

Summary of the Compact and Ordinance for the Flathead Reservation Water Rights Settlement

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Introduction

The Confederated Salish and Kootenai Tribes (CSKT or Tribes), the State of Montana, and the United States (collectively, the Parties) have negotiated a water rights settlement that includes a Compact quantifying the water rights of the Confederated Salish and Kootenai Tribes on and off the Flathead Indian Reservation (Reservation) and a Unitary Administration and Management Ordinance (also referred to as Law of Administration) that provides for the administration of water rights on the Reservation.

This document summarizes key parts of two lengthy and detailed documents; please refer to the Compact and Ordinance (Appendix 4 to the Compact) for further information on any issues of particular interest.

Summary of Provisions:

- Protects valid existing water uses as those rights are ultimately decreed by the Montana Water Court or permitted by the DNRC.
- Provides legal protection for post-1996 domestic wells and permits that were developed on the Reservation despite the absence of a legal framework to authorize them.
- Establishes a process to authorize new water rights on the Reservation.
- Provides a process for authorizing changes to existing water uses.
- Provides funding for improved water measurement and water supply forecasting.
- Provides funding for habitat and Flathead Indian Irrigation Project improvements.
- Quantifies the Tribes' water rights for all time.
- Recognizes Tribal instream flow rights on and off the Reservation in exchange for the Tribes' agreement to relinquish all other claims within Montana.
- Provides additional water from the Flathead River and Flathead Lake (which includes an allocation from Hungry Horse Reservoir) to meet CSKT instream and consumptive water needs and provides a process to lease portions of this additional water for new development on and off the Reservation.
- Recognizes existing Tribal uses, including traditional Tribal cultural and religious uses.
- Establishes a joint state-tribal board to administer water use on the Reservation under a Reservation-specific law modeled heavily on the

- Montana Water Use Act though modified to address local conditions.
- Provides flexibility, local control, and certainty.

Provisions related to the Flathead Indian Irrigation Project:

- Leaves administration and distribution of water within the Flathead Indian Irrigation Project (FIIP) to the Project Operator.
- Provides an evaluation process to ensure that modeled River Diversion Allowances (RDAs)¹ meet Historic Farm Deliveries.²
- Entitles an irrigator to receive a FIIP Delivery Entitlement Statement, a document issued by the BIA verifying that a tract of land (so long as the water user is in compliance with all applicable BIA/FIIP rules and guidelines) is entitled to the delivery of water by the Project Operator. The Delivery Entitlement Statement runs with the land and is valid so long as the land remains assessed.
- Includes shared shortage provisions to meet both the RDAs and instream flows in low-water years.
- Provides for continued FIIP access to the low-cost block of power and net revenue provisions from the Water Use Agreement regarding Séliš, Ksanka and Qíispé Dam (formerly known as Kerr Dam).
- Includes a process to measure and allocate water and provide for within year adjustments to the enforceable levels of the Tribes' on-reservation instream flow rights and to the RDAs in response to on-the-ground climatic and hydrologic conditions.
- Sets out a schedule for the implementation of Operational Improvements and Rehabilitation and Betterment projects and a process to incrementally increase the enforceable level of the Tribes' on-reservation instream flow rights as these projects are implemented. Water saved through increased FIIP efficiency will be split between instream flows and irrigation uses once the Tribes' target instream flows are satisfied.
- Provides irrigators and the FIIP Project Operator a role in water management and the implementation of these projects.
- Does not require irrigators to relinquish filed water rights claims or affect their ability to pursue those claims in the Montana General Stream Adjudication.

¹ "River Diversion Allowance" means initially the volume of water identified in Appendix 3.2 and defined for wet, normal and dry Natural Flow years that is necessary to be diverted or pumped to supply the FIIP Water Use Right. As Reallocated Water is made available through Rehabilitation and Betterment, the RDA is the amount defined in Appendix 3.2, reduced by the volume of Reallocated Water made available by a particular Rehabilitation and Betterment project.

² "Historic Farm Deliveries" means the aggregate annual volume of water for irrigation and Incidental Purposes on the FIIP that was delivered to all farm turnouts within an individual River Diversion Allowance Area prior to the date the ratification of the Compact by the Montana Legislature takes effect under State law. Historic Farm Deliveries include historic crop consumption and estimated standard rates of on-farm conveyance and irrigation application inefficiencies and are used to evaluate RDA values pursuant to Article IV.D.1.e. Historic Farm Delivery volumes are specified in Appendix 3.3.

Understanding the context for the water rights settlement requires some historical background. In 1855, the Tribes entered into a treaty with the United States. In that Hellgate Treaty, the Tribes reserved an exclusive Tribal homeland—the Flathead Indian Reservation—and retained hunting, fishing, trapping and gathering rights throughout their aboriginal territory, which encompassed large portions of modern-day Montana. On the Reservation, the Tribes retained the “the exclusive right of taking fish in all the streams running through or bordering said reservation.” Federal Courts have determined that this right may carry with it a “time immemorial” instream flow water right to sustain fisheries. At the very least, the existence of this treaty language gives the Tribes credible legal claims to such rights—claims that absent a settlement would have to be resolved on a claim by claim basis through the statewide general stream adjudication and any appellate litigation that might follow. “Time immemorial” water rights are senior to all other water rights.

The relationship between this treaty language and the Tribes’ water rights claims are also greatly affected by a 1908 U.S. Supreme Court ruling in a case called *Winters v. United States* (that arose off the Fort Belknap Reservation in north-central Montana). *Winters* holds that when land is set aside for an Indian reservation, a quantity of water sufficient to fulfill the purposes of the reservation is similarly reserved, even if the documents creating the reservation make no mention of water or water rights. In addition, *Winters* provides that the priority date of the water right to meet tribal consumptive needs is the date of the treaty (for CSKT, the Hellgate Treaty date of July 16, 1855). Since the Flathead Indian Reservation was only opened to homesteading in 1909, the Tribes’ claims to consumptive use water rights are therefore also senior to all other water rights on the reservation.

Indian reserved water rights differ from state-based water rights in significant ways: 1) the priority date for aboriginal water rights (that is, actual tribal uses that pre-date the creation of a tribe’s reservation) is time immemorial and the priority date for Indian reserved water rights is the date the reservation was created – *not* the date water was first put to beneficial use; 2) they are not measured by beneficial use but rather encompass all the water necessary to satisfy the purposes for which the reservation was created, including both present and future uses; and 3) they cannot be abandoned or lost through non-use. Moreover, in determining the extent of tribal water rights associated with treaties, the United States Supreme Court has held that courts must interpret the treaty language in the light most favorable to the tribes and as the tribal signatories would have understood the treaty at that time.

While the legal basis of the Tribes’ claims to water rights is well established, especially on the Reservation, the full extent of the Tribes’ rights has not yet been quantified by the Montana Water Court. The Montana General Stream Adjudication requires the quantification and legal determination of *all* pre-1973 claims to water rights in Montana, including the aboriginal and Federal

reserved water rights claimed by the CSKT and the United States on their behalf. The Montana legislature established the Reserved Water Rights Compact Commission to negotiate with Montana tribes and the United States in order to “conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state.” Section 85-2-701, MCA. If the Compact is not approved, the Tribes’ rights would need to be decreed through the normal course of the adjudication based on the claims filed by the Tribes and the United States in June of 2015, filings that were done in accordance with State law. The Compact rights would displace the filed claims if the Compact is finally approved.

Key Elements of the Compact:

Protection of Existing Uses of Water: The Compact protects valid existing uses of water as decreed by the Water Court or permitted by the DNRC. It also provides a mechanism to protect existing domestic and stock uses of groundwater that are generally exempt from the State’s permitting process and provides an expedited process for new domestic and stockwater wells and replacement wells, similar to that which exists off the Reservation. There is NO metering requirement for new wells serving fewer than three homes or businesses.

The Tribes and the United States have agreed to relinquish their right to exercise the Tribal water right to make a call against *any* non-irrigation water right as well as against groundwater irrigators who use less than 100 gallons per minute. The Tribes and the United States have also provided call protection for *all* water rights upstream of the Reservation, except for irrigation rights sourced from the mainstem of the Flathead River, including Flathead Lake, or the North, South, or Middle Forks of the Flathead River.

Water for the FIIP: The Compact includes River Diversion Allowances (RDAs) to meet Historic Farm Deliveries as defined by the Compact. The FIIP Project Operator will continue to allocate this water among irrigators as the compact leaves internal FIIP operations solely to the determination of the Project Operator pursuant to the applicable BIA rules and guidelines. The Compact includes provisions to evaluate the RDAs and adjust them if necessary to meet Historic Farm Deliveries. In the event that additional water is required to meet Historic Farm Deliveries, it would come from additional pumping from the Flathead River using money from the Montana Pumping Fund³.

Adaptive Management: The Compact includes a process to measure and allocate water on the FIIP and to provide for within-year adjustments that are

necessary to address variability in water supply. The process includes:

- Establishing comprehensive water measurement and reporting programs that are publicly accessible;
- Planning, design, and implementation of water management planning tools, including water supply forecasting methods, operational models for division of water between FIIP Instream Flows and the FIIP Water Use Right, and water accounting programs; and
- Planning for and implementation of Operational Improvements and Rehabilitation and Betterment.

Funding: Montana will seek funding from the Montana Legislature for implementation of parts of the settlement. Within five years of federal ratification of compact legislation, the State has committed to contribute:

- \$4 million for water measurement activities;
- \$4 million for improving On-Farm efficiency;
- \$4 million for mitigating the loss of stockwater deliveries from the Project;
- \$30 million to provide a fund that makes annual payments to offset pumping costs and related projects; and
- \$13 million to provide for aquatic and terrestrial habitat enhancement.

The Tribes will dedicate part of the settlement funding they receive from the United States to fund portions of the operational improvements and the rehabilitation and betterment projects.

Low-cost Block of Power: The Compact does not include any hydroelectric water rights associated with the Séliš, Ksanka and Qíispé Dam (formerly known as Kerr Dam); these rights are the subject of entirely separate proceedings and are considered state law-based water rights. The Compact does, however, stipulate that the Tribes will continue to supply FIIP irrigators with a low-cost block of power for irrigation from Séliš, Ksanka and Qíispé Dam, so long as they are the dam licensee.

Quantification of CSKT On-Reservation Water Rights: The Compact quantifies the Tribes' aboriginal and reserved water rights. These include water rights for the FIIP, instream flow and existing uses by the Tribes, tribal members, and allottees, including religious and cultural uses. The Compact also quantifies water rights for wetlands, high mountain lakes, Flathead Lake, the Boulder and Hellroaring hydroelectric projects, and minimum pool elevations for FIIP reservoirs.

The Compact defines the relationship between the exercise of the Tribes' instream flow water rights and the River Diversion Allowances for the FIIP. The Compact and Ordinance also address the Tribes' instream flow water rights for

on-reservation streams outside the FIIP. The Tribes will defer the enforcement of these instream flow rights until enforceable flow schedules have been established that are protective of existing users on those streams through a process set forth in the Ordinance.

Flathead System Compact Water: The Compact quantifies a water right to “Flathead System Compact Water.” This term describes water from the Flathead River and water stored in Hungry Horse Reservoir that the Tribes may use to meet instream flow and consumptive use needs on the Reservation. The Tribes may also lease this water for use on or off the Reservation. The Compact provides access to 11,000 acre-feet per year of this water from Hungry Horse Reservoir that may be leased at a fixed rate to mitigate for domestic, commercial, municipal, and industrial water development off the Reservation.

Water Rights on Land Acquired by the Tribes: The Tribes will take ownership of the state law-based water rights associated with land the Tribes acquire on the Reservation, as those rights are finally decreed by the Water Court or permitted by the DNRC. Under the Compact, these water rights must be exercised in a manner consistent with their historic use.

Quantification of CSKT Off-Reservation Water Rights: Under the Hellgate Treaty, the CSKT assert claims to off-reservation water rights to protect fishery resources in a wide swath of Montana. To settle these claims, the Compact includes instream flow water rights for the maintenance and enhancement of fish habitat in the Kootenai River (consistent with the fishery operations at Libby Dam under the Federal Columbia River Power System Biological Opinions and the Northwest Power and Conservation Council’s Columbia River Basin Fish and Wildlife Program), the Swan River, and the Lower Clark Fork River. The tribes will also have five additional off-reservation instream flow rights in small Kootenai River tributaries, located within the Kootenai National Forest and upstream of private lands.

The Compact provides the Tribes co-ownership with Montana Fish, Wildlife, and Parks (MFWP) of existing water rights for instream flow and recreation purposes in the Clark Fork, Bitterroot, Kootenai, and upper Flathead basins. Co-ownership means joint ownership—one water right with two owners where each party has the independent ability to exercise the right. The Compact also makes the Tribes and MFWP co-owners of a water right associated with the former Milltown Dam. Ratification of the Compact by the Montana legislature changed the purpose of that right from hydropower to instream fishery, fulfilling the State’s obligation under its consent decree with ARCO in a separate natural resource damages case, to maintain this right for non-consumptive instream uses. The Tribes and MFWP will work to develop joint management plans for the exercise of this right. The Compact also provides the Tribes with a beneficial interest in three contracts for the delivery of water from Painted Rocks Reservoir

and Lake Como, both located in the Bitterroot Basin. These existing rights are the only rights that would be recognized for the Tribes in the Bitterroot Basin. The Compact recognizes no instream flow rights east of the continental divide, where the Tribes would assert claims in the absence of the Compact.

Administration of Water Rights on the Reservation: The Compact provides the framework for the administration of water rights on the Reservation through the Unitary Administration and Management Ordinance (or Law of Administration). The Law of Administration describes the process to 1) register existing uses of water; 2) change water rights; 3) provide for new water development; and 4) enforce water rights.

The Compact establishes a Water Management Board to administer the Compact and Ordinance on the Reservation. The Board has five voting members: two members selected by the Governor based on recommendations from county commissions of the four on-Reservation counties; two members appointed by the Tribal Council; and one member selected by the other four members. The Department of the Interior appoints a sixth, non-voting member. The Compact and Ordinance describe the powers and duties of the Board and the process to review the Board's decisions. Neither the Board's jurisdiction nor the Ordinance's jurisdictional area extend off the Reservation.

Key Elements of the Unitary Administration and Management Ordinance

The Unitary Administration and Management Ordinance provides procedures for the administration of water uses on the Reservation, the process for permitting new uses of water, and the process for enforcing water rights.

The Ordinance becomes effective only when the Compact has been finally approved by all three Parties and when the Ordinance has been formally adopted as both State and Tribal law. Approval and enactment by the Montana Legislature has already occurred. The Ordinance cannot be changed by one party without the agreement of the other.

Registration: Water uses do not need to register a water use with the Water Management Board if there is a claim for the use filed in the adjudication or if the use has been recognized by a permit or certificate of completion issued by the DNRC, or if the use is of FIIP water.

The following water uses would need to be registered with the Board:

- Pre-1973 domestic or stock uses for which a claim was not filed in Montana's General Stream Adjudication.
- Post-1973 domestic or stock uses for which completion forms (DNRC Form 602 or 605) were not accepted by the DNRC.
- Uses of the Tribal water right by Tribal members and allottees.

Existing Domestic Wells: Domestic wells that have received a permit or certificate from the DNRC or that are registered under the provisions of the Ordinance would be fully protected from the exercise of the Tribes' (senior) water rights.

New and Replacement Domestic Wells: The Ordinance provides an expedited process for authorizing new and replacement wells.

New Domestic Wells: The source of water for "domestic allowances" can be wells or developed springs. The Ordinance authorizes domestic allowances for three categories of use:

- Individual allowances, which may serve one home or business using a maximum of 35 gallons per minute, 2.4 acre-feet per year. This allowance provides for irrigation of up to 0.7 acres. NO metering is required for individual allowances.
- Shared allowances, which may serve up to three homes or businesses using a maximum of 35 gallons per minute and 2.4 acre-feet per year. Irrigation for two homes is limited to 0.5 acres and 0.75 for three homes. NO metering is required for shared allowances.
- Development allowances, which are available for contiguous or closely grouped parcels of land under the same or affiliated ownership, including housing subdivisions or any combination of business and residential units. A development allowance will allow a combined maximum use of 35 gallons per minutes, and 10 acre-feet per year. The amount of irrigated land will be limited to 0.25 acres for each home or business within the development. Development allowances will require a measuring device on each well or developed spring.

Stock Water Allowances: The Ordinance provides an expedited process for new stockwater systems that use:

- Wells or developed springs that have a maximum flow rate of 35 gallons per minute and a maximum diverted volume of 2.4 acre-feet per year.
- Pits served by groundwater seepage or a non-perennial stream that have a maximum capacity of 5 acre feet and a maximum annual volume of 10 acre-feet per year.
- Tanks served by a perennial or non-perennial stream that have a maximum flow rate of 10 gallons per minute and a maximum diverted volume of 2.4 acre-feet per year.

For more information visit:

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