

# Angry Waters

*In the West, one truism never changes: whiskey is for drinking, water is for fighting.*

*Words and photos by Dave Skinner.*

**A**ll westerners know water issues, taken alone, are volatile. Most westerners know that Indian-white relationships can be, um, toxic. Combining the two can be radioactive. Add in white-guy bureaucratic bad faith with race-gaming politicians of any color? Try thermonuclear. And on the Flathead Indian Reservation in western Montana, things are beginning to glow.

Montana came late to the water party, starting formal statewide rights adjudication only in 1973. In 1979, the Montana Reserved Water Rights Compact Commission (MRWRCC) was created, tasked with negotiating “the equitable division and appor-

tionment of waters” between the “state and its people” and federal reserved interests.

These federal interests break into two main parts: First, reservations of water for the purposes of parks, national forests, military installations and wildlife refuges; and in trusteeship for Indian tribes, reserved water rights sufficient for the purposes for which the Indian reservation was set aside.

After 34 years, MRWRCC has successfully negotiated 17 of the necessary compacts for various federal land-management agencies and six of seven of Montana’s Indian reservations. One remains, concerning the reserved water rights for the Confederated Salish-Kootenai Tribes (CSKT) of the Flat-

head Reservation. Negotiations officially ended in December 2012, with the result—all 1,400 pages of compact plus water abstracts—presented to the 2013 Montana Legislature for approval.

Then, the deal blew up in everyone’s face—get ready for the fallout.

## **A Short History**

The Flathead Reservation was established in 1855 by the six-page Hellgate Treaty, one of about a dozen “Stevens Treaties” negotiated by Washington Territory Gov. Isaac Stevens in a two-year flurry. The Pend O’Reille, Salish and Kootenai ceded 12 million acres of western Montana drained by the Clark Fork and



*More than almost anywhere in Montana, the Flathead Reservation has been shaped by water, first by the epic, cyclic floods of Ice Age Lake Missoula, and then by irrigation. On the far west side of the reservation is one of Montana’s best-kept secrets, the Hot Springs Valley. Only about half the valley can be irrigated by the Little Bitterroot River, a glorified creek most of the year. This is Lone Pine Reservoir, a gem made even neater when one considers this place lay 500 feet underwater 10,000 years ago.*

Kootenai rivers for a 1.3-million-acre reservation roughly between Flathead Lake and Missoula—plus \$120,000 on the easy-pay plan, a penny per acre.

In 1904, Congress approved the Flathead Allotment Act, sponsored by U.S. Sen. Joseph Dixon of Montana and approved by Congress the same year. It gave tribal members first choice of 80- and 160-acre parcels and established the National Bison Range on reservation lands. In 1910, the entire reservation was opened to non-Indian (read: white) homesteaders, on parcels from 40 to 160 acres.

The lure for white settlers was irrigation, provided by the Flathead Irrigation Project (FIP) and authorized by the Flathead Allotment Act. Without irrigation, the rich glacial dirt of the reservation grows little more than ponderosa pine, sagebrush, camas and a bit of grass. Irrigation utterly transformed the Flathead Reservation, but not just in terms of agriculture. The culture transformed, too. Out of 1.3 million original acres, by 1930 half the reservation belonged to non-Indians. Today, after decades of buybacks, 63 percent of reservation land is Indian owned, either fee or trust.

The 2010 U.S. Census reported that of a total population of 28,359, only 7,042 Indians reside on the reservation. And of the richest land, the 130,000 acres wetted by FIP, tribal members own only 10 percent; non-Indians own 90 percent. So, it's not a surprise to learn that Tribal Lands Department official documents read, "The Flathead Allotment was enacted which began the allotting and theft of lands of our homeland."

As with most if not all Indian treaties negotiated in the presettlement days by white easterners raised on riparian water doctrine, the Hellgate Treaty ignores water rights—more a sign of cluelessness than larceny—akin to the 160-acre Homestead Act.

After a century and a half of legal precedent known generally as "Winters doctrine," Indian treaty water rights are well-supported, along with other rights affirming sovereign Indian control on Indian reservations not only of water but other resources thereon—land, minerals, forests, farms, wildlife, all under Indian control for Indian benefit.

Specific to the Pacific Northwest are Stevens Treaty rights, which through litigation in the 1970s known as the "Boldt decision" expanded tribal rights to water and wildlife outside reservation boundaries, and further made certain rights senior and supe-

rior to all others. In addition, the Klamath tribes won the "Adair" case in 1983, which established treaty rights to wildlife and the water right to sustain same with a priority date of "time immemorial"—at least within jurisdiction of the 9th U.S. Circuit Court of Appeals.

### Savvy Negotiators

The CSKT have earned a reputation for being, as St. Ignatius rancher and irrigator Bill Slack puts it, "the most forward-looking, strategic-thinking of all Indian tribes in Montana." CSKT's forest management program is well-run, CSKT's businesses are known for their ability to sign and fulfill Indian-preference government contracts, and Salish-Kootenai College is one of the Northwest's best Indian colleges.

One forward-looking tribal goal is found in the tribal council's mission statement adopted in 1996: "[A] completely self-sufficient society and economy." Toward that goal, the council promised to "strive to regain ownership and control of all lands within our reservation boundaries."

With good lawyers, determination and legal precedent, the CSKT have sought and won "ownership and control" of many Flathead Reservation assets. On Flathead Lake, half of which rests within Flathead Reservation boundaries, CSKT shares management of the lake fishery with Montana Fish, Wildlife & Parks. The CSKT have also assumed management of the National Bison Range from U.S. Fish & Wildlife Service.

Then there is 205-foot, 195-megawatt Kerr Dam, completed in 1937 on the Flathead River within the reservation. Kerr Dam is the heart of the Flathead Irrigation Project, enabling storage of irrigation waters in Flat-



Retired from Boeing, Jerry Laskody thought running a few Red Angus cows would be a fun way to stay busy. "I wouldn't wish this kind of fight on anybody. It pits neighbors against neighbors."

head Lake and pumping of same (at favorably low cost) to a high elevation at Pablo Reservoir for gravity flow to the FIP canal system.

During the Federal Energy Regulatory Commission relicensing process in 1987 (mandated to occur every 50 years), the tribe asserted its strong treaty rights to make changes to dam operations (to favor wildlife) and a doubling of dam-site rental payments to CSKT. Furthermore, CSKT took over day-to-day control of operations and maintenance of the renamed Flathead *Indian* Irrigation Project (FIIP) in 1989, and negotiated an option to buy Kerr Dam from current owner Pennsylvania Power and Light after fall 2015—although PPL and the tribes are tens of millions apart on the price.

Off-reservation, CSKT has successfully asserted treaty rights on the Superfund-afflicted Clark Fork River and Silver Bow Creeks between Butte and Missoula. The tribe recovered \$18.3 million of tailings remediation damages, \$13.5 million going to buy back land within Flathead Reservation





*Below Kerr Dam, the Flathead River runs high and cold with spring runoff on its way to join the Clark Fork. To the far east are the Mission Mountains, while Round Butte, rear left, stands in the western part of the main Mission Valley. The facing bank gives an idea of how much rich glacial silt was left behind by Lake Missoula in the last ice age, and how high all that fertile ground sits above the water that makes it all work.*



*In 1967, Bill Slack moved to Montana from southern Utah “for green grass and water. I had no interest in getting into a water fight. I was told there was lots of opportunity here, and I was assured the Flathead was an open reservation—so I came up.”*

boundaries, as well as an enforceable 2,000 cfs (cubic feet per second) water right formerly assigned to the now-removed Milltown Dam at Missoula.

### **Let's (Not) Make A Deal**

Regarding reserved water rights, the CSKT have been firm, even aggressive in negotiation with the state of Montana. In fact, for CSKT the compact process began with litigation in 1979, filed by the U.S. government on behalf of the tribes only months after the MRWRCC was created.

That litigation was stayed in 1983, enabling CSKT to focus on other matters, such as Kerr Dam, bison range and FIIP control, as well as wait upon and study the outcomes of reserved water-rights disputes concerning other tribes. Not until 2005, after Democratic Gov. Brian Schweitzer was elected, did regular compact negotiations commence, conducted under an already extended statutory termination date for the MRWRCC of June 2013. Finally, in spring 2012, an incomplete draft



compact was released.

Like many irrigators, Jerry Laskody of St. Ignatius was irked by the timing: “Why not winter? Spring is our busy time, not the best for meetings or studying water abstracts.” Nonetheless, the incomplete draft made clear massive changes in the control of water rights both on and off the Flathead Reservation were proposed.

### Door Number One

First, on the reservation, a “tribal water right” with a priority date of 1855 and instream flow rights with “time immemorial” would be formalized along with \$55 million in state “settlement” funding as a share of a final federal settlement expected to be north of \$700 million and possibly double.

Second, FIIP irrigators would see their “water rights arising under state law” effectively suspended, replaced with a “farm turnout allowance (FTA)” limited to an average of 1.4 acre-feet. State water rights above the FTA would be subject to call as well as post-compact adjudication, possibly termination.

Laskody set about helping to found the Western Montana Water Users Association, which opposes the compact. He explains: “I’m an engineer, and I’ve studied my water use closely. Moving pipe is work. I simply cannot do what I need to do on the farm turnout allowance. I need 25 or 26 inches minimum, and the FTA only allows 16.8 inches. I’m on till soils here, but for some of the irrigators at Moeise, Charlo, and Dixon with their sandy soils and six-month growing season, FTA is even worse.”

Hydrologist Catherine “Kate” Vandermoer, Ph.D., began her career as tribal water engineer for the Wind River Reservation, then moved on to other agencies, including the National Marine Fisheries Service. Now consulting with the Western Montana Water Users and allied interests, Vandermoer feels that “turning a water right into a right to receive water [FTA] may or may not be enforceable” legally. Hydrologically, the across-the-board FTA amount per acre “is completely arbitrary.”

Steve Killorn, who ranches organic bison near St. Ignatius, asks: “Let me get this straight. I’ve been paying Lake County property taxes on my water rights all my life, and now those rights aren’t my property?”

Third, compact administration would fall under a Water Management Board comprised of two tribal representatives appoint-



*State Rep. Dan Salomon of Pablo was appointed to the Montana Reserved Water Rights Compact Commission by then Montana House Speaker Mike Milburn “two years ago to the day. When the speaker asks, you accept...but I had no clue what I was getting into.” When asked today if he’d do it again, Salomon pauses. “Probably.”*

ed by the tribal council, two appointed by the governor upon “consultation” with state water rights’ owners, and a chair picked by either the other appointees or Montana’s attorney general. WMB members must reside within the reservation and have cer-

empowered with enforcing such rights on behalf of CSKT. All off-reservation irrigation rights over 100 gallons per minute “hydrologically connected” to surface waters would be subject to call, although domestic water rights would not.

tain skills.

Laskody and several others point out that while CSKT will appoint 40 percent of the board outright, tribal members own only 10 percent of FIIP irrigated land: “We’d be subject to a politically appointed board with no direct election by, or accountability to, irrigators.”

### Door Number Two

Off-reservation, a slew of “time immemorial” instream-flow water rights would be imposed upon hundreds of miles of rivers draining 11 Montana counties across 12 million acres, an unprecedented arrangement contained in no other Montana tribal compact. These rights, totaling tens of millions of acre-feet, would be jointly held by CSKT with Montana Fish, Wildlife & Parks and/or the U.S. Department of Interior, the latter entities

## Under the Surface

During RANGE interviews, one unfamiliar name was mentioned over and over: Jay Weiner, actually Jeremiah D. Weiner, a Massachusetts native and U.C. Berkeley law school graduate. Since 2004, he has worked as a staff attorney for MRWRCC. But with the reserved water rights process expected to end with the CSKT compact, Weiner needed a new job. So in February he applied to replace retiring C. Bruce Loble as chief water judge, in charge of water rights adjudication for Montana.

Oh, but it gets better. In 2003, Weiner had joined Rosette, LLP, an Indian-owned law firm specializing in tribal legal matters, primarily gaming. As Weiner’s water judge application indicated, he continued to work at Rosette concurrent with his state work until January 2012, when at “that time I was representing the Havasupai of Arizona in their efforts to quantify their federal reserved water rights.”

Was any of this reported in any Montana newspaper? Of course not, but somehow about 50 public comment letters regarding Weiner made their way to the judicial nomination commission. At least 45 were in opposition, with only three letters in support, all from Weiner’s water rights co-workers.

One letter against Weiner’s candidacy stands out, from Sen. Debby Barrett (R-Dillon). As the Montana Senate’s Republican selectee to MRWRCC, and Dan Salomon’s counterpart, Barrett wrote Montana Chief Justice Mike McGrath that she’d “had a lengthy opportunity to observe Jay Weiner in a professional role. Please be advised I have serious reservations over Mr. Weiner’s ability to properly serve” as chief water judge. On May 1, McGrath appointed the other guy, William R. McElyea.—*Dave Skinner*

“Nobody knows which rights might be called, or how often,” warns Sen. Verdell Jackson (R-Kalispell). But Jackson’s larger concern is 90,000 acre-feet of previously unallocated water stored in Hungry Horse Reservoir, upstream of Flathead Lake on the South Fork of the Flathead River.

Several years prior, Jackson had found himself battling power utility Avista’s attempt to close the entire Clark Fork Basin to new water uses. Out of that fiasco (trust us, it was), Jackson wrangled the establishment of the legislative Water Policy Interim Committee and funded studies of Clark Fork Basin water use. From the studies, it was learned that 100,000 acre-feet of stored water in Hungry Horse Reservoir remained potentially available for new users in western Montana. But the CSKT compact proposal would give 90,000 acre-feet of that to the tribes to lease away for new uses, or not lease at all. Jackson warns, “Either the tribes or the federal government will be able to stop any future water development in this basin.”

### The Impossible Job

State Republican Rep. Dan Salomon has spent his entire life on the family operation overlooking the tribal headquarters town of



*The Mission Irrigation District waters this prosperous-looking patch from Mission Creek, named for the Catholic mission at St. Ignatius.*

Pablo. As a legislative appointee to MRWRCC, it fell to Salomon to present the compact to the 2013 Montana Legislature for approval. He clearly believes the CSKT have legal precedent on their side, including “time immemorial” rights: “Regardless of the compact, the tribes do have a senior water right off-reservation.” Without a compact,

Salomon warns, “there will be years, even decades, of adjudication, leaving irrigators less water that will cost us more.”

Handicapping Salomon’s efforts is the fact the 1,400-page proposed compact was made final Dec. 19, 2012, despite his pleas for timeliness and just two weeks before the legislative session was to begin. Lowering the odds even more was simultaneous litigation by multiple parties against and for the compact. Then a Flathead Joint Board of Control (representing FIIP irrigator interests) election saw several pro-compact members replaced by opponents, including Jerry Laskody.

In the end, Salomon was unable to marshal support for either his full compact legislation or an interim compromise with partial settlement funding. Only Sen. Jackson’s bill to extend MRWRCC’s mandate to 2015 and authorize the Water Policy Interim Committee to study and make recommendations passed to Democratic Gov. Steve Bullock’s desk, where he vetoed it.

Bullock’s veto letter stated that it had been “made clear during the committee hearings that there is no reason to believe the CSKT would agree to reopen negotiations” and no point in having the Water Policy



*After 16 years of water-policy wrangling in the Montana Legislature, including debates over Montana’s six other tribal water compacts, state Sen. Verdell Jackson feels the proposed Flathead reserved water compact is “more about money than it is about water, and far more about power than it is about money.”*



Interim Committee suggest changes. Bullock instead instructed MRWRCC parties to “prepare a comprehensive report addressing the questions raised about the compact during the 2013 legislative session.” On May 31, the MRWRCC met to discuss the veto and duly agreed to produce the required report by Sept. 1, 2013.

### Bright Lines On Angry Waters

Is another Klamath Basin fiasco, with dried farms and blown dams, on the way? Terry Backs, with compact opponent Concerned Citizens of Western Montana, says Klamath or not, the Flathead Reservation dispute has “huge implications for development in all of western Montana.”

Bill Slack—whose 1969 to 1991 career with FIP and then for the Mission, Jocko and Flathead irrigation districts put him up close and personal with tribal water issues—feels another Klamath won’t happen “for a few years, but eventually. The compact as currently written will put [CSKT] in complete charge of the reservation.”

As things are, the Confederated Salish-Kootenai Tribes leadership is already in charge of what happens next. Robert McDonald, CSKT communications director, has told the *New York Times* that “generations of misunderstanding have come to a head. It’s starting to tear the fabric of our community apart.”

However, tribal leadership shows no interest in changing the compact. After the compact approval effort failed in the Montana Legislature, the CSKT tribal council issued an open letter declaring that the tribe had “negotiated in good faith...[to] reach a fair and equitable solution for the benefit of all water users,” but “a protracted, costly and disruptive legal process...now seems unavoidable.”

The council also expressed its regret how, through a compact, “[c]ertainty regarding the tribes’ water rights and existing state-law-based water rights would have finally been achieved, ending decades of litigation and uncertainty.”

Asked for his feelings about certainty, Sen. Jackson replies: “Uncertainty is far better than the certainty of having nothing.” ■

*Next time Dave Skinner takes a day trip to enjoy the scenic splendors and amazing geomorphology of the fabulous, fertile Flathead Reservation, he’ll be packing a jug of water from home. Safer that way.*



*To compact supporters, Western Montana Water Users Association leaders Steve Killorn (left) and Gene Erb wear the black hats. Erb, a former steamfitter who runs cows near Charlo, is fine with treaty rights being upheld, but points out that in the Hellgate Treaty, Indians also “promised to ‘commit no depredations upon the property’ of their fellow citizens. What is this compact, if not depredation?” Killorn feels that “not only the federal government but my own state government is spending millions negotiating these compacts, only to sell me out, pry me off, or both. Well, I ain’t for sale.”*

## A Matter of Interpretation

Federal court rulings have shaped the terms of Indian treaty water rights, forming a shorthand language all their own: Winters doctrine, Lower Colorado, Stevens Treaties, Adair ruling, Boldt decision.

In 1908, the U.S. Supreme Court established several parameters for interpretation of Indian treaty rights: All reservations came with water rights sufficient for reservation needs; all rights not specifically ceded to the U.S. government were retained by treaty tribes; and as such treaties had been signed between sophisticated government officials and “unlettered” tribal leaders, ambiguous treaty language would be interpreted to favor the tribes. This became known as “Winters doctrine.”

In the 1960s, as Arizona and California fought over which could suck the Lower Colorado driest, several tribes with reservations asserted Winters rights. The Supreme Court affirmed these Winters rights existed, vested at the date of reservation establishment, and furthermore valid regardless of actual “beneficial use.”

It has been long understood that reservation tribes have exclusive control of reservation waterways, game and fish. But Stevens Treaty tribes have substantial off-reservation wildlife rights, bolstered by the so-called Boldt decision in 1974 (upheld by the Supreme Court in 1979). It held that “every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant” was a “usual and accustomed” treaty fishing location, and “in common with” all citizens meant half the allowable commercial and recreational salmon and steelhead catch.

The Boldt decision was built upon by the so-called Adair (1983) ruling in the 9th Circuit concerning the Klamath tribes: The Klamath had Winters rights, not only on the reservation, but a right to sufficient off-reservation water flows to maintain hunting and fishing, furthermore with a priority date of “time immemorial.” Adair, of course, has been a huge factor in precipitating the Klamath Basin water debacle—the most recent development as of May 29 being the release of a “Final Environmental Impact Report for Klamath Facilities Removal,” the four dams on the Klamath River.

Keep in mind, western Montana and the Flathead Reservation lie within the 9th Circuit’s jurisdiction.—*Dave Skinner*