

G. ANDREW ADAMEK
CHAD E. ADAMS
DANIEL J. AUERBACH
KIMBERLY A. BEATTY
TROY L. BENTSON
SARA S. BERG
LEO BERRY
LAURA K. BUCHHOLTZ
MARK D. ETCHART
STEVE J. FITZPATRICK
HALLEE FRANDSEN
OLIVER H. GOE
THOMAS E. HATTERSLEY, III



**BROWNING KALECZYC
BERRY & HOVEN P.C.**
ATTORNEYS AT LAW
Bozeman • Great Falls • Helena • Missoula

J. DANIEL HOVEN
JUDD M. JENSEN
CATHERINE A. LAUGHNER
CHRISTY SURRE MCCANN
EMILY MCCULLOCH
MICHAEL L. RAUSCH
BRIAN P. THOMPSON
EVAN M. THOMPSON
W. JOHN TIETZ
STEVEN T. WADE
LEO S. WARD
MORGAN M. WEBER
R. STEPHEN BROWNING (1940-2018)
STANLEY T. KALECZYC - OF COUNSEL

Mailing Address

POST OFFICE BOX 1697
HELENA, MONTANA 59624-1697
TELEPHONE (406) 443-6820
bkbh@bkbh.com

Street Address

800 N. LAST CHANCE GULCH, #101
HELENA, MONTANA 59601-3351
TELEFAX (406) 443-6883
www.bkbh.com

MEMORANDUM

TO: Flathead Reservation Water Management Board Members and the Office of the Engineer

FROM: Hallee C. Frandsen & W. John Tietz

DATE: December 2, 2022

RE: Board Funding and Appropriations

QUESTIONS PRESENTED

How does the Flathead Reservation Management Board (the “Board”) receive funding and what is its authority in using its funds?

ANALYSIS

This memo will define the Board’s funding mechanisms and will describe in what ways the Board can use its funds to partake in certain functions (i.e., contracting, insurance, etc.).

I. STATUTORY AUTHORITY

In general, the Board is appropriated money on an essentially equal basis between the State and the Tribes. Specifically, the Board receives its funding from both the State, through the Department of Natural Resources & Conservation (the “State” or “DNRC”) and the Tribe, through the Confederated Salish & Kootenai Tribes of the Flathead Reservation (the “Tribe”).

Pursuant to Article IV.I.2.h and Unitary Authority and Management Ordinance (“UAMO”), § 1-2-105, the expenses of the Board shall be shared equally between the State and the Tribes. The Funding Agreement (“Agreement”) between the State, the Tribes, and the Board states the purpose of the Agreement is to establish mutually agreeable terms and conditions,

specifications, and requirements to provide funds to the board for operational development pursuant to the State's and the Tribes' joint obligation to support the Compact and the Board. Agreement, § 1. The State administers funds awarded by the legislature, while the Tribes administer funds obtained from the federal government. Agreement, §§ 3-4.

More broadly, the Tribes receive its ability to fund water management projects through the Montana Water Rights Protection Act (the "Act"). *See generally* S. 3019, 116 Cong. (1st Sess. 2019). The Act provides that the amounts in the Trust Fund shall be used by the Tribes to "implement the Compact, the Law of Administration (the Unitary Administration and Management Ordinance) for the following purposes . . . the administration, implementation, and management of the Tribal Water Right and the regulation and administration of water rights within the Reservation under the Act, the Compact, and the Law of Administration, and such infrastructure as is necessary to meet programmatic needs." *Id.*, § 8(g). The Act specifically provides that \$1,900,000,000 to remain available until expended, withdrawn, or reverted to the general fund. *Id.*, § 9(a).

The Agreement also provides that the Board shall use the funds provided exclusively for the formation and operation of the Board (e.g., funds for staff, office, insurance, travel, and contracted technical and legal expenses). Agreement, § 5. The State and the Tribes both assume no responsibility for the Board's obligation to faithfully perform the tasks and activities necessary to implementation of the Compact; thus, the Board has sole authority to use the appropriations for the purposes stated in the Agreement. *See generally* Agreement, §§ 3-4.

In 2021, the Montana legislature approved \$500,000 per biennia to DNRC's base budget to fund the Board. Further exploration of the Board's needs and current budget was conducted, and, as a result, the Governor's 2025 Biennium executive budget proposed an additional \$733,000 to the State's budget, with a one-time funding amount of \$92,500 in the first year for such things as Board vehicles, employee set up, and website development. After the 2025 biennia, the State's funding of the Board will be \$570,500 per year. Additionally, the Board receives application fees, pursuant to UAMO § 1-2-112, that become part of the overall Board funding. It is estimated that the Board has received around \$27,500 in application fees since June, which are applied to the overall function of the Board.

While the governmental entities—the State, the Tribes, and the federal government—provide funding, the Board has the sole authority to determine how best to use the funds for the statutorily mandated purposes of administering and managing water rights within the boundaries of the Reservation. Again, the Compact and the UAMO are both silent as to specific implications of Board authority regarding its funding abilities, thus, leaving room for unique applications of its broad authority.

II. UNIQUE IMPLICATIONS OF FUNDING AUTHORITY

A. Indemnification and the Board's ability to utilize appropriations

The Board had concerns with indemnification clauses within multiple contracts it was potentially entering into, and its ability to utilize appropriations. This evaluation delves into whether the Board can use future appropriations and in what manners it can do so.

The basis of the inquiry came from the indemnification clause within the Agreement. It states: “The Board shall defend, indemnify, and hold harmless the Tribes and DNRC and the State of Montana and their agents from and against any and all claims, demands, or actions for damages to property or injury to persons or other damages to persons or entities arising out of or resulting from the performance of the work or services funded by this Agreement. This Agreement is not intended to relieve a liable party of financial or legal responsibility.” Agreement, § 14.

Under federal law, a federal employee is prohibited from making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A). Similarly pursuant to state law, it is unlawful for an authority of a state institution maintained in whole or in part by the state or an officer, department, board, commission, or bureau of the state, to expend, contract for the expenditure, or to incur or permit the incurring of any obligation whatsoever, in excess of the legislative appropriation. Mont. Code Ann. § 17-8-103(1). Again, although the Board was created out of a legislative agreement between the State, the Tribes, and the federal government, and it receives appropriations from the State, it is *not* a State entity nor is it a subdivision of the State. Additionally, the Board is not a federal entity and thus its employees are not federal employees. Rather, the Board operates as a unique independent entity—a government instrumentality—and, thus, should be treated as such for purposes of evaluating its authority to use appropriations in future scenarios.

An indemnification clause is a standard practice in contracting. As such, the Board should evaluate each indemnification clause on a case-by-case basis, and take action to redefine the clause given the nature of the contract, if it so chooses. However, the Board is not required to abide by the federal or state regulatory scheme prohibiting employees of those entities from making or authorizing a future expenditure from appropriated funds.

CONCLUSION

As a government instrumentality, the Board is a wholly independent entity and has the authority, as such, to utilize its appropriated funds according to the purposes laid out in the Agreement, the Compact, and the UAMO.