Local/township/county/city government, Federated state/territorial/provincial government, Community or organized citizens*

Related to the tribes' non-consumptive off-reservation claims were the safety and status of non-tribal, state-law based water rights. The Tribes' rights were senior to the state-law based rights. Consequently, non-tribal water users and the state of Montana both wanted guarantees from the Confederate Salish and Kootenai Tribes that they would not call any off-reservation rights not included in the compact.

### **Compact Implementation**

*Variables: Water Quantity, Governance, Assets*

*Stakeholder Types: Local/township/county/city government, Federated state/territorial/provincial government, Sovereign state/national/provincial government, Community or organized citizens*

The other tribal compacts negotiated by the Montana Reserved Water Rights Compact Commission all called for the joint administration of water rights. Despite significantly more substantial guarantees in the Confederated Salish and Kootenai Tribes' original treaty with the U.S. than those of the state's other tribes, the state of Montana assumed that the new compact would resemble the other compacts. However, the Tribes' insisted upon the unitary management of water rights and, at the start of negotiations, exclusive administrative responsibility.

## **Water Rights**

### **Treaty of Hellgate**

On July 16, 1855, representatives of the United States government and the Salish (Flathead), Kootenai, and Upper Pend d'Orielle Indian tribes signed the Treaty of Hellgate, establishing what has come to be known as the Flathead Reservation. Approved by Congress in 1859, the Treaty of Hellgate stated that in exchange for ceding their rights to a vast region of land west of the continental divide, tribal leaders were to reserve 1.25 million acres for the Flathead Reservation, as well as additional land for the "Conditional Bitterroot Reservation," which was to be for the Tribes' "exclusive use and benefit."

The treaty also included a provision stating that the tribes maintained the right to use water that passes through some of the land they conceded. The Hellgate Treaty is the only one of the United States' treaties with Montana's native tribes that includes language providing the tribes water rights outside of their reservation. Article III of the Treaty of Hell Gate reads in part:

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gather roots and berries, and pasturing their horses and cattle upon open ad unclaimed land.(*Hellgate Treaty* 1859)

As was often the case in its treaties with native tribes, the United States government violated the spirit and letter of Hellgate within a few decades. In 1871, for example, President Grant ordered the Salish tribe to leave the Bitterroot valley and move to the Jocko Reservation (as the Flathead Reservation was originally known).(CSKT 2017) In 1891, the last of the Salish tribe in the Bitterroot Valley were forcibly removed from their reservation and relocated to the Jocko Reservation. Today, the Flathead Reservation is home to the Confederated Salish and Kootenai Tribes (“CSKT”).

### Water Rights in Montana

Montana, like many western states, adopted the “first in time, first in right” doctrine of prior appropriation to manage its water resources. Under this doctrine, a user with an earlier priority date is entitled to their full allocation of water before a junior user can utilize their allocation.

Until 1973, water rights in Montana could be claimed through a “use right” or a “filed right.” A “use right,” the more common method, was exercised when someone diverted water for a beneficial use. Water rights could also be “filed” by recording a notice of appropriation at a county courthouse. If a dispute arose, users could seek a resolution, known as a decree, from a state district court. However, most rights had no paper records, and those that did were held at individual county courthouses. As water sources span multiple counties, and as many users held rights on each source, the existing system steadily grew more difficult to track. (William Flanning and Michelle Bryan Mudd 2014)

In 1972, Montana held a constitutional convention. The resulting constitution recognized all existing water rights and called on state legislature to “establish a system of centralized records” for water rights.(Constitution n.d.) The following year, in an effort to comply with this provision, the Montana legislature passed the Water Use Act.

The Water Use Act mandated that all water rights claimed after July 1, 1973 be permitted by the state Department of Natural Resources and Conservation (“DNRC”). Moreover, the act created an adjudication process through which all existing water rights—that is, rights claimed prior to July 1, 1973—were to be reviewed and decreed by the state courts and entered into the DCRC’s comprehensive water rights database. In 1979, the state legislature created a specialized Water Court to review these claims. The Water Court was initially provided a term of 15 years, but the intensiveness of the court’s work has repeatedly required the legislature to push back its expiration date. The process of adjudicating rights existing prior to July 1, 1973 is ongoing, and the court’s current goal is to conclude its duties in 2028. (William Flanning and Michelle Bryan Mudd 2014)

While the 1979 legislation was still under consideration, both the United States Department of the Interior and the state’s native tribes expressed opposition to the prospect of having their water rights adjudicated by a state court. They argued that their water rights were federally reserved and not subject to state courts. Many in Montana’s agricultural community also opposed the use of a Water Court to determine native rights; ranchers and others were afraid

that Tribal claims would supersede their historical usages.(Stansbury 2006, 133) In response to this unified opposition, the legislature amended the draft legislation so that all federally reserved water rights, including tribal rights, were to be established in the centralized state system through negotiation and not litigation. To accomplish this, the 1979 legislation also created the Montana Reserved Water Rights Compact Commission (“the Compact Commission”), which negotiates on the state’s behalf.(Rundle 1988) The Compact Commission was also originally authorized for a limited term, but its expiration date has repeatedly been pushed back by the State Legislature.

### Federal Reserved and Aboriginal Water Rights

Federal courts have defined “aboriginal” rights as those claims that predate a reservation and are explicitly recognized in the treaty or statute that created the reservation. These rights extend from a tribes’ historic and uninterrupted use.(MRWRCC 2014) Aboriginal water rights have a priority date of “time immemorial,” defined as “time extending beyond the reach of memory, record, or tradition, indefinitely ancient, ‘ancient beyond memory or record;’ a time before legal history and beyond legal memory.” (Montan DNRC, n.d.)

A “reserved” water right is one that was set aside by the federal government for use by a native tribe. In 1908, the United States Supreme Court found in *Winters v. United States* that when the federal government sets aside land for an Indian reservation, it implicitly reserves adequate water for the tribes to fulfill their livelihoods. What has come to be known as the Winters Doctrine established that reserved rights have the same priority date as a reservation’s creation.(MRWRCC 2014) In the case of the Flathead Reservation, the priority date is understood to be July 16, 1855. Federally reserved water rights are quantified according to the amount of water necessary to satisfy a reservation (as opposed to quantification through beneficial use) and cannot be abandoned through non-use.

Given that the Flathead Reservation was not opened to homesteading until 1909, the Tribes’ on-reservation water rights are necessarily senior to all other on-reservation rights, regardless of whether they are aboriginal or reserved. It is important to note, however, that this reality was not accepted by many at the time, particularly by non-tribal residents of the reservation, local municipal governments, and Republican State Legislators.

### The Compact Process

The Compact Commission was tasked with negotiating two kinds of agreements–Tribal Compacts, such as the one that is the subject of this case study, and Federal Compacts, which cover federally owned lands, such as national parks, monuments, and wildlife refuges. Once approved by the Compact Commission, Tribal Compacts must be ratified by the Montana Legislature, the United States Congress, and the tribes themselves. Finally, as a procedural matter, the Montana Water Court must endorse the agreement and enter the rights negotiated under the agreement into the centralized system mandated by the state’s 1972 Constitution and the 1972 Water Use Act.

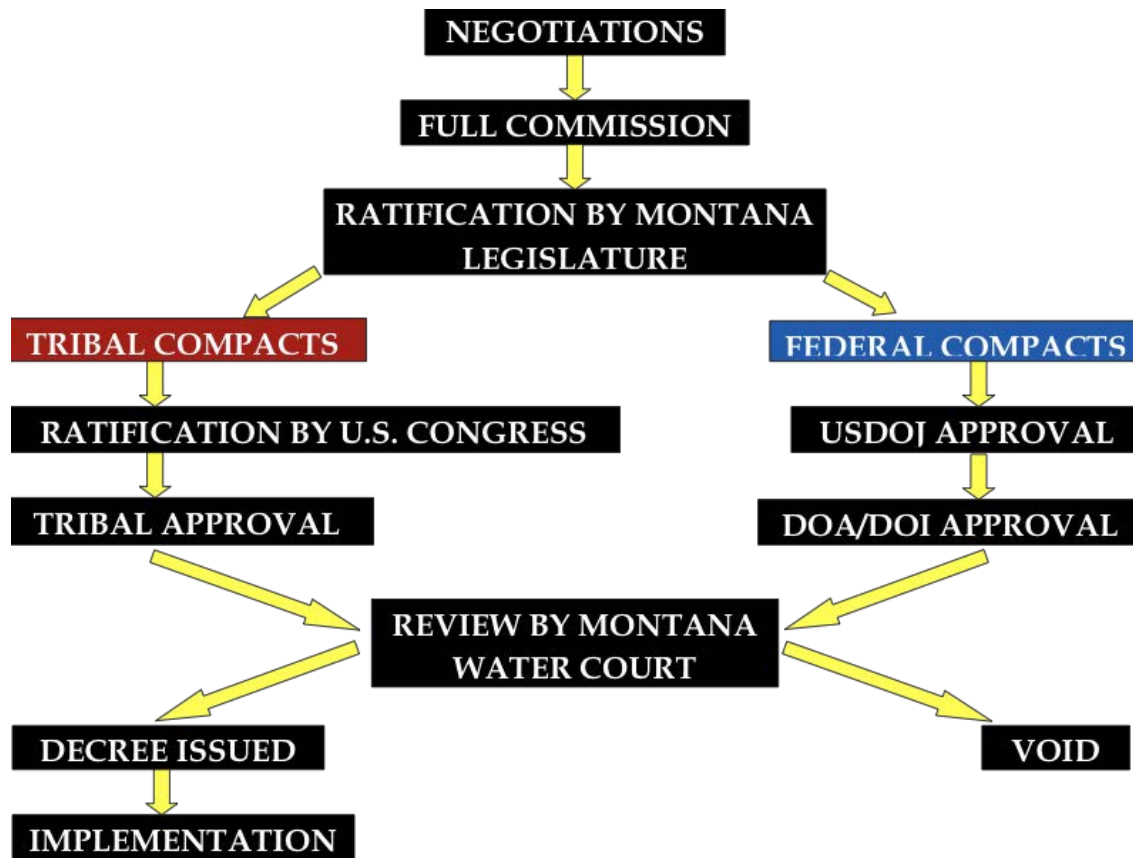


Figure 1. "Water Compact Process" (Source: Status Report for May 3, 2012, The Montana Reserved Water Rights Compact Commission)

The Compact Commission is the state's representative in negotiations over tribal and Federal compacts. The Compact Commission itself is made up of nine members appointed to four-year renewable terms. Two members each are appointed by the Speaker of the House and the President of the Senate, one is appointed by the Attorney General, and four are appointed by the Governor. The Compact Commission also has a technical staff that offer expertise on a range of environmental and policy issues.

## History

### Allotment

In 1887, the General Allotment Act, better known as the Dawes Act, subdivided native reservations into individual allotments for tribal members. The Dawes Act also opened Indian reservations to settlement by whites by legislating the sale of "surplus" land to non-native homesteaders.

In 1904, Congress passed the Flathead Allotment Act, which began the process of breaking up the Flathead Reservation by providing for the distribution and irrigation of allotments of 160 acres to Indian heads of household and 80 acres to single Indian adults. Two rounds of allotments proceeded, a tribal census was completed, and officials conducted a survey of potentially irrigable lands on the reservation. Ultimately, of the reservation's 1,245,000 acres, just 228,434 acres, including 60% of the lands deemed irrigable by the Federal Government, were secured by tribal members through allotments. (Wunder 1977, 30–31) The initial allotments



were completed in 1908, and the remaining lands were deemed “surplus.” The Flathead Allotment Act laid the foundation for the Flathead Indian Irrigation Project (“FIIP”).

Later amendments to the Flathead Allotment Act and further acts of Congress seized additional lands from the Flathead Reservation for the Bureau of Indian Affairs, town sites, churches, reservoirs, power sites, Montana schools, and a National Bison Range, among other uses. (CSKT 2017)

### The Flathead Indian Irrigation Project

In 1908, on the grounds that it would help Indian landowners transition to agriculture, Congress passed the Flathead Irrigation Act, which authorized \$50,000 for the planning and development of irrigation systems for all lands of the reservation. Functionally, the 1908 legislation had the effect of adding irrigation for white settlers to the plan enacted in the Flathead Allotment Act, which had begun the process of providing irrigation to Indian irrigators. (Garrit Voggeser 2001, 9) The Flathead Indian Irrigation Project began as a collaborative effort between the Bureau of Indian Affairs, which managed the program’s finances, and the Bureau of Reclamation, which managed the actual engineering. Ownership of the FIIP was held by the Bureau of Indian Affairs in trust of the Tribes.

Early on, the FIIP was divided into a number of geographic divisions: the Jocko Division; the Mission Division; the Pablo Division; the Post Division; the Polson Division; and the Camas Division. These districts provided comment on the FIIP but were not involved in construction or operations. While surveys began in 1907, and the program officially started in the summer of 1908, the Flathead Irrigation Project was not completed until the early-1960s. A 2001 report commissioned by the Bureau of Reclamation details the numerous reasons why the project took so long to complete:

Congress, fairly consistently, appropriated substantial sums for Flathead, but sometimes the level simply did not match the expansive amounts needed to make quick progress on the large project. Its immense size also required a considerable labor force that did not always meet with expectations. The 130,000 acres, or 150,000 depending on the source, that federal officials intended to irrigate was not extraordinarily huge, but the topographic features of the area—rugged mountains and valleys, numerous waterways diverse and size, and a large amount of natural lakes—made the project a reclamation challenge. (Garrit Voggeser 2001, 10)

Furthermore, the report continues, “the two bureaus continuously bickered about the scope of Flathead and who it was being built for—Indians or whites.” (Garrit Voggeser 2001, 10–11)

Once completed in 1963, the FIIP incorporated 110,500 irrigable acres, 1,185 miles of canals, laterals, and distribution systems, 3 pumping stations, 15 storage reservoirs, and a power plant on the Flathead Lake dam. (Garrit Voggeser 2001, 24) Today, there are over 1,300 miles of canals and over 10,000 minor structures on the FIIP, covering a drainage area approximately 8,000 square miles in size. The FIIP’s waters are drawn from dozens of sources, among them the Big Knife, Mud, Fall, Post, Crow, Dry, Mission, Finley, Valley, and Agency Creeks; the Flathead, Jocko, and Little Bitterroot Rivers; and roughly sixty other small streams. (Garrit Voggeser 2001, 2–25) Today, roughly 85 percent of the acreage served by the FIIP is non-Indian owned. And while the FIIP was originally designed for irrigation, it is now a multi-purpose resource with extensive recreation.

In 1988, in accordance with the Indian Self-Determination and Education Assistance Act, the Bureau of Indian Affairs contracted the CSKT to operate the FIIP’s power division. This



contract was renewed in 1991 for an indefinite term. Under this contract, the tribes were responsible for 1,473 miles of distribution lines, 172 miles of transmission lines, and 20 electrical substations serving 23,000 residents of the Flathead Reservation. (Garrit Voggeser 2001, 33–34)

## Context and Other Considerations

### Other Tribal Compacts

Prior to initiating negotiations with the CSKT in 2000, the Compact Commission completed numerous Federal and Tribal compacts, including agreements with the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, the Chippewa Cree Tribe of the Rocky Boy’s Indian Reservation, the Crow Indian Reservation, the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation, and the Northern Cheyenne Tribe (drafts of these agreements were complete, but some had yet to be approved by either the State Legislature or the United States Congress). The other tribal agreements were “cookie-cutter” in nature, including providing for the joint administration of water rights (with the state managing its water rights and the tribe managing its water rights). From the beginning, the CSKT refused to take this approach. (John Carter 2021)

### CSKT Water Measurement Program

In 1982, in anticipation of negotiations with the Compact Commission, the CSKT and the United States Geological Survey (“USGS”) initiated a long-term Water Measurement Program. (CIIT 2016) Over more than 30-years, the Water Measurement Program has produced an extensive, drainage-by-drainage analysis of groundwater and surface water resources on the Flathead Reservation. The CSKT recognized interjecting additional unquantified rights on the reservation would only strain resources and further complicate an already not-well-understood collection of claims. (Jordan Andrew Jimmie 2020)

As negotiations had not yet begun, the state of Montana and the Water Compact Commission were not party to Water Measurement Program. At the start of formal negotiations in 2000, the Compact Commission was not in possession of the Water Measurement Program data or any other data of equivalent quality. The fact-finding portion of the negotiations was mostly “a process of sharing data with the state to bring the state up to speed,” said longtime CSKT Staff Attorney John Carter in a recent interview. (John Carter 2021)

### Ciotti I, II, and III

In 1996, the Montana Supreme Court ruled in *Ciotti I* that the CSKT’s water rights had to be quantified before the DNRC could grant any new permits. In their ruling, the court recognized the distinction between state appropriative water rights and reserved water rights (held in trust by the Federal Government), which often predate state appropriative rights. At the time, applications for new or amended water use permits had to show that their proposed uses would not “unreasonably interfere with a planned use for which water has been reserved.” (Stansbury 2006, 145) The court determined that this burden of proof could not be met because it was not known how much water was available for further use.

During the next legislative session, the Montana Legislature responded by removing the requirement that a proposed use not interfere with the reserved right of another planned use and

replaced it with a requirement that applicants demonstrate that water is “legally available” for their use. (Stansbury 2006, 145) At the same time, however, the legislature amended the definition of an “existing water right”—which were still protected from adverse impacts from new permits—to include “federal non-Indian and Indian reserved water rights created under federal law.” (Stansbury 2006, 145) The CSKT again filed suit (*Ciotti II*), and the Supreme Court ruled that “legally available” meant “there is water available which, among other things, has not been federally reserved for Indian tribes.” (Stansbury 2006, 145–46) In other words, the Supreme Court reaffirmed its decision in *Ciotti I* that the DNRC could not meet the legal standard for approving a use permit until the Tribes’ rights were quantified.

However, a dissent filed in *Ciotti II* disclosed that because groundwater was not at issue in either of the first two cases, new groundwater uses might still be legally permissible. When, soon after, the DNRC approved an application for a new groundwater diversion for a non-Tribal use, the CSKT filed suit for a third time. In *Ciotti III*, Supreme Court affirmed that its prior decisions were applied to groundwater as well as surface water. (Stansbury 2006)

The rulings in *Ciotti I, II, and III* had a few implications for the soon-to-begin negotiations between the Compact Commission and the CSKT. The decisions gave the CSKT a significant amount of bargaining power. As municipalities and non-Indian residents of the Flathead Reservation could not apply to the state for new or amended beneficial use permits so long as the Tribes’ reserved rights remained unquantified, the potential negative impact on the state of having to litigate each of the CSKT’s claims separately was ramified. Furthermore, non-Indian permit-holders were newly frightened of not receiving sufficient water for their own uses or of losing their water rights altogether. This generated political panic among non-Indian municipal and county politicians on and in the region of the reservation.

### The Alternative to Negotiations

If a situation were to arise in which the Compact Commission could not finalize an agreement, the state and the relevant tribe would be forced to litigate each right in the Water Court—a process that would be tremendously costly for both sides and likely take many years. Both the state and the CSKT agreed from the beginning that this would be an unfortunate alternative.

From the state’s perspective, there was a valid fear that non-tribal residents of the Flathead Reservation, and of areas nearby the off-reservation rights that the tribes claimed, would be at risk of losing their state apportioned rights. As mentioned previously, most of the CSKT’s water rights have a priority date of either “time immemorial” or 1855—the latter nearly 50-years prior to Montana’s admission to the Union. And Rob McDonald, a spokesman for the CSKT told a reporter from the *Missoulian* in 2008, as the negotiations stagnated, the alternative to negotiation “would begin a monumental court case that would require all reservation residents to find some sort of legal representation” and could take 30 to 40 years. McDonald continued, “As CSKT sees it, litigation would be extremely expensive, time-consuming and provide rigid solutions for all. [...] Negotiation is the preferred tack because it offers more flexible solutions.” (Delvin n.d.)

Nevertheless, the Tribe was prepared for litigation. Said former CSKT Staff Attorney John Carter: “The tribes always knew that the compact negotiation process if done well was a better alternative to litigation. However, the data collection, the surface water modeling, and the groundwater modeling were all done in anticipation of litigation.” (John Carter 2021)

## Negotiations

### Timeline

|                              |   |
|------------------------------|---|
| <p><b>May 3, 2000</b></p>    | <p>The first session between the CSFT and the Compact Commission takes place at a tribally-owned resort in Polson, the seat of Lake County and the largest city on the Flathead Indian Reservation. The purpose of the session is to organize the negotiations. Negotiators agree to meet four times annually. CSFT, state, and Federal negotiators agree to the Tribes’ proposal to proceed with quantifying water resources on a watershed-by-watershed basis (as opposed to doing all of it at once). John Stromnes, “Long Process of Reservation Water Talks Begins,” missoulian.com, accessed April 27, 2021, <a href="https://missoulian.com/uncategorized/long-process-of-reservation-water-talks-begins/article_76e93514-97eb-56e8-b4ea-3082b522d597.html">https://missoulian.com/uncategorized/long-process-of-reservation-water-talks-begins/article_76e93514-97eb-56e8-b4ea-3082b522d597.html</a>.</p>   |
| <p><b>September 2000</b></p> | <p>The first formal negotiation session takes place between the CSKT, the Compact Commission, and the federal government. At the meeting, the CSKT negotiators surprise the Compact Commission’s negotiators with a proposal for a “unitary” system of on-reservation water rights management, in which the tribal government would administer both tribal and non-tribal rights. Their proposal calls for “a Reservation-wide Tribal water administration ordinance which guarantees due process and equal protection under a prior appropriation system to all people who use water on the Flathead Reservation.” (Stansbury 2006, 142) This kind of system was the opposite of what the other tribal compacts had produced in their compacts. As Susan Cottingham, the staff director of the Compact Commission, told a reporter from the <i>Missoulian</i>, “other state-tribal negotiations have proceeded quite differently.” After this meeting, formal negotiations are paused while the CSKT detail their proposal in writing. The CSKT submit their proposal in June 2001, and the two sides prepare for a negotiation session in early 2002. In mid-2002, asked for the State’s opinion on the tribe’s proposal, Compact Commission Chairman Chris Tweeten says, “we do not believe that the proposal would serve as an acceptable outline for a final plan.” (Jamison n.d.)</p> |
| <p><b>June 7, 2001</b></p>   | <p>On June 7, Reginald Lang’s water permit is approved by the Montana Department of Natural Resources. In 1999, Lang had applied for a beneficial use permit on land he had recently purchased on the Flathead Reservation to divert groundwater from an artesian well for a bottling plant. The permit was approved despite the apparent precedent of the <i>Ciotti</i> rulings. Eight days later, the CSKT sue Lang, the Department of Natural Resources, and three of its top officials and asks that the Supreme Court take the case and stay the permit, which it does. (Johnson n.d.)</p>   |
| <p><b>July 17, 2002</b></p>  | <p>Having determine that the process of negotiating a final agreement will take significantly longer than they initially anticipated, CSKT and the Compact Commission begin negotiating an interim agreement that will accommodate new well and groundwater permits on the Flathead Reservation for non-Indians as well as tribal members. The proposal under discussion would have created a review board to jointly approve and track new single family, community, and municipal wells. (Jamison n.d.)</p>   |

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|---------------------------|---|
| <b>September 2002</b>     | The Consolidated Charlo-Lake County Water and Sewer District’s backup well fails and the pressure in their water system drops precipitously. Because of ongoing litigation between the State and the CSKT and the lack of an interim agreement, the Charlo Water District had been unable to access money that the Legislature had appropriated for a new backup well. Charlo Water District Chairman publicly stated that he held the state and CSKT officials accountable for the crisis. (Stromnes n.d.)   |
| <b>December 6, 2002</b>   | The Montana Supreme Court ruled 5-2 in favor of the CSKT in the Reginald Lang suit. After reiterating the court’s decisions in the Ciotti cases, the majority opinion stated: “We cannot say it more clearly. The DNRC cannot process or issue beneficial water use permits on the Flathead Reservation until such time as the prior preeminent reserved water rights of the tribes have been quantified.” (Johnson n.d.)   |
| <b>September 16, 2003</b> | After a nearly year-long delay, the CSKT notified the Compact Commission that the tribes have written a draft interim water use agreement and are prepared to resume discussions. A major point of contention was the revocability of an interim agreement. Earlier in the year, the Legislature had authorized the Compact Commission to pursue an interim agreement. (Stromnes n.d.)  |
| <b>June 20, 2005</b>      | <p>The CSKT and the Compact Commission agreed to suspend discussions of an interim water use agreement for the Flathead Reservation. A draft interim agreement was presented for public review in the fall of 2004, but after a year of public comment, the Compact Commission came to two conclusions: first, that “federal legal constraints on the nature of the license were unacceptable”; and second, “that the treatment of domestic wells created too great a burden on the public.” (Interim Agreement 2006)</p> <p>Non-tribal residents in the region expressed that they felt the agreement did not adequately protect their property rights. Although construction continued to take place on the reservation. (J. S. of the Missoulian n.d.)</p> <p>The CSKT and the Compact Commission agree to return their attention to quantifying the Tribes’ water rights and to developing a permanent agreement.</p> |
| <b>January 2008</b>       | By the end of 2007, talks between the CSKT and the Compact Commission had mostly stagnated. A January 2008 meeting is canceled because of a winter storm, and both sides are staring down a July 2009 deadline, at which point the Compact Commission will dissolve. During its 2007 session, the Montana State Legislature declined to extend the commission’s deadline, and it is unclear if they will do so in their 2009 session (as they meet just once every two years). (Delvin n.d.)  |
| <b>February 8, 2008</b>   | Among the five items on the agenda for the February 8 negotiation session is a study on a new, compromise proposal, put forward by the tribe, for unitary system of on-reservation water management that is jointly administered by the CSKT, the state, and the federal government. Relatively little has been agreed upon despite eight years of on-again, off-again negotiations. (Delvin n.d.)  |

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| <b>March 2009</b>                    | During its 2009 session, the State Legislature extend the Compact Commission’s existence for another four years (until 2013), and the CSKT and Montana Governor Brian Schweitzer agree to continue negotiating through that time.  |
| <b>2011</b>                          | Early in 2011, the Bureau of Reclamation bring Edward W. Sheets, a longtime negotiation facilitator, into discussions between the Compact Commission and the CSKT. According to CSKT attorney John Carter, Ed Sheets was able to further develop a comprehensive approach to administration using unitary and conjunctive management. In Carter’s words, Sheets “avoided taking any sides on any issue, which was the perfect facilitator. Prior to the facilitation component of the negotiations, they were a little disorganized. A little bit of table pounding.” (John Carter 2021) Sheets facilitates a process by which the state, federal, and tribal negotiators can focus on “developing trust” (Carter’s words). Carter: “He was calm, persistent, and if something was just turning into a loggerhead, we moved to a different subject matter and come back to it later. And then the technical folks would get together on that issue. He really was good at deferring politically sensitive issues to the technical people to sit down independent of the politicians and lawyers to see if they [could] work out something that both sides could agree to. And not to say that they were the negotiators, but they were working with the actual data.” (John Carter 2021) |
| <b>June 20, 2012</b>                 | Dan Solomon, a legislative member of the Compact Commission, writes a column in the <i>Missoulian</i> announcing that the Commission, the CSKT, and the federal government are rapidly developing a draft compact, which they hope to have prepared in time for public review and approval during the Montana Legislature’s 2013 session. Solomon writes that a “critical objective” of the commission is to “protect state water rights from the exercise [...] of tribal water rights,” including extracting a commitment from the CSKT “not to call any valid state law-based water rights for a non-irrigation purpose, and to include protections for irrigation users outside the Flathead Indian Irrigation Project as well.” (D. Solomon n.d.)   |
| <b>October 3, 2012</b>               | The Compact Commission and the CSKT release a draft of their “Proposed Unitary Administrative and Management Ordinance” for public comment. (Delvin n.d.)  |
| <b>November 8, 2012</b>              | The Compact Commission, the CSKT, and the federal government announce that a draft compact has been finalized and will be presented to the legislature in early 2013. As required, the proposed settlement quantified the CSKT’s water rights on and off the Flathead Reservation. Also, the CSKT agreed not to call non-tribal members for any current water use other than irrigation. Furthermore, compact was to be administered by a single board (a unitary model) with five members—two appointed by the governor, two appointed by the CSKT, and one appointed by the first four. All five members would be required to live on the Flathead Reservation and meet certain professional criteria. (Delvin n.d.)   |
| <b>November 2012 – December 2012</b> | A formal public comment period begins, and the response is contentious. For example, Harley Hettick, a melon farmer in Dixon, Montana, a town on the Flathead Reservation, writes an op-ed for the <i>Missoulian</i> on November 21 expressing alarm at what the compact might mean for non-tribal farmers like himself. He notes that the maximum 1.4-acre-feet that he would receive under   |

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|                          | <p>the draft compact would be insufficient to grow his melons, even with a drip irrigation system, and that an agricultural consultant advised that he move his farm. (Harley Hettick n.d.)</p> <p>On December 14, a number of Lake County residents meet with the Ravalli County commissioners and members of the public in an attempt to muster opposition to the proposed compact. An article about the meeting noted that the residents “found a receptive ear” in the commissioners. (Backus n.d.)</p> <p>On December 16, Chris Tweeten, chairman of the Montana Reserved Water Rights Compact Commission, writes a guest column in the <i>Missoulian</i> combatting rampant misinformation. For example, he notes that at the meeting of the Ravalli County commissioners, residents asserted that the CSKT compact would give room to other Indian tribes in Montana to reopen their compacts and claim water outside of their reservations. Tweeten writes, “This is simply false. No other Montana tribe has the language in its treaty with the United States that exists in the Hellgate Treaty regarding the retention of the right to fish in usual and accustomed locations.” (Tweeten n.d.) Tweeten continues: “The folks who are asserting that the compact will lead to decades of litigation really have it backward. Without a compact, the tribes’ claims for water rights will be litigated for years, perhaps decades. The compact opponents who show up at the Ravalli County Commission meeting last week are certainly entitled to their own opinions about the compact. Fortunately, they are not entitled to their own facts. (Tweeten n.d.)</p> |
| <b>January 23, 2013</b>  | <p>The Flathead Joint Board of Control (FJBC), a fee-based organization that represents irrigators in the Flathead, Mission, and Jocko water districts that use water from the Flathead Indian Irrigation Project, votes 7-4 to recommend that its 1,500 members support the Flathead Indian Irrigation Project Water Use Agreement (and the compact, of which the Water Use Agreement is a part.) Many irrigators remain opposed to the compact. (Delvin n.d.)</p>   |
| <b>February 15, 2013</b> | <p>In a case filed by a coalition of non-tribal users of water from the Flathead Indian Irrigation Project, Judge C.B. McNeil of Montana’s Twentieth District Court enjoins the Flathead Joint Board of Control from entering the compact, finding that doing so would constitute a taking of private property without just compensation under Montana constitution. (C.B. McNeill 2013)</p>  |
| <b>February 26, 2013</b> | <p>The Compact Commission officially votes to send the draft compact to the Legislature for consideration. The agreement with the Flathead Joint Board of Control, which is an important piece of the overall compact, remains under a cloud of litigation. (Vince Delvin n.d.)</p>   |
| <b>February 27, 2013</b> | <p>One day after the CSKT ask the Montana Supreme Court to take “supervisory control” of the Flathead Board of Control Case, the court stays further proceedings and gives the state and the parties in the lawsuit until March 14 to comment on the tribes’ request. (Dennison n.d.)</p>   |
| <b>March 8, 2013</b>     | <p>In his biennial State of the Indian Nations address, given to a joint session of the Montana House and Senate, CSKT chairman Joe Durglo urges the legislature to pass the compact. “There are forces that wish to tie up the western Montana</p>   |

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|                       | economy with unnecessary court battles that will drag down all of our businesses. [...] We are in danger of allowing our differences to define us when we should be using our differences to make us stronger,” Durglo tells legislators. (C.B. McNeill 2013)  |
| <b>March 22, 2013</b> | The compact’ would-be sponsor, State Representative Dan Salomon, a Republican from Ronan, Montana (a town on the Flathead Reservation), acknowledges that the compact does not have sufficient support to pass during the 2013 legislative session. Rather than introduce the compact, Salomon says he will introduce a year-year legislative study of the compact. (The legislature’s next session will be in early 2015.) (Dennison n.d.)  |
| <b>March 23, 2013</b> | Representative Kathleen Williams introduces the compact as House Bill 629. It is referred to the House Judiciary Committee. Representative Salomon, who was expected to introduce the compact, does not join the effort. At the same time, a bill sponsored by Senator Verdell Jackson to extend the Compact Commission’s legal authority for two additional years in case the CSKT agreement needs to be renegotiated receives a hearing in front of the House Natural Resources Committee. (Dennison n.d.)   |
| <b>April 2, 2013</b>  | Representatives Salomon and Williams’ bills die in committee, where they face significant criticism from their Republican colleagues. Expressing disappointment, Representative Salomon later tells the <i>Missoulian</i> that if the CSKT are forced to pursue quantification of their water rights in court, they will likely secure far in excess of what they agreed to in the compact. “They had done a good job of documenting the traditional and ancestral places where they fished. [...] If they go to court, they’re going to go for Yellowstone and Musselshell and why wouldn’t they?” he says. (Haake n.d.)<br><br>On the same day, the Montana Supreme Court vacate Judge McNeill’s decision and says it will issue an opinion at a later date. (Dennison n.d.) |
| <b>May 3, 2013</b>    | Montana Governor Steve Bullock vetoes Senator Jackson’s bill (recently passed) to extend the life of the Compact Commission for two additional years. The Governor notes that the compact was negotiated in good faith and that both sides have made concessions; that the agreement is a reasonable settlement given the alternative (litigation); that there is no reason to think the CSKT would agree to reopening negotiations; and that even without the Compact Commission, the state and the tribes can mutually agree to further negotiations. (Steve Bullock 2013)   |
| <b>May 8, 2013</b>    | Opponents of the CSKT compact win additional seats on the Flathead Joint Board of Control. The board’s chairman of 24 years, who supported the compact, loses his seat. (Vince Delvin n.d.)  |
| <b>July 31, 2013</b>  | A group called Concerned Citizens of Western Montana, and a number of Republican state legislators, release an alternative compact, which the CSKT had no part in drafting. Compact Commission Chairman Chris Tweeten tells the <i>Missoulian</i> : “It is inconsistent with the whole concept of a compact that one party put something together without even talking to the other parties. It has no footing in any reality of what happens in compact negotiations. The most you  |



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|                          | can say is this constitutes a vision for settlement held by a couple of state legislators. (Vince Delvin n.d.)  |
| <b>December 12, 2013</b> | Divided over the Water Use Agreement, the Flathead Joint Board of Control dissolves, throwing the status of the Water Use agreement into question. (FJBC 2014)  |
| <b>May 13, 2014</b>      | Governor Steve Bullock states that he will reopen limited negotiations with the CSKT in the hopes of having a revised compact ready to present during the 2015 legislative session. The limited negotiations will mostly focus on revising the FIIP Water Use Agreement, which was deemed invalid because of the Flathead Joint Board of Control’s dissolution. (AP n.d.; CSKT 2015)  |
| <b>December 11, 2014</b> | The CSKT, Montana Governor Steve Bullock, and Attorney General Tim Fox announce that they have reached a revised compact. The new draft includes changes to the Flathead Indian Irrigation Project waters will be shared and managed, including additional provisions protecting the irrigation use of non-tribal members, as well as \$30 million for water pumping in dry years. Critics, such as Senator Verdell Jackson, continue to contend that the compact does not do enough to protect Montana residents from the tribes’ off-reservation water rights. However, a newly formed organization calling itself the Farmers and Ranchers of Montana comes out in support of the agreement. (Chaney n.d.)   |
| <b>April 16, 2015</b>    | The Montana Legislature narrowly passes the CSKT water compact (53 Y–47 N). (Montana Legislature n.d.)  |
| <b>April 24, 2015</b>    | Governor Steve Bullock signs the CSKT Compact into law. (Steve Bullock n.d.)  |
| <b>May 26, 2016</b>      | Montana Senator John Tester (D) formally introduces the Confederated Salish and Kootenai Tribes Water Compact in the United States Senate. (John Tester n.d.) The compact quickly stalls, lacking bipartisan support.   |
| <b>November 10, 2017</b> | The Montana Supreme Court upholds the CSKT Water Compact, vacating a 2016 district court ruling that a portion of the compact required a two-thirds majority approval in the state legislature. (Tristan Scott 2017)  |
| <b>July 2018</b>         | In anticipation of the potentiality that the compact fails, the CSKT and the U.S. Department of Justice have been filing claims of water rights in the Montana Water Court. As of July 2018, they have filed 10,109 claims. These claims are “placeholders,” stayed before the court so long as the draft compact remains before the United States Congress. Among the claims are: 1,720 on-Reservation water claims, 1,094 off-Reservation instream water claims (all with time immemorial priority dates), and 7,295 federal claims in trust of the CSKT (including duplicates of the 1,094 off-Reservation claims). The off-reservation claims are in 51 of the 85 basins that have already been adjudicated by the Montana Water Court. (Montana DNRC 2019)<br><br>For comparison, the compact grants the CSKT just 211 on-reservation water rights, 10 off-reservation rights, and coownership of 87 instream flow, in-lake, and storage rights held by the Montana Department of Fish, Wildlife & Parks (in exchange for which the CSKT would drop its other claims). |
| <b>November 21, 2019</b> | The Trump administration comes out in support of the compact. “I think that this is a kind of complicated problem that needs to be resolved, because a lot of   |

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|                          | economic decisions are pending,” says Attorney General William Barr. “People should not assume that they’re going to end up with a better deal [through litigation].” (Adams 2019a)                                 |
| <b>December 10, 2019</b> | Montana Senators Daines (D) and Tester (R) reintroduce the compact. (Adams 2019b)   |
| <b>July 29, 2020</b>     | The CSKT compact passes out of the Senate Indian Affairs Committee.(Indian Affairs 2020)  |
| <b>December 21, 2020</b> | Congress passes the CSKT compact, formally known as the Montana Water Rights Protection Act, as part of the omnibus Covid-19 stimulus bill. (Mabie n.d.) President Trump signs the bill into law December 27, 2020. |
| <b>December 29, 2020</b> | The CSKT Tribal Council formally ratifies the compact via Zoom. (Tribal Council n.d.) Review by the Montana Water Court is forthcoming.   |

### Water Court Review

The Montana Water Court is expected to take up review of the CSKT Compact in the near future. Five of the six tribal compacts that the Compact Commission has negotiated have been positively decreed by the Water Court without revision. However, the CSKT Compact is expected to face significant opposition from some politicians and non-Tribal water-users opposition during this review. As such, it remains possible that the Tribes will be forced to litigate their claims.

### Final Compact\*

#### Existing Uses

Under the compact, the CSKT and the United States agree to relinquish their rights to utilize Tribal water rights to call non-irrigation, state-law based uses and groundwater uses under 100 gallons per minute. They also agree not to call water rights upstream of the Flathead Reservation, except for irrigation rights from a few key sources. Also, the compact protects valid existing uses as permitted by the DNRC or decreed by the Water Court, including domestic and stock uses of groundwater that are generally exempt from such approval processes.

#### Funding

The State of Montana agreed to fund roughly \$50 million in water measurement activities, irrigation improvements, mitigation fees for the loss of water during deliveries, annual payments to offset pumping costs, and habitat enhancement. The CSKT will also receive \$1.9 billion operations and rehabilitation funding from a settlement with the federal government.

#### CSKT On-Reservation Water Rights

CSKT Compact quantifies the Tribes’ aboriginal and reserved water rights, including: FIIP rights; instream flow rights; the rights of tribal members and allottees; the rights for wetlands, high mountain lakes, and the Boulder and Hellroaring hydroelectric projects; the rights for Flathead Lake; and the rights to minimum pool elevations on FIIP reservoirs. The final agreement also includes stipulations on the relationships between the Tribes instream flow rights and the diversion allowances for the FIIP.

## Flathead System Compact Water

In a detailed schedule, the compact provides the Tribes with rights to 229,383 acre-feet per year diverted, and 128,158 acre-feet consumed, from the Flathead River, Flathead Lake, and the south Fork of the flathead River, including the Hungry horse Reservoir. The compact also identifies some alternative routes for the State to apportion this quantity of water to the Tribes depending on the water depletion from other uses. The Tribes maintain a right to lease their rights within the State of Montana.

## The Flathead Indian Irrigation Project

Through the FIIP Water Use Agreement, the compact recognizes that the FIIP water rights are held by the United States in trust of the Tribes. However, the FIIP Water Use Agreement also includes binding provisions that protect non-Tribal irrigation deliveries from call by the Tribes' senior, "time-immemorial" instream flow rights.

The FIIP agreement provides for delayed implementation while improvements to the FIIP are made and conservation efforts are implemented. In the meantime, it details "River Diversion Allowances" for the FIIP Operator to allocate to farms with existing and historic uses (also known as Historic Farm Deliveries), while providing for adjustments in delivery quantities based on variability in the water supply. In the long term, the FIIP Water use agreement provides for a Farm Turnout Allowance for all FIIP irrigators and a Measured Water Use Allowance to ensure that irrigators who demonstrate a need can obtain additional water.

"The FIIPs water rights were the biggest issue individually, just because there are so many different interests there and so much history. That was the biggest hurdle, and to acquire title to those water rights in the name of the Tribe was, I thought, no small accomplishment," said Carter. (John Carter 2021)

## Land Acquired by the Tribes

If the Tribes acquire land on the Flathead Reservation, it also owns those associated rights decreed by the Water Court or permitted by the DNRC.

## CSKT Off-Reservation Water Rights

Tribes agreed to relinquish roughly 97% of their off-reservation claims, therein protecting junior, non-tribal, state law-based claims. In addition to off-reservation water rights on the Kootenai River, the Swan River, the Lower Clark Fork River, and five small tributaries, the CSKT received co-ownership of a small number of additional rights formerly held in full by Montana Fish, Wildlife, and Parks (MFWP).

The State played an essential role in making this compromise. "Early on in the hardcore negotiations, the State said, 'please hold your off-reservation claim proposals until we come with something. And what they come up I thought was fairly inspired,'" said John Carter (John Carter 2021). The State offered the Tribes co-ownership of claims that it already owned; in exchange, the Tribes agreed never to call most of its off-reservation claims. Through this exchange the State facilitated the Tribes' continued access to off-reservation waters while guaranteeing in perpetuity the claims of junior water users across western Montana.

## Administration

The CSKT Compact creates a system of joint and unitary management for the administration of existing uses and the permitting of new uses on the Flathead Reservation. The Water Management Board will have five voting members: two selected by the Governor on recommendations from county commissioners of the four on-reservation counties; two appointed by the Tribal Council; and one appointed by the other four members. The Department of the Interior will appoint one additional, non-voting member.

Unitary management was “the bottom line for the tribe. If [the compact] didn’t include that it wasn’t going to work,” said Carter. (John Carter 2021) The Tribes raised this idea in the first negotiations session precisely because, more than any individual water claim, they wanted sovereignty. The CSKT got unitary management, though they ultimately did agree that to joint rather than sole administration.

\*(85-20-1901, n.d.; 85-20-1902, n.d.; CSKT 2015)

## Discussion

The compact between the Confederated Salish and Kootenai Tribes and the State of Montana clearly defines the Tribes’ water rights for the first time since the Flathead Reservation’s creation in 1855 and offers non-Tribal water users across western Montana unprecedented assurances that their claims are secure from call by the Tribes’ senior rights. No constituent got everything they felt they were legally entitled to; all constituents got more than another party felt they had a legal right to. And despite a variety of setbacks, both during negotiations and after an agreement had been reached, the final compact is written to be durable.

## Opposition

Two related stakeholder groups remained opposed to, or divided on, the final compact: conservative county and state elected officials from the Flathead Reservation and the surrounding regions, as well as some non-Tribal irrigators on the reservation. While some of these antagonists have specific grievances (generally pertaining to the amount of water they would be allocated from the FIIP), many others are generally opposed to the legal rights of the Flathead Reservation.

For instance, the Lake County Commissioners opposed the compact while it was being negotiated and continue to oppose it now that it is complete. Roughly two-thirds of Lake County is in the Flathead Reservation, and the vast majority of the Flathead Reservation lies in Lake County (though small portions of the reservation also lie in Flathead, Missoula, and Sanders Counties). Over the years, County Commissioners Gale Decker, Bill Barron, and Dave Stipe have expressed numerous grievances with the CSKT Compact: that it was negotiated in secret; that it relies on an unfounded reading of the Treaty of Hellgate; that the purpose of the \$1.9 billion federal settlement is vague; that the CSKT will distribute portions of the settlement directly to tribal members regardless of its stated purpose (there would be no legal basis for such payments, but there is no reason to think the Tribes would ever do such a thing); that the labor influx needed to do make major repairs to the FIIP will lead to an increase in cartel-related drugs and crime, and so on. (Gale 2020; Azure n.d.)

Taking a step back, there exists a larger antagonism between some of the region’s white residents and political groups and their Indian neighbors. Although Lake County’s technical

experts regularly work with the CSKT's technical experts, the Lake County Commissioners have consistently shown an unwillingness to work with Tribal leaders. Regardless of the issue at hand, those parties adverse to the Flathead Tribes' interests have long tried to pretend that the rights bestowed to the Tribes by the Treaty of Hellgate and the litigation that emanated from it do not exist or are based on misinterpretations of the U.S. and Montana constitutions (despite repeated assertions from the State and U.S Supreme Courts that these rights are sound).

### Water Diplomacy Framework

With regards to the Water Diplomacy framework, there are four key takeaways from the CSKT–Montana compact worth detailing further. First, information asymmetries are an impediment early on in negotiations. Water measurement should be jointly undertaken (or, at a minimum, observed). Second, impartial facilitators are essential and should be utilized even before negotiations begin. Third, when politics are bound to get in the way of an agreement's approval, it is better to include skeptical parties than to build a wall around negotiators. For example, state Representatives and Senators, and major irrigators, could have been educated on the issues throughout negotiations, or, at the very least, prior to the agreement's public release. And fourth, adaptive governance necessitates shared control.

### Information Asymmetry

An information asymmetry was an impediment early in the CSKT negotiations. The CSKT Water Measurement Program, undertaken by the Tribes and the USGS, resulted in the most comprehensive dataset in existence of the Flathead Reservation's groundwater and surface water resources—a dataset to which the State of Montana was not privy until negotiations began. This resulted in a “fact finding” process that mostly took the form of one party educating the other party.

The Water Measurement Program was initiated in 1982, by which time the Compact Commission was a burgeoning entity whose scope of work was understood. The CSKT and the Federal Government knew that they would have to negotiate with the Compact Commission, which is part of why measurement program was created in the first place. As early as 1985, the Compact Commission and the CSKT had tentative discussions about their forthcoming negotiations. And yet, neither the Compact Commission nor the DNRC, nor any other state entity, was included in the Water Measurement Program. The reason for this is simple: The Tribes were preparing to litigate their claims. They were unsure if negotiations would succeed.

In the context of the Water Diplomacy framework, it is apparent that this asymmetry set negotiations back by 1) adding to the general environment of mistrust, and 2) creating a years-long imbalance that impeded negotiations from progressing. While it is true that the Compact Commission was busy negotiating other agreements throughout the 1980s and 1990s (in part, it seems, because they knew the CSKT agreement would be far more complex than the other agreements), an invitation from the CSKT and the USGS for the State of Montana to participate in or observe the Water Measurement Program would have carried a lot of legitimacy.

### Facilitators

After years of fits and starts, Edward W. Sheets played an important role in moving the CSKT negotiations forward. As Islam and Susskind write, neutral facilitators can play several important roles:

- Develop discussion protocols to clarify the agenda.
- Remind the parties of the procedural commitments they have made.
- Keep parties on track and nudge the discussions if they become bogged down.
- Help parties shift from hard bargaining to value creation.
- Work with the group to propose and revise the agenda for each meeting.
- Enforce the ground rules. Parties often agree but then come unprepared, or lose track of the group's objectives.
- Make sure that the parties own the design of the process.

(Shafiqul Islam and Lawrence Susskind 2013, 144)

It is not difficult to imagine that if Sheets had been hired earlier on in negotiations—and ideally even before negotiations began—the process of building trust, making trade-offs, and finding point of mutual gain may have proceeded more smoothly and quickly.

### **Known Opposition**

From the beginning of the negotiations, it was clear that non-CSKT on-reservation irrigators and other major water users throughout western Montana were going to be opposed to any compact to which the Tribes might reasonably agree. That this opposition would translate to opposition in the State Legislature was foreseeable. Although the state was represented by the Compact Commission and legislators were not independently party to the agreement, the State Legislature's support was essential to the process' resolution.

As the journey of state Senator Chas Vincent between 2013 and 2015 demonstrates, a part of this opposition was rooted in legislators not understand the details of the compact or the issues that had been negotiated. In 2013, Vincent played an important role in killing the compact; in 2015, when the compact ultimately passed, Vincent was one of its sponsors. When Governor Bullock signed the bill, Vincent “was praised for his willingness to dive into the details of the contentious compact, learn what it contained and help convince enough of his fellow Republican lawmakers that the changes made had produced an agreement in the best interests of Montanans.” At the same time, CSKT Chairman Vernon Finley identified Vincent as “the one who worked hard to make sure it didn't pass last time, and carried it through this time.” (Delvin 2015)

Between 2013 and 2015, the parties made minor adjustments to the compact to make it more agreeable to Vincent and other Republican legislators. More importantly, however, they educated him water issues. The CSKT compact is hundreds of pages long and immensely technical. It is likely that even legislators who supported the 2013 draft did not fully understands its technical details. In a sense, Vincent was responding to another information asymmetry. By bringing Vincent into the process, the Compact Commission and the CSKT leveled the information playing field. “All stakeholders need to be involved at every decision-making step,” write Islam and Susskind. (Shafiqul Islam and Lawrence Susskind 2013, 15).

### **Adaptive Governance**

The CSKT–Montana compact shows that adaptive governance necessitates shared control. The compact's administration structure is planned to adapt on-reservation water deliveries to unforeseen circumstances. Islam and Susskind write, “Effective management of complex water systems requires an approach that takes advantages of the unexpected and assumes an adaptive learning orientation.” (Shafiqul Islam and Lawrence Susskind 2013, 16)

Most importantly, the joint, unitary system to which the two sides ultimately agreed will have legitimacy with CSKT members and nonmembers alike.

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Spring 2021

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