

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 SURR 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: November 16, 2022

RE: Board Jurisdiction and Entity Authority

QUESTIONS PRESENTED

What is the Flathead Reservation Management Board (the “Board”) and how is the Board classified for jurisdiction and authority purposes?

ANALYSIS

This memo will attempt to define the classification of the Board for purposes of addressing jurisdictional issues and questions regarding the Board’s authority in general.

I. STATUTORY AUTHORITY

The Confederated Salish & Kootenai Tribes—Montana Compact (the “Compact”) was entered into by the Confederated Salish and Kootenai Tribes of the Flathead Reservation (the “Tribes”), the State of Montana (the “State”), and the United States of America to settle all existing claims to water of or on behalf of the Tribes within the State of Montana. The Board is an independent board created by the Compact and the Unitary Administration and Management Ordinance (“UAMO”) to be the exclusive regulatory body for water rights administration within the boundaries of the Flathead Reservation (the “Reservation”). Thus, the Board is an agreed upon creation of governmental entities, like the State, the Tribes, and the federal government.

The Board is established through Article IV.I.1. of the Compact, “[t]he Board shall be the *exclusive regulatory body* on the Reservation for the issuance of Appropriation Rights and authorizations for Changes in Use of Appropriation Rights and Existing Uses, and for the *administration and enforcement* of all Appropriation Rights and Existing Uses.” (Emphasis added). “The Board shall also have exclusive jurisdiction to resolve any controversy over the meaning and interpretation of the Compact on the Reservation, and any controversy over the right to the use of water as between the Parties or between or among holders of Appropriation Rights and Existing Uses on the Reservation except as explicitly provided otherwise in Article IV.G.5.” “The jurisdiction of this Board does not extend to any water rights whose place of use is located *outside the exterior boundaries* of the Reservation.” Article IV.I.1 (emphasis added). Meaning, the Board’s control and authority is limited to *within the boundaries* of the Reservation.

The jurisdiction of the Board is more narrowly defined in Article IV.I.4 of the Compact. The Board has distinct jurisdiction over the issuance of appropriation rights, authorizations for changes in use, enforcement of the Compact and the Law of Administration, and water right ownership updates. The Compact, under Article IV.I.5, also describes the Board’s powers and duties. In general, the Board, “shall have the power to promulgate procedures, prescribe forms, develop additional materials, and implement amendments thereto as may be necessary and proper to exercise its jurisdiction and carry out its assigned functions under this Compact and the Law of Administration.” The Board also has the power to hold hearings upon notice in proceedings and can administer oaths, take evidence, and issue subpoenas to compel attendance of witnesses or production of documents, and appoint technical experts. The Board also has the power to employ a water engineer and appoint a water commissioner.

The UAMO, in addition to the powers and duties set forth in Article IV.I.4 and 5 of the Compact, additionally includes those powers *necessary and proper* to carry out all Board responsibilities. UAMO, § 1-2-107(1). “Necessary and proper” is a broad term generally meaning the ability to do what is necessary for executing other powers and those of the entity as a whole; the term, thus, provides comprehensive power to the entity.

While the Board has total authority and jurisdiction over the administration and business of water rights management within the boundaries of the Reservation, the Compact and the UAMO are silent as to the characteristic of the Board for purposes of general governmental administration and business.

II. WHAT IS THE BOARD?

Under Article II of the Compact, “Flathead Reservation Water Management Board,” “Water Management Board,” or “Board” is defined as the entity established by the CSKT Compact and the Law of Administration to administer the use of all water rights on the Reservation upon the Effective Date. While the Board is a defined term, the implication of the term lacks clarity. The Board is neither a state nor tribal governmental entity; rather it is an amalgamate of both.

In hopes of narrowing the Board’s designation, an evaluation of common organizational terms is required. The Board has been described as a “quasi-governmental” entity. A “quasi-governmental” organization is an organization, entity, agency that operates like, or has

responsibilities similar to, a unit of government. However, quasi-governmental entities also blur the lines of *both public and private sectors*. The Board is a wholly public entity, and while it simplistically resembles a blend of state and tribal government, its functions are unlike any other entity; making it's designation difficult.

More broadly, a “governmental entity” is that which is closely affiliated, generally by government ownership or control, with state and local government. A “nongovernmental or private entity” is one which is not affiliated, through ownership or control, with state and local governments. Generally, the status of governmental versus nongovernmental is determined by the state. When statutes do not specify if an entity is governmental in nature or not, *the language distinguishing an entity as governmental for some purpose* may aid in the determination. For example, if an entity is required to abide by open meetings laws it is likely governmental in nature. A “political subdivision” is either a municipal corporation, or a division of government that has been delegated the right to exercise part of the government’s sovereign power (power to tax, power of eminent domain, and police power). The Board is most assuredly some form of governmental entity, however, one that lacks common governmental characteristics like the ability to tax, etc. Thus, the Board is some form of governmental subdivision/instrumentality.

Organizations and agencies can be considered government instrumentalities of governmental units. Six characteristics are used to determine if an entity is an instrumentality of the government: (1) is the entity used for a governmental purpose; (2) is the performance of its function on behalf of the state or a political subdivision/instrumentality; (3) are the private interests involved or does the state or political subdivision involved have the powers and interests of an owner; (4) is the control and supervision of the organization vested in the public authority; (5) is express or implied statutory or other authority necessary for the creation and use of such an instrumentality, and whether such authority exists; and (6) what is the degree of financial autonomy and the source of its operating expenses.¹

The Board qualifies as a government instrumentality. First, the Board serves a governmental purpose. The Board performs legitimate governmental purposes of administering and maintaining water rights within the boundaries of the Reservation. The agreement between the State, Tribes, and federal government, through the Compact, accounted for the Board’s independent role as a governing authority—both administratively and judicially—within the boundaries of the Reservation. Thus, the Board performs and has the authority to perform legitimate governmental purposes.

The performance of the Board’s powers and duties is not necessarily on behalf of solely the state or political subdivision itself; rather, on behalf of the State, Tribes, and federal government. While the Board’s authority and jurisdiction comes from an agreement between the state, tribal, and federal governments, the Compact and UAMO wholly divest authority to the Board for the administration and business of water rights within the boundaries of the Reservation. The authority of the Board was granted and agreed upon by the three entities, however, divested independent control and authority to it.

¹ The six characteristics are derived from the 1990 EO CPE text from the Internal Revenue Service, <https://www.irs.gov/pub/irs-tege/eotopice90.pdf>.

The third characteristic does not necessarily encompass what the Board is. The Board is not influenced or controlled by private interests, and thus we must turn to the powers of the state or political subdivision. The Board was created by agreement between the State, the Tribes, and the federal government, however, those entities relinquished control and authority of water administration and management within the boundaries of the Reservation to the Board, as an independent entity. The State and Tribes continue to have fiscal oversight of the Board, however, they have no control of the governmental purposes of the Board.

Because the State and Tribal governments do not have full control or authority over the Board (only in a limited fiscal oversight scenario), the control and supervision of the organization is completely vested in the public authority. The Board functions as a wholly independent entity and is subject to public requirements, like open meetings, public notice, and having board personnel who are appointed by public officials. The Board has complete autonomy in administering and managing water rights within the boundaries of the Reservation and thus has full control and authority as the public authority.

The Board's authority is entirely derived from the Compact and the UAMO, which are legislatively created and enacted statutes. Both statutory schemes expressly defined how the Board shall operate in administering water rights and in a judicial review setting, however, provided for broad interpretations of its implied authority and regulation in other, more general settings (e.g., board meetings, contracting, funding, human resources operations, etc.).

The Board's financial autonomy is complex. The Board receives its funding from both the State and the Tribes through different funding mechanisms. The State funds the Board through a funding agreement between the Montana Department of Natural Resources & Conservation and the Board. The State provides expenses of the Board on a 10-month term to support the operations of the Board. The expenses are equally shared between the State and the Tribes. The Tribes fund the Board through an agreement between the Confederated Salish & Kootenai Tribes of the Flathead Nation and the Board. On a broader scope, the Tribes receive its funding through the federal government via the Montana Water Rights Protection Act. *See generally* S. 3019, 116 Cong. (1st Sess. 2019). Again through both funding mechanisms, and pursuant to Article IV.I.2.h of the Compact and UAMO, § 1-2-105, the expenses are shared equally between the State and the Tribes. The Board, however, has the exclusive authority for the regulation and administration of water rights within the Reservation.

The Board primarily falls within the meaning of a government instrumentality. For purposes of providing clarity moving forward, the Board shall be considered a government instrumentality.

III. UNIQUE IMPLICATIONS OF AUTHORITY

A. Whether the Board qualifies for a “.gov” domain as a government instrumentality?

The Board is in the process of creating a website for the administration of water rights within the Reservation. To do so, it requires a proper domain name. This evaluation delves into whether the Board could receive a “.gov” domain name as a government instrumentality.

Only U.S. based government and public sector organizations are eligible to obtain a “.gov” domain, which includes any federal, state, local, or territorial government entity, or other publicly controlled entity. Eligibility is determined by three criteria: existence as organized entity; governmental character; and substantial autonomy. *Domain Requirements*, <https://home.dotgov.gov/registration/requirements/#eligibility>. Existence as an organized entity is provided by the presence of some form of organization and the possession of some corporate powers (e.g., right to sue and be sued, make contracts, acquire and dispose of property). Governmental character is indicated where officers of the entity are popularly elected or appointed by public officials. *Criteria for Classifying Governments*, <https://www.census.gov/programs-surveys/gus/technical-documentation/methodology/population-of-interest1.html>. Substantial autonomy is considered through fiscal and administrative independence. *Id.* Fiscal independence derives from power of the entity to determine its budget without review and detailed modification by other local officials or governments, to determine taxed to be levied for its support, to fix and collect charges for its services, or to issue debt without review by another local government. *Id.* Administrative independence is closely related to the basis for selection of the governing body of the entity. *Id.* A public agency is counted as an independent government if it has independent fiscal powers and one of the following: a popularly elected governing body; a governing body representing two or more state or local governments; or functions that are essentially different from those of, and are not subject to specification by, its creating government. *Id.*

An entity must have both fiscal and administrative independence to be considered a government. Therefore, local government agencies having considerable fiscal autonomy may be classified as dependent agencies having considerable fiscal autonomy may be classified as dependent agencies of another government, where one or more of the following characteristics is present: (1) control of the agency by a board composed wholly or mainly of parent government officials; (2) control by the agency over facilities that supplement, serve, or take the place of facilities ordinarily provided by the creating government; (3) provision that agency properties and responsibilities revert to creating government after agency debt has been repaid; (4) requirement for approval of agency plans by the creating government; (5) legislative or executive specification by the parent government as to the location and type of facilities the agency is to construct and maintain; (6) dependence of an agency for all or a substantial part of its revenue on appropriations or allocations made at the discretion of another state, county, municipal, township, school district, or special district government; (7) provision for the review and the detailed modification of agency budgets by another local government. *Id.*

As a government instrumentality, the Board can clearly establish two of the three necessary criteria to have a “.gov” domain. Similarly to establishing the definition of “government instrumentality,” a case could be made that the Board has financial autonomy. Again, while the Board receives its funding from the state and the tribe, it has the exclusive regulatory authority to use said funds for the regulation and administration of water rights within the Reservation. The Board, as a government instrumentality, should be able to receive a “.gov” domain.

B. What is the Board's classification for liability insurance purposes?

The Board is required to maintain primary general liability insurance coverage through the Agreement with the State and the Tribes. *See* Agreement, § 14. The Board is neither solely a state entity nor a tribal entity, rather it is a uniquely independent entity—a government instrumentality. Any insurance policy the Board enters into should classify it as a government instrumentality. Meaning, and similarly to its tax classifications, the Board's insurance policy should be structured like a governmental instrumentality, as a sole authoritative entity as a subdivision of both state and tribal governments. While there is no direct definition of a government instrumentality for insurance purposes, the coverage should generally include coverage arising out of the purposes and uses of funds articulated in the Agreement, the Compact, and the UAMO.

CONCLUSION

Both the Compact and the UAMO define governmental characteristics of the Board. While certain criteria is not met for defining a true governmental entity, the Board consists of characteristics that resemble a government instrumentality. For purposes of clarity, the Board should be considered a government instrumentality.