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BASIN-0001-76L-1985

December 22, 2022

Montana Water Court

Attorney for State of Montana

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK SUBDIVISION
JOCKO RIVER HYDROLOGIC SUB-BASIN (BASIN 76L) AND
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)

BASIN-0001-76L-1985 & BASIN-0001-76LJ-1985

**STATE OF MONTANA’S BRIEF IN SUPPORT OF THE JOINT PETITION OF THE
CONFEDERATED SALISH & KOOTENAI TRIBES AND UNITED STATES OF
AMERICA FOR EXTENSION OF STAY OF ADJUDICATION OF ALL CLAIMS IN
BASINS 76L AND 76LJ**

I. INTRODUCTION

On December 13, 2022, the Confederated Salish and Kootenai Tribes (“CKST” or “Tribes”) and the United States Department of Justice (“United States”) filed a Joint Petition for Extension of Stay of Adjudication of All Claims in Basins 76L and 76LJ (“Petition”). The Petition seeks to extend the existing stay deadline until January 10, 2024, to allow the CSKT Compact to move through the Water Court proceedings in WC-0001-C-2021. *See* Mont. Code Ann. § 85-20-1901. The State of Montana, by and through the Office of the Attorney General, Special Assistant Attorney General (“Montana”) supports the Petition and incorporates the arguments presented. Additionally, Montana presents its own perspective of the “hardship or inequity” that would be incurred if the stay deadline is not extended.

II. FACTUAL BACKGROUND AND REPORT ON ACTIVITY DURING THE CURRENT STAY

The 1979 Montana Legislature established the Reserved Water Rights Compact Commission (RWRCC) as part of the state-wide general stream adjudication to negotiate settlements with Montana Indian tribes and federal agencies claiming reserved water rights within the State of Montana. (Decl. Anna Pakenham Stevenson (APS Decl.), ¶ 2 (attached as Exhibit A).) The RWRCC's mission was to conclude compacts for the equitable division and apportionment of waters between: the State of Montana, its people, and the several Indian tribes claiming reserved water rights within the state (Mont. Code Ann. § 85-2-701); and the State, its people and the federal government claiming non-Indian reserved water within the state (Mont. Code Ann. § 85-2-703). (APS Decl., ¶ 2.)

Eighteen reserved water right compacts have been negotiated and ratified by the Montana Legislature including seven with Montana Indian tribes. *Id.*, ¶ 3. The other compacts settle the water rights associated with various federal enclaves managed by the Departments of Agriculture and Interior. *Ibid.* The CSKT-Montana Compact is the result of more than a decade of negotiations to resolve the Tribes' claims to reserved water rights within the State. Montana's 2015 Legislature ratified the Compact (Mont. Code Ann. § 85-20-1901). (APS Decl., ¶ 4.) At the time of this Court's last extension of the stay in Basins 76L and 76LJ, the Compact was awaiting congressional and Tribal approval. *Ibid.* Since that time, the Compact has been ratified by all sovereigns and the Secretary of Interior executed the Compact on September 17, 2021. *Ibid.* The Compact is now before the Water Court in WC-0001-C-2021 pursuant to Art.V11.B. of the Compact and Mont. Code. Ann. § 85-2-702. *Ibid.* The Preliminary Decree was issued on June 9, 2022, and the deadline for objections is February 9, 2023. *Ibid.* As noted in the United States' Petition, over 400 objections have already been filed.

In accordance with Montana law, including Mont. Code Ann. §§ 85-2-217, -702(3), the United States and the Confederated Salish and Kootenai Tribes have filed more than 10,000 claims for water rights for the Tribes in Montana’s general stream adjudication. (APS Decl., ¶ 5.) The United States and CSKT filings each claim on- and off-reservation water rights within 51 of Montana’s 85 adjudication basins. *Ibid.* In addition, both the Tribes and United States have filed claims to water rights for the Flathead Indian Irrigation Project. *Ibid.*

On or about December 13, 2022, the United States petitioned this Court to extend the stay of the claims currently in effect in Basins 76L and 76LJ, including claims examination. *Id.*, ¶ 6. The rationale for the continued stay is that Article VII of the Compact provides that, if the Compact is finally decreed by the Water Court, the Tribes and the United States will dismiss these filed claims, obviating the need for their adjudication. *Ibid.*

III. ARGUMENT

If the extension of the stay is not granted and these basins are adjudicated before the Court issues an order approving the CSKT-Montana Compact, the parties will incur significant hardship. Without the Compact, 10,109 claims will need to be adjudicated, impacting 51 of Montana’s adjudication basins, many of which already have preliminary or final decrees in place.¹ (Mont. Dep’t of Nat. Resources, Update 2019 – CSKT Compact vs. Adjudication of CSKT Claims (2019); *see also* APS Decl., ¶ 8.) Adjudication of these claims would severely impact the DNRC Water Rights Bureau and interfere with the Legislature’s mandated priorities to re-examine nearly 90,000 water rights that were not part of the original examination process. *See* APS Decl., ¶ 12.

¹ As of July 2018, the CSKT and the United States have filed 10,109 claims in place of the Compact. *See* https://dnrc.mt.gov/divisions/water/water-compact-implementation-program/docs/cskt/2018-08-09_cskt-claims-analysis_final2pg_report.pdf.

The parties will suffer significant hardship if the stay is not extended. If the Water Court declines to continue the stay, there will be public notice of the entry of these claims in one or more preliminary decrees and the opportunity to file objections whenever a preliminary decree including any of these claims is issued by the Court. *See* Mont. Code Ann. §§ 85-2-232, -233; *see also* APS Decl., ¶ 7. Should the stay be lifted prior to the Compact’s final decree by the Water Court, the implications stretch far beyond the boundaries of Basins 76L and LJ, because the adjudication of the more than 10,000 claims filed in 51 adjudication basins on behalf of the tribes would also have to proceed. (APS Decl., ¶ 8.)

If adjudicated by this Court, the Tribal claims would presumably be considered *prima facie* proof of their content and would therefore be decreed “as claimed” in a similar fashion to how this Court recently issued the Turtle Mountain Band of Chippewa claims, which were filed in trust by the United States Department of Justice. *Id.*, ¶ 11. Such a large-scale, unexamined decree process across 51 of Montana’s 85 basins would present a serious risk to current senior water users who have invested heavily in defending their water claims, and many of which have been decreed previously by this Court. *Ibid.*

The impact of such proceedings would also fall heavily on the Adjudication Bureau, which is currently occupied with the re-examination of nearly 90,000 water rights that were not part of the original examination process. *Id.*, ¶ 12. This re-examination must be completed by June 30, 2025, as mandated by the Montana Legislature. *Ibid.* The 2017 Legislature also tasked the Adjudication Bureau with accepting 27,941 exempt water rights, which includes a full examination and entry into the current re-examination process. *Ibid.* Basins 76L and 76LJ are scheduled to go to the Water Court as an updated summary on February 28, 2022. *Ibid.* The potential addition of the 76L and 76LJ adjudication, in addition to the impact of the Tribes’

off-reservation claims, would make it impossible for DNRC to meet these legislatively established deadlines and would extend the adjudication process for Basins 76L and 76LJ by years, if not decades, in addition to requiring the re-opening of decrees throughout much of the State. *Ibid.* In addition, the current Adjudication Bureau includes 31 FTE and an annual budget of 2.3 million dollars. The work needed to fully examine the 10,000 U.S. and Tribal claims would mandate a need for significant additional staff and funding. *Id.*, ¶ 13.

A final Water Court decree of the Compact will preclude these claims ever having to be adjudicated by the Water Court and processed by the DNRC Adjudication Bureau and will ensure that the 308 water rights recognized by the Compact represent a full and final settlement of the Tribes' on and off reservation claims. *Id.*, ¶ 14. By allowing the Compact to proceed through the Water Court approval process, the parties and this Court in this proceeding could avoid adjudicating a significant number of claims, save State, DNRC, and judicial resources, and contribute to judicial economy.

IV. CONCLUSION

Montana supports the United States' Petition to extend the stay of the adjudication of all claims in basins 76L and 76LJ until January 10, 2024, and to require that the United States, Tribes, and the State of Montana provide a written report every six months regarding the status of efforts to have the Montana Legislature extend the preliminary decree deadline, and an update on the progress resolving the hundreds of objections in the Water Court regarding the Tribes' Compact water rights.

DATED this 22nd day of December, 2022.

AGENCY LEGAL SERVICES BUREAU

/s/ Chad R. Vanisko

CHAD R. VANISKO

Agency Legal Counsel

CERTIFICATE OF SERVICE

I certify that I served a true and accurate copy of the foregoing document on the Montana Water Court via email at watercourt@mt.gov with a request for delivery receipt, and a copy was served on the following by first class mail and/or email:

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Dated: December 22, 2022

/s/ Rochell Standish
Rochell Standish, Paralegal

Exhibit A

Affidavit of Anna Pakenham Stevenson
(December 19, 2022)

IN THE MONTANA WATER COURT OF THE STATE OF MONTANA

IN THE MATTER OF THE UNITED)
STATES PETITION FOR EXTENSION)
OF STAY OF ADJUDICATION OF ALL)
CLAIMS IN BASINS 76L AND 76LJ,)
AND 51 OF 85 ADJUDICATION BASINS)

FLATHEAD RIVER, BELOW FLATHEAD LAKE HYDROLOGIC SUB-BASIN
(BASIN 76L) AND
FLATHEAD RIVER, TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)

AFFIDAVIT OF ANNA PAKENHAM STEVENSON

STATE OF MONTANA)

: ss.

County of Lewis and Clark)

I, Anna Pakenham Stevenson, hereby declare as follows:

1. I am the Administrator for the Montana Department of Natural Resources and Conservation’s Water Resources Division. I have worked for the DNRC Water Resources Division since 2020. I oversee all of the Department’s Water Resource work including oversight of eight Water Resources Regional Offices, the Department’s Water Adjudication Bureau, and the Department’s Compact Implementation program.

2. The 1979 Montana Legislature established the Reserved Water Rights Compact Commission (RWRCC) as part of the state-wide general stream adjudication to negotiate settlements with Montana Indian tribes and federal agencies claiming reserved water rights within the State of Montana. The RWRCC’s mission was to conclude compacts for the equitable division and apportionment of waters between: the State of Montana, its people and the several Indian tribes claiming reserved water rights within the state (§ 85-2-701, MCA); and the State, its people and the federal government claiming non-Indian reserved water within the state (§ 85-2-703, MCA).

3. Eighteen reserved water right compacts have been negotiated and ratified by the Montana Legislature including seven with Montana Indian tribes. The other compacts settle the water rights associated with various federal enclaves managed by the Departments of Agriculture and Interior.

4. The CSKT-Montana Compact is the result of more than a decade of negotiations to resolve the Tribes’ claims to reserved water rights within the State. Montana’s

2015 Legislature ratified the Compact (§ 85-20-1901, MCA). At the time of this Court's last extension of the stay in Basins 76L and LJ, the Compact was awaiting congressional and Tribal approval. The Compact has been ratified by all sovereigns and the Secretary of Interior executed the Compact on September 17, 2021. The Compact is now before the Water Court in WC-0001-C-2021 pursuant to Art.VII.B. of the Compact and § 85-2-702, MCA. The Preliminary Decree was issued on June 9, 2022, and the deadline for objections is February 9, 2023.

5. In accordance with Montana law, including §§ 85-2-217 and 85-2-702(3), MCA, the United States and the Confederated Salish and Kootenai Tribes have filed more than 10,000 claims for water rights for the Tribes in Montana's general stream adjudication. The United States and CSKT filings each claim on- and off-reservation water rights within 51 of Montana's 85 adjudication basins. In addition, both the Tribes and United States have filed claims to water rights for the Flathead Indian Irrigation Project.

6. The United States has petitioned the Montana Water Court to extend the stay of these claims currently in effect in Basins 76L and 76LJ, including claims examination. The rationale for the continued stay is that Article VII of the Compact provides that if the Compact is finally decreed by the Water Court, the Tribes and the United States will dismiss these filed claims, obviating the need for their adjudication.

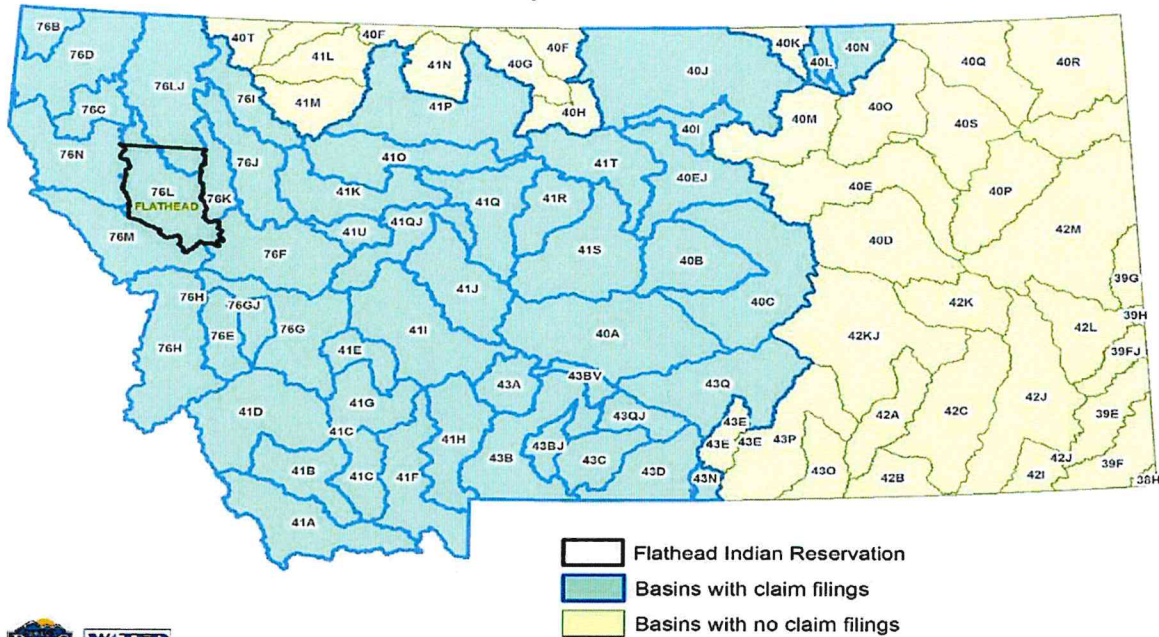
7. If the Water Court declines to continue the stay, there will be public notice of the entry of these claims in one or more preliminary decrees and the opportunity to file objections whenever a preliminary decree including any of these claims is issued by the Court. See Mont. Code Ann. §§ 85-2-232 and -233.

8. Should the stay be lifted prior to the Compact's final decree by the Water Court, the implications stretch far beyond the boundaries of Basins 76L and LJ, because the adjudication of the more than 10,000 claims filed in 51 adjudication basins on behalf of the tribes would also have to proceed.

9. The following map illustrates the scope of the CSKT's claims, and their potential impact on the adjudication should the stay be lifted before final compact decree:



Adjudication Basins with CSKT & US Dept. of Justice Claims



10. In further illustration of this impact, attached is a true and correct copy of a document titled, “Comparison: Adjudication of CSKT Claims vs. CSKT-MT Compact Rights,” produced by the Montana DNRC’s Compact Implementation Program, also available at, http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/docs/cskt/2018-08-09_cskt-claims-analysis_final2pg_report.pdf.

11. If adjudicated by this Court, the Tribal claims would presumably be considered prima facie proof of their content and would be decreed “as claimed” in a similar fashion to how this Court recently issued the Turtle Mountain Band of Chippewa claims, which were filed in trust by the United States Department of Justice. Such a large-scale unexamined decree process across 51 of Montana’s 85 basins would be present a serious risk to current senior water users who have invested heavily in defending their water claims, and many of which have been decreed previously by this Court.


12. The impact of such proceedings would also fall heavily on the Adjudication Bureau, which is currently occupied with the re-examination of nearly 90,000 water rights that were not part of the original examination process. This re-examination must be completed by June 30, 2025, as mandated by the Montana Legislature. The 2017 Legislature also tasked the Adjudication Bureau with accepting 27,941 exempt water rights, which includes a full examination and entry into the current re-examination process. Basins 76L and 76LJ are scheduled to go to the Water Court as an updated summary on February 28, 2022. The potential addition of the 76L and 76LJ adjudication, in addition to the impact of the Tribes’ off-reservation claims, would make it impossible for DNRC to meet these legislatively

established deadlines and would extend the adjudication process for Basins 76L and 76LJ by years, if not decades, in addition to requiring the re-opening of decrees throughout much of the State.

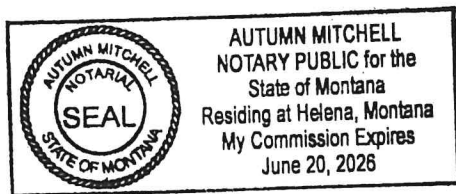
13. The current Adjudication Bureau includes 31 FTE and an annual budget of 2.3 million dollars. The work needed to fully examine the 10,000 U.S. and Tribal claims would mandate a need for significant additional staff and funding.

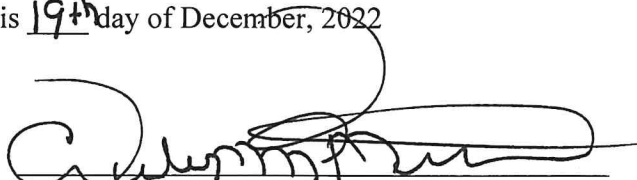
14. Final Water Court decree of the Compact will preclude these claims ever having to be adjudicated by the Water Court and processed by the DNRC Adjudication Bureau and will ensure that the 308 water rights recognized by the Compact represent a full and final settlement of the Tribes' on and off reservation claims.

Dated this 19th day of December, 2022

By: 
ANNA PAKENHAM STEVENSON
Administrator, Montana DNRC
Water Resources Division

SUBSCRIBED AND SWORN to me before this 19th day of December, 2022




Notary Public for the State of Montana

Residing at: 7910 Shooting Star Drive
Helena, MT
My Commission Expires: June 20 2026

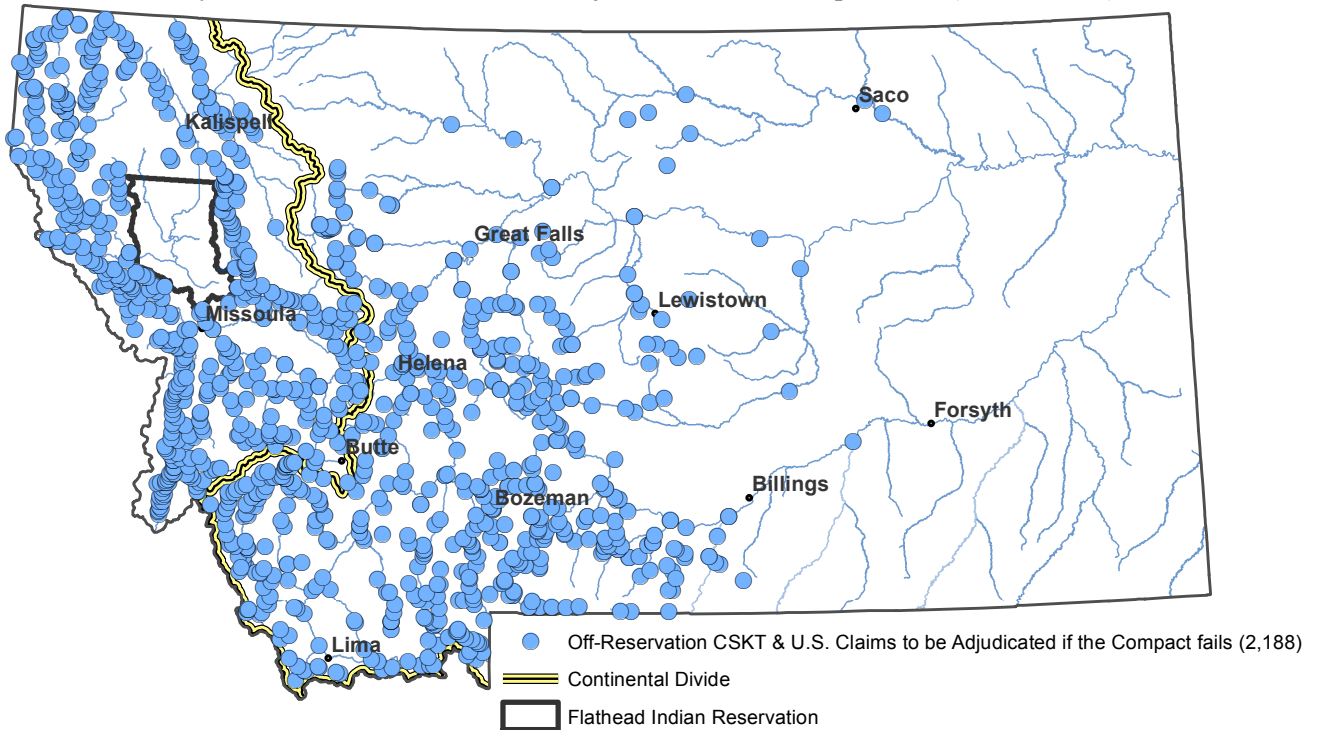
ATTACHMENT

Comparison: Adjudication of CSKT Claims vs.
CSKT-MT Compact Rights



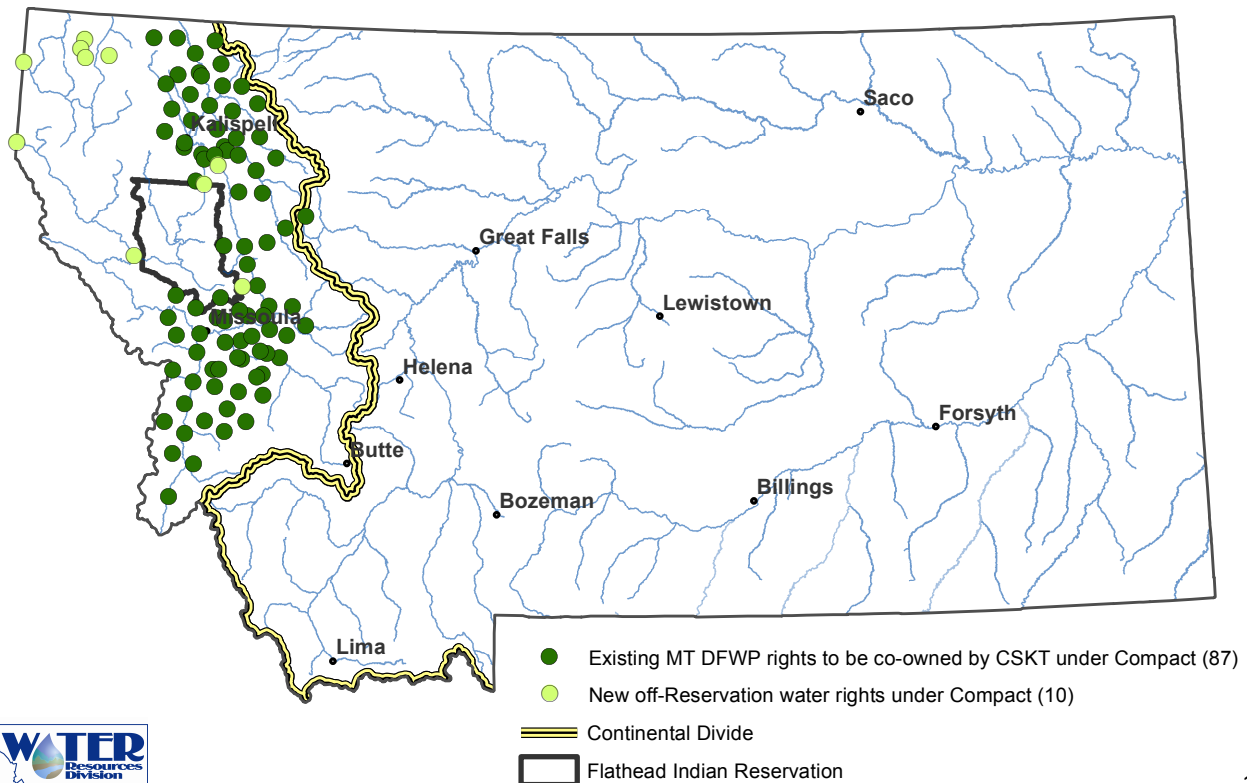
Comparison: Adjudication of CSKT Claims vs. CSKT-MT Compact Rights

Without Compact: Off-Reservation instream flow claims
Filed by CSKT & United States to be Adjudicated if the Compact fails (2,188 claims)



Vs.

With Compact: CSKT-Montana Compact
off- reservation water rights (97 total rights)



Comparison: Adjudication of CSKT Claims vs. CSKT-MT Compact Rights

As of July 2018, the Confederated Salish and Kootenai Tribes (CSKT or Tribes) and United States Department of Justice (USDOJ) have filed 10,109 claims in place of the Compact. These claims, filed as placeholders to the Compact, are currently *stayed* before the Montana Water Court. If the Compact is approved by the U.S. Congress, the Tribes, and the Water Court, both sets of claims will be dismissed. If the Compact is not approved, both sets of claims will be adjudicated through the Montana Water Court.

Without Compact – Claims to be Adjudicated in place of the Compact – 10,109

The Tribes filed 1,720 on-Reservation water right claims and 1,094 off-Reservation instream flow claims—all 2,814 with *time immemorial* priority dates. The Tribes' off-Reservation claims are within 51 of Montana's 85 adjudication basins. Adding these to the 6,201 total claims filed by the USDOJ on behalf of the Tribes (including 1,094 off-reservation instream flow claims identical to those filed by the Tribes), the total number of claims that would need to be adjudicated in place of the Compact is 10,109.

With Compact – CSKT-MT Compact Rights - 308

The Compact grants the Tribes' 211 on-Reservation water rights, 10 new off-reservation rights, and co-ownership in 87 existing instream flow, in-lake, and storage rights held by the Montana Dept. of Fish Wildlife & Parks (DFWP) which comes to 308 total rights.

The 211 on-Reservation water rights quantify the Tribes' rights including: instream flows, Hungry Horse Reservoir Water, high mountain lakes, wetlands, and Flathead Indian Irrigation Project (FIIP) water. The Compact also includes an administrative process to grant over 1,000 non-tribal on-Reservation groundwater certificates left in limbo by the absence of a regulatory framework on the Reservation.

New off-Reservation water rights granted to the Tribes include:

- Eight *time immemorial* instream rights on the Swan River, Kootenai River, Lower Clark Fork River, and five headwater streams, all with protections for existing water users;
- One *time immemorial* Flathead Lake water right that protects the natural lake level; and
- One 1855, any purpose, on- and off-reservation right that includes 11,000 acre-feet (AF) of Hungry Horse Reservoir storage that can be allocated by Montana; and

Co-ownership of DFWP rights includes:

- Two instream flow rights formally associated with Milltown Dam;
- 83 instream/in-lake rights, and
- Fisheries storage shares in Lake Como and Painted Rocks Lake.

For more information:

<http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/confederated-salish-and-kootenai-tribes>