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IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)

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**BASIN-002-76LJ-1985**

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**THE UNITED STATES OF AMERICA’S MOTION FOR AN EXTENSION OF THE  
STAY OF PRELIMINARY DECREES IN BASINS 76L AND 76LJ**

All proceedings to adjudicate state-law based water rights claims in basin 76LJ are currently stayed until April 30, 2024. *Court Minutes, and Order Setting Filing Deadline and Extending Stay*, March 15, 2024 (“*March 2024 Order*”) at 2. The proceedings in basin 76L are stayed as well until May 31, 2024. *Order Extending Stays*, September 8, 2023 (“*2023 Order*”), at 4. The Court recently conducted a status conference regarding the lifting of these stays on March 14, 2024. At the hearing, the State of Montana, the United States of America, and the Confederated Salish and Kootenai Tribes (“*Tribes*”) (collectively “*the Governments*”) requested that the stays be extended until January 31, 2025. *March 2024 Order*.<sup>1</sup> Delaying the start of the adjudication in basins 76L and 76LJ would allow for the substantial conclusion of proceedings in Case No. WC-2021-01 regarding the preliminary decree (“*CSKT Decree*”) of the water rights

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<sup>1</sup> Counsel for the State has reviewed this Motion, and the State supports it. The Tribes are filing a separate brief in support of this Motion.

recognized in the Tribes-Montana-United States water rights Compact, 85-20-1901, MCA (“CSKT Compact”). Pursuant to the *March 2024 Order*, the United States reiterates its request to continue the stay in both basins 76L and 76LJ. Allowing the CSKT Decree proceedings to reach substantial conclusion before issuing the preliminary decrees in these two basins will allow for existing staff for the United States to complete the extensive task of resolving over 600 objections and amendments to objections remaining in Case No. WC-2021-01. It will also limit confusion among existing water rights claimants in basins 76L and 76LJ about the proper forum to contest either the Tribal water rights or their own water rights promoting a better final decree in these basins and judicial economy. In the Brief in Support of this Motion below, we describe the relevant events since the *2023 Order* and explain the ample support to continue the stay in both basins.

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**BRIEF IN SUPPORT OF MOTION TO EXTEND STAY OF ISSUING PRELIMINARY DECREEES IN BASINS 76L AND 76LJ**

**I. BACKGROUND**

At the end of the September 7, 2023 status conference, the Court noted that further developments in the proceedings in the CSKT Decree case may warrant extension of the stay on issuing preliminary decrees in basins 76L and 76LJ. A report on intermediary events in that case therefore follows. In September and October 2023, the Governments engaged in the final rounds of mediation with self-represented parties and addressed requests for stipulations. At the same time, the Governments sought to determine an appropriate approach for the litigation phase of the CSKT Decree case and ultimately sought to resolve with represented Objectors a common plan and schedule. This occurred at the status conferences on October 3 and 10, 2023 that led to the Court’s third Case Management Order issued on October 18, 2023, in Case No. WC-2021-01 (Dkt. No. 1395) (“CMO 3”).

The initial litigation component of CMO 3 was a chance for Objectors to amend their objections. Both represented and unrepresented Objectors used this opportunity to expand the

number of issues before the Court regarding the CSKT Decree. They filed more than 100 motions to amend that the Governments and the Court had to wade through over the winter. Many of these were extensive, quite elaborate, difficult to follow, or not germane. For example, a group of represented parties filed five motions to amend involving sixty Objectors, eighty-four objections, and sixty amended objections that needed to be scrutinized.<sup>2</sup> Other self-represented parties filed amendments that discussed many topics requiring considerable time to sort through. One Objector filed four amendment documents, including the most operative one that covered thirty-two paragraphs and included over 100 exhibits covering hundreds of pages. *Order No. 43 on Motions to Amend Objections*, March 1, 2024 (Dkt. No. 1729). Another filed six amendment documents that covered multiple topics not before the Court. *Order No. 44 on Motions to Amend Objections*, March 5, 2024 (Dkt. No. 1732). Further, four Objectors to the CSKT Decree used the motion to amend process to complain about the Department of Natural Resources Commission's treatment of their own water rights rather than something in the CSKT Decree.<sup>3</sup>

The litigation phase continues next week with the Governments' opportunity to move to dismiss objections. CMO 3 at 3. This has occupied substantial research time for federal attorneys over the winter and careful consideration of the Court's forty-five orders resolving Motions to Amend.

The ensuing step in the hearing track schedule is to file motions of law and motions regarding the CSKT Compact Decree's adequacy and fairness. *Id.* For the Governments, the groundwork for this deadline is reviewing over 600 objections and amendments to objections

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<sup>2</sup> *Third Order on Motions to Amend Objections*, January 26, 2024 (Dkt. No. 1611); *Fourth Order on Motions to Amend Objections*, January 26, 2024 (Dkt. No. 1612); *Fifth Order on Motions to Amend Objections*, January 26, 2024 (Dkt. No. 1613); *Sixth Order on Motions to Amend Objections*, January 26, 2024 (Dkt. No. 1614); *Seventh Order on Motions to Amend Objections*, January 26, 2024 (Dkt. No. 1615).

<sup>3</sup> *Order No. 21 on Motions to Amend Objections*, February 9, 2024 (Dkt. No. 1642); *Order No. 35 on Motions to Amend Objections*, February 22, 2024 (Dkt. No. 1721); *Order No. 36 on Motions to Amend Objections*, February 26, 2024 (Dkt. No. 1722); *Order No. 40 on Motions to Amend Objections*, February 29, 2024 (Dkt. No. 1726).

that are still on the Court's docket. Staff for the Governments are seeking to place them in relevant groups for litigation and discern an efficient means of responding to the numerous issues raised by Objectors. This is a very extensive and time-consuming process given the large number of objections. It requires massive document review and legal research on varied and sometimes seemingly irrelevant topics.

The many objections allege a multitude of legal issues about the validity of the process to form the Compact as well as the legality of many of the Compact's Decree provisions. Preliminary issue classification of the combined objection grounds identifies around ten topics (e.g., allegations of fraud or process violations in negotiating the CSKT Compact; state or federal constitutional issues arising from the CSKT Compact or the CSKT Decree; perceived illegalities in some parts of the CSKT Decree), with many topics having ten or more separate components. This is very time-consuming. It requires knowledge of the CSKT Compact, Decree, and the other objections to the CSKT Decree, which takes significant time for new attorneys to develop. Some objection grounds are stated so cryptically that we must work to surmise the Objector's intent, while others are fully developed and lengthy.<sup>4</sup>

After completion of the rapid response and reply briefs on the legal motions in August, the Governments must participate in oral argument on those motions on September 19, 2024, and prepare for a possible factual hearing January 6-19, 2025. CMO 3 at 3. Preparation for the argument on the legal motions will certainly be extensive and the three-month period between the argument and evidentiary hearing means that any discovery process required will likely be fast-paced and arduous.

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<sup>4</sup> E.g., the Objection filed on December 5, 2022, on behalf of the Cathy Ann Huan Living Trust, Dkt. No. 328, consists of 124 pages in total, of which 56 pages present legal contentions in twelve numbered objections; and (2) the December 8, 2023, *Motion to Amend Objection and Incorporated Brief*, Dkt. No. 1530, which was granted by the Court's January 25, 2024, *First Order on Motion to Amend Objections*, Dkt. No. 1605, presents thirty-five pages of Amended General Objections containing many legal contentions that the Compact Parties dispute.

## **II. A FURTHER STAY OF PROCEEDINGS REGARDING THE STATE-LAW BASED WATER RIGHTS IS WARRANTED.**

The United States asks the Court to continue the stay of the state-law based claims in the preliminary decrees for basins 76L and 76LJ through January 31, 2025. Such an extension is consistent with the three criteria the Court uses to assess stay requests in this case.<sup>5</sup> First, the extension request is within the Court’s inherent power to control its docket. Second, the extension request would allow the United States and Tribes to have adequate time and resources to complete the quantification of the Tribes’ crucial water rights in Case No. WC-2021-01 and carry out other necessary duties. Third, the stay would advance the public welfare by reducing the level of confusion among water users in the two basins, leading to fewer errant filings and a greater awareness of the importance for water users to scrutinize the state-law water rights claims presented by the two basin preliminary decrees.

### **A. Granting the Stay Is Within the Court’s Inherent Power to Control Its Docket.**

The Court has the power to grant the United States’ stay request covering the nine months between now and the end of the litigation phase under CMO 3. *State ex rel. Kennedy v. Dist. Court of Fifth Jud. Dist. in & for Beaverhead Cnty.*, 121 Mont. 320, 336 (1948) (reciting Supreme Court cases providing for the trial court to control its docket). In past Status Conferences, the Court and the Governments have addressed the application of 85-2-270(2), MCA, to these proceedings. That provision entreats the Water Court to issue preliminary decrees in all basins in the State by June 30, 2024. The Court recognized at the January 6, 2023, Status Conference that the legislature’s direction to issue preliminary decrees by mid-2024 was not proscriptive. The Montana Legislature during the 2023 session did not change this provision.

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<sup>5</sup> “(1) [T]he balancing of competing interests with a recognition the Court has inherent authority to control its docket; (2) that the party seeking the stay make out a clear case of hardship or inequity in proceeding, even if there is a fair possibility the stay will damage someone else; and (3) consideration of the promotion of public welfare or convenience, especially in cases of ‘extraordinary public moment.’” *Order on Motion to Extend Stay*, February 1, 2023, at 4.

During the March 14, 2024 status conference, the Governments agreed with that understanding of this provision.

**B. Immediate Issuance of Preliminary Decrees in Basins 76L and 76LJ of the State-law Rights Will Cause the United States and Tribes Clear Hardship.**

The United States requests that the Court not proceed directly to the issuance of preliminary decrees in basins 76L and 76LJ as doing so will create immediate and substantial hardship for the holders of the rights at issue in the CSKT Decree. The Tribes and the United States have an extraordinary interest in the litigation over the quantification of the water rights of the Tribes in Case No. WC-2021-01. Those water rights result from a significant compromise by the Tribes and have been approved by both the Montana legislature and the United States Congress. The water rights in the CSKT Decree are the Tribes' rights to provide a permanent homeland for their members by securing water for natural resources, for economic and commercial ventures, and for municipal and domestic water uses. In addition, a successful outcome in Case No. WC-2021-01 presents a substantial opportunity to advance the intent of the Montana legislature expressed in 85-2-701, MCA, to equitably apportion the waters of the State. The Tribes and United States should be allowed to concentrate their limited resources on that case for the rest of the year and not have to focus at the same time on investigating thousands of private claims in basins 76L and 76LJ.

We explained in section I above the extraordinary demands that the litigation track of the CSKT Decree has placed on the available technical and legal staff of the United States and Tribes. It has largely consumed attorney and technical staff time since inception. Besides the litigation phase, knowledgeable federal staff are engaged in other aspects of the overall settlement and management of a related federal program -- (i) implementation of the Compact, e.g., the state-federal land exchange; (ii) ongoing operation of the Bureau of Indian Affairs' Irrigation Project on the Flathead Reservation, a large enterprise with attendant operations questions annually. They also have extensive other case work.

To add to that heavy burden the further responsibility of investigating the thousands of claims in preliminary decrees for basins 76L and 76LJ will prejudice the United States and the Tribes. If the preliminary decrees for these basins are issued, staff from the United States and the Tribes will need to review thousands of water rights claims filed in the early 1980s under state law, determine whether objections should be filed, and prepare those objections, all within 180 days. This will be a very resource-intensive examination and the simple fact is that neither the Tribes nor the United States have unlimited resources.

Furthermore, the review the Tribes and the United States need to make of claims in preliminary decrees for Basins 76L and 76LJ will be different, depending on whether the CSKT Decree is approved. With the many concessions to private water users in the CSKT Decree, e.g., ¶¶ III.D and III.G, the Tribes and the United States need to review the private claims in basins 76L and 76LJ to make many Decree provisions work as intended. For example, under the CSKT Decree, the Tribes and United States have agreed to never make a call against any water use other than irrigation. CSKT Decree, ¶ III.G.1. With that allowance, there is a need to ensure that the rights ultimately decreed are not overstated and have been continuously used. Similarly, some of the tribal instream flows in certain streams within the Reservation are limited to amounts not used by irrigation rights pursuant to the Water Court final decrees in basins 76L and 76LJ. *Id.* at ¶ III.C.1.d.iii & CSKT Compact, Art. III.C.1.d.iii (referencing process in Unitary Management Ordinance, 85-20-1902, Sec. 2-1-115, MCA). Thus, the irrigation rights on those streams must be carefully reviewed, because only the water left over after these irrigation rights are finally decreed could become the protected instream flow for the Tribes in these streams.

The attorneys and technical staff working on Case No. WC-0001-C-2021 are the same that are assigned to this matter. Similarly, many Objectors to the CSKT Decree are also ones who are likely to be engaged in or who should be engaged in the preliminary decree review for basins 76L and 76LJ. Thus, there is a “clear case of hardship” on the Tribes and the United States and likely on other parties affected by the Tribal water rights recognized in the CSKT Decree if the stay for basins 76L and 76LJ is not extended.

**C. Continuing the Stay of the Preliminary Decree of the State-law Rights in Basins 76L and 76LJ Promotes the Public Welfare.**

The United States asserts that continuing the stay of the litigation concerning the state-law water rights included in the two decrees would also substantially advance the public welfare. Our interaction with Objectors in Case No. WC 2021-01 and water users more generally in basins 76L and 76LJ suggests that adding another major water rights proceeding would not enhance sound water management or water adjudication. First, there would not be a thorough review of those preliminary decrees by all affected water users. The current focus of private water users is on the Tribes' water rights in Case No. WC-2021-01. If the preliminary decrees of state-law water rights are issued now, amid the conflict over the Tribes' water rights, there is likely to be little scrutiny by private water users of adjacent private water rights claims. This will lead to greater burdens on the DNRC and the Water Court to address issue remarks on many private water rights abstracts. It will also likely cause many water users to realize in five to ten years that focusing so closely on the Tribes' water rights, when they are limited in reach by key provisions of the CSKT Decree, led them to miss the impact their neighbor's water use will ultimately have on them. Second, issuing the preliminary decrees now in basins 76L and 76LJ will also likely lead to many errant filings by water users who mistakenly believe this "new" document from the Water Court provides them with another opportunity to complain about the Tribal water rights that are currently at issue in Case No. WC-2021-01. Putting off the issuance of those decrees for the rest of the year will provide enough space between major objection filing deadlines to lessen the chance that opponents of the Tribal water rights believe that they have been presented with another chance to register their complaints about the CSKT Decree. In short, separation of the institution of a second major water rights filing deadline will have a long-term benefit for the public welfare. Third, state-law based water rights claimants in basins 76L and 76LJ suffer no harm by not having the determination of their claimed water rights started now. They may continue to use water in accord with their claimed rights until adjudicated or a distribution action is initiated, 85-2-406, MCA, just as they have since 1982.



### III. CONCLUSION

The Government Parties in their filings today request that the Court stay the issuance of the preliminary decrees in basins 76L and 76LJ through January 2025 for multiple reasons. The Court previously ordered that the stays be staggered by five months with the preliminary decree for basin 76LJ decreed first. *2023 Order* at 3-4. The United States requests that the Court utilize such staggered stay expiration dates in any future order so that the preliminary decrees are not issued close in time.

Dated this 29th day of March 2024.

UNITED STATES DEPT. OF JUSTICE

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following persons by electronic mail or U.S. mail on this 29th day of March 2024.

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