



THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION

P.O. BOX 278
Pablo, Montana 59855
(406) 275-2700
FAX (406) 275-2806
www.cskt.org



A People of Vision

A Confederation of the Salish,
Pend d' Oreilles
and Kootenai Tribes

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Terry Pitts

May 15, 2012

Jay Weiner, Staff Attorney
Reserved Water Rights Compact Commission
1625 Eleventh Avenue
PO Box 201601
Helena, MT 59620-1601

Re: Off-Reservation Proposal

Dear Jay,

Attached please find the Confederated Salish and Kootenai Tribes (CSKT) response to the State of Montana proposal for resolution of the CSKT off-reservation water rights claim. We have carefully reviewed both the July 20, 2011 and January 30, 2012 State submittals. Our response describes areas of concurrence with the State proposal and areas where the Tribes propose refinements or expansion to the proposal.

There are elements of the Tribes' response that require further interaction and work with the State, and we are prepared to engage in this effort at the earliest opportunity. Thank you for your consideration of enclosed materials.

Sincerely,

Joe Durglo, Chairman,
Tribal Council

Introduction

The Confederated Salish and Kootenai Tribes (Tribes) have reviewed the two submittals¹ prepared by the State of Montana (State), which combined characterize the State's proposal (*Proposal*) for resolution of the Tribes' claims to off-reservation water rights. The *Proposal* defines an assemblage of existing and proposed water rights that would either confer a water right to the Tribes, or co-ownership of a water right with the Montana Department of Fish, Wildlife and Parks (FWP). Additionally, the *Proposal* identifies a set of tributaries in the Kootenai and Swan Basins where the State proposes to place limitations on new water rights permit development following the completion of a Tribal Water Rights Compact (Compact). The permit limitations would not transfer an existing or new water right to the Tribes, but would provide protections in designated critical bull trout habitat in selected streams. The geographic extent of the *Proposal* is for water bodies west of the continental divide and located in the Columbia River Basin.

The Tribes have an extensively documented affinity with water bodies in areas of their aboriginal territory, both east and west of the continental divide. The Tribes assert that incorporation of off-reservation water rights for water bodies west of the continental divide into the Compact does not prejudice or diminish the Tribes', or individual Tribal members', claims to Treaty-based uses, including cultural and religious uses, or hunting, fishing and gathering uses in and around water bodies both east and west of the continental divide.

This response to the State's proposal evaluates each element of the *Proposal*, identifies areas of concurrence and areas where the Tribes recognize deficiencies in the *Proposal*, and provides specific modification or expansion to the *Proposal* to address deficiencies.

Enforceable Hydrographs on the mainstem of the Kootenai and Swan Rivers

The *Proposal* identifies a daily flow hydrograph to be administered at the U.S. Geological Survey (USGS) Kootenai River streamflow gage at Leonia, Idaho (USGS site # 12305000). The water right that would be confirmed through the Compact would be a Tribal water right with a time immemorial priority date, purposed for maintenance of fish habitat. The proposed hydrograph mimics a dry-year flow pattern for the Kootenai River prior to the emplacement of Libby Dam. The construction and operation of Libby Dam have notably altered the natural flow regime of the Kootenai River and limit the potential that the Tribes would be able to exercise call against the pattern of the enforceable hydrograph. Consequently, the following informational remark,

¹ The State of Montana's Proposal For The Resolution Of The Off-Reservation Water Rights Claims Of The Confederated Salish & Kootenai Tribes, Montana RWRCC, July 20, 2011; Detailed Explanation of the State of Montana's Proposal for the Resolution of the Confederated Salish & Kootenai Tribes' Claims to Off-Reservation Tribal Water Rights, Montana RWRCC, January 30, 2012.

developed in coordination with Compact Commission staff, should be placed on the abstract for this water right.

"The exercise of this right shall be suspended so long as Libby Dam remains in existence and the Army Corps of Engineers' operations of that dam are conducted consistently with the 2008 Federal Columbia River Power System Biological Opinion, and the 2010 updated Biological Opinion, specifically as described in Reasonable and Prudent Alternative Action (RPA) No. 4 (Storage Project Operations), Table No. 1 (Libby Dam), including the Northwest Power and Conservation Council's 2003 mainstem amendments to the Columbia River Basin Fish and Wildlife Program, or any subsequent Biological Opinion(s) governing the same RPAs and Operations."

The Kootenai River at Leonia gage is operated by the USGS, with cooperation from the U.S. Army Corps of Engineers. The Tribes will not accept any cost for the continued operation and maintenance of this gage.

With incorporation of the two points immediately above, the Tribes concur that the enforceable hydrograph, and supplemental provisions identified in the *Proposal* for the main-stem Kootenai River, form a positive and appropriate component of the Tribes' off-reservation water right.

The enforceable hydrograph to be administered at the Swan River at Bigfork gage (USGS gage # 12370000) would also be a Tribal water right with a time immemorial priority date, purposed for maintenance of fish habitat. Call could be made to enforce this water right against junior surface water irrigators and junior groundwater irrigators whose rights indicate a flow rate greater than 100 gpm.

Currently, the enforceable gage location is operated by the USGS, with cooperation from the Montana DNRC and FWP. The Tribes will not accept any cost for the continued operation and maintenance of this gage.

With the preceding provision, the Tribes find the enforceable hydrograph, and supplemental provisions identified in the *Proposal* for the main-stem Swan River, a positive and appropriate element of the Tribes' off-reservation water right.

Co-Ownership of Existing FWP Murphy Rights, Public Recreation Rights, and Contract Reservoir Storage

The State has proposed co-ownership of existing water rights with the FWP in the following basins: Clark Fork Basin, Bitterroot Basin, Kootenai Basin, and upper Flathead Basin. Co-ownership rights are categorized as Murphy rights, public recreation rights, filed use rights, and contract storage rights. The *Proposal* lists, by water right number, the water rights and contract

storage rights under consideration. The State's proposal for the former Milltown Dam right is addressed in a subsequent section.

The Tribes have developed the following list of requisite considerations that would form a basis for entry into a water rights co-ownership relationship with the FWP. Our understanding is that several of these points share a mutual overlap with objectives of the FWP.

1. The Tribes defer to Montana to defend public recreation claims and Murphy right claims while retaining the right to enter into an active defense role at the discretion of the Tribes;
2. The Tribes retain the right, but not the obligation, to object to any actions that may adversely impact any claims or contract water rights;
3. The Tribes retain the right, but not the obligation, to monitor and measure water availability for any aspect of the co-owned water right;
4. The Tribes retain the right, but not the obligation, to prosecute a "call" to maintain water right claims and contract storage water;
5. The Tribes disclaim and Montana agrees to indemnify the Tribes from all liability that may arise out of or result from the operation, management, maintenance, or rehabilitation of the Painted Rocks or Como reservoirs, and that may arise out of or result from storage, release and delivery of contract water from Como and Painted Rocks reservoirs.

Recognizing that these points form the basis for furtherance of this topic, the Tribes are prepared to work with the State of Montana to develop the details of what a co-ownership relationship will look like for the water rights enumerated in the *Proposal*.

Co-Ownership of the former Milltown Dam Water Right

Through its *Proposal*, the State has detailed a process where the former Milltown Dam hydropower water right, with a December 11, 1904 priority date and currently held by the Montana State Department of Justice Natural Resource Damage Program, would be transferred to a co-ownership status between the Tribes and the FWP. Concurrent with this transfer, the State proposes that: a) the purpose of the water right be changed from hydropower to an instream purpose for the benefit of fisheries resources; b) the 2,000 cubic feet per second (cfs) water right be protected from abandonment; c) appropriation of the water right be subject to an enforcement protocol that includes a minimum daily flow hydrograph (enforceable hydrograph) and a process to initiate call; and d) call be restricted to junior surface water irrigation uses and junior groundwater irrigation uses with an appropriation right greater than 100 gallons per minute (gpm).

The enforceable hydrograph proposed by the State is staged with flow values that range between a minimum of 1,100 cfs and 2,000 cfs. During the critical summer and early fall period (mid-July through mid-October) the enforceable hydrograph value is set to 1,100 cfs. The

Proposal identifies that the hydrograph would be enforced at the Clark Fork River above Missoula gage (USGS # 12340500).

The State, in its July 2011 submittal, presents a perspective on implementation and enforcement of the former Milltown Dam hydropower water right which draws from the Blackfoot River Drought Response Plan. In general terms, the State defines a process to set flow targets in individual Clark Fork tributaries, while allowing an adaptive management process to proceed. The objective for the adaptive management process, as stated, is to utilize the former Milltown Dam water right in a biologically productive manner, while perpetuating historic water management efforts. In their January 2012 submittal, the State describes an enforcement process that may rely on a water commissioner or other administrative means provided by law, but remains silent on a distribution of flow targets in specific tributaries.

After careful consideration, the Tribes strongly recommend the following refinements to the *Proposal*. Refinements are aligned with: a) the Tribes role as a Natural Resources Trustee in the upper Clark Fork River Basin (Consent Decree dated November 1998) and at the Milltown Site (Consent Decree dated July 2005); b) elements of the *Proposal* prepared by the State; and c) discernible objectives of State Resource Agencies, including FWP and the Montana Department of Environmental Quality. While specific details would need to be addressed, the following points highlight the Tribes recommendations for refinement of this element of the *Proposal*.

Set Enforceable Target Flows for the Blackfoot River Basin and Clark Fork River Basin above the Confluence with the Blackfoot River. The Tribes believe that direct attribution of enforceable target flows to the Blackfoot River and the Clark Fork River above the confluence will: a) result in more equitable allocation between the basins during periods of drought and water rights enforcement; b) improve implementation of the former Milltown water right by segregating the administrable area of the Clark Fork Basin into two logical units; c) preserve the current workings of the Blackfoot Challenge Drought Response Plan; d) bring specific focus to the Clark Fork above the confluence, segments of which are recognized as chronically dewatered by FWP², and subject to reduced beneficial use support due to low flow alteration by the Montana Department of Environmental Quality³; and e) be consistent with elements of the *Proposal*. Specifically, the Tribes propose that the enforceable target flows be administered at the Blackfoot River near Bonner streamflow gage (USGS # 12340000), the Clark Fork River at Turah gage (USGS # 12334550), and cumulatively at the Clark Fork River above Missoula gage (USGS # 12340500).

² <ftp://ftp-fc.sc.egov.usda.gov/MT/www/programs/eqip/DewateredStreams.pdf>

³ <http://www.cwaic.mt.gov/query.aspx>

Modify the Minimum Flow Levels in the Enforceable Hydrograph Proposed by the State. The *Proposal* identifies a minimum enforceable flow level of 1,100 cfs for parts of the year, including the late July through mid-October period. The Tribes propose that the minimum enforceable flow level be raised to 1,200 cfs at the Clark Fork River above Missoula gage for all days where the proposed enforceable hydrograph falls below this level. Further, the Tribes propose that a minimum enforceable target flow be set to 700 cfs at the Blackfoot River at Bonner gage and 500 cfs at the Clark Fork River at Turah gage.

The 700 cfs enforceable flow target at the Blackfoot River gage matches the current FWP Murphy rights for this reach, and is a trigger flow for actions in the Blackfoot Drought Response Plan. The 500 cfs enforceable flow target at the Clark Fork River at Turah gage is lower than the FWP 600 cfs flow water reservation request supported by their instream flow requirements assessment⁴. Additionally, the Tribes believe this magnitude of flow at the Turah gage is required to lead to meaningful adaptation in water management practices, as well as meaningful biological benefits in the basin.

Apply an Adaptive Process to Phase In the Enforceable Target Flows. Below, the Tribes provide a perspective on an approach to implement the former Milltown Dam water right, but recognize that the implementation approach may require additional interaction between the parties. The approach builds on the benefits to setting defined enforceable target flows for both the Blackfoot and Clark Fork Rivers.

The magnitude of the proposed enforceable target flow for the Blackfoot Drainage matches the current FWP Murphy right for the lowermost reach of the Blackfoot River, which is directly integrated into the Blackfoot Drought Response Plan. One basic difference between the current and proposed target is the priority date of the underlying water rights. The Tribes consider that the Blackfoot Challenge interest groups that implement the drought response plan should be afforded the opportunity to integrate the enforceable target flow and priority date into their ongoing drought management process. The FWP preserves the right to call junior users in the current drought response plan, and the Tribes feel this enforcement mechanism needs to be preserved in any future adaptation to the plan. Also, the Tribes, at their discretion, may choose to be a party to the drought response plan.

While specific tributaries to the Clark Fork River above the confluence may have water-rights driven - drought management procedures in place, the Tribes are not aware of a basin-scale procedure. Consequently, the Tribes propose the following sequential process to implement the enforceable target flow proposed for the Clark Fork River at Turah location.

⁴ MFWP, 1986. Application for Reservations of Water in the Upper Clark Fork Basin.

1. In the Compact legislation anticipated to be before the State, assign responsibility and appropriate funding to an existing or new State entity to facilitate a drought management planning process for the Clark Fork River and tributaries above the confluence with the Blackfoot River. The Tribes anticipate that the process would array a broad interest group, and the Tribes would anticipate being a partner in this process.
2. Embed a deferral period, for example five years, for development and then implementation of the drought management planning process.
3. Preserve the ability to enforce the enforceable target flow through call on junior irrigation users, both throughout the life of the drought plan, and if the deferral period is reached without development of a drought management plan that meets the intended purpose of the former Milltown Dam water right.

In summary, the Tribes concur with: a) the concept of co-ownership of the water right with FWP, with the requisite considerations detailed in the previous section of this summary, and additional details yet to be addressed; b) the call protections for specific types of junior users identified in the *Proposal*; and c) the procedures to initiate call, detailed in the *Proposal*. However, the Tribes consider that the refinements presented above need to be addressed to protect Tribal off-reservation uses and the intended purpose of the former Milltown Dam water right.

Basin and Sub-basin Post-Compact New Permit Limitations

The *Proposal* identifies a set of tributaries in the Kootenai and Swan basins that overlap with designated critical bull trout habitat where limitations on new permit appropriations would be set (Basin Restrictions). The Basin Restrictions do not transfer a water right or co-ownership of a water right to the Tribes, but provide resource protections to fisheries resources in designated water bodies.

The Tribes are cognizant that the Basin Restrictions represent a positive step toward the shared objective to protect resources in designated critical bull trout habitat, but are concerned that the geographic scope of the Basin Restrictions are too limited. Consequently, the Tribes have identified a set of watersheds in the Kootenai and Lower Clark Fork River Basins that are proposed for inclusion through the Compact.

The Tribes recommend the following basins in the Kootenai Drainage be included with the list of basins included in the State Proposal – the Fisher River; the Yaak River; and Lake Creek.

No off-reservation water rights in the lower Clark Fork Basin have been attributed to the Tribes through the *Proposal*, and the Tribes consider this a significant deficiency in the *Proposal*. The basins recommended by the Tribes for inclusion in the lower Clark Fork area include streams designated as critical bull trout habitat (attached table).

In summary, the Tribes identify the following points as key to the Basin Restrictions component of the off-reservation proposal.

1. The Tribes will defer to Montana to defend the methodologies relied upon to design basin closures and restrictions;
2. In the event the methodologies employed by the State are found to be deficient, Montana will apply an alternative approach such as the wetted perimeter methodology combined with a channel forming flow to develop basin closures or restrictions;
3. The Tribes retain the right, but not the obligation, to monitor compliance with basin restrictions and closures and standing to object or otherwise challenge acts that may adversely affect a basin closure or restriction;
4. The Tribes, in the attached table and text above, include a list of water bodies in the Lower Clark Fork River and Kootenai River area that need to be considered for inclusion in the Basin Restrictions. The current Basin Restrictions methodology is considered an appropriate procedure to develop new appropriation limits, with the conditions noted immediately above.

Proposal for Inclusion of Additional Elements to the Tribes Off-Reservation Water Rights

Enforceable Hydrograph for the Main-stem of the lower Clark Fork River

As previously noted, the Tribes consider it a significant deficiency that the *Proposal* is silent regarding the lower Clark Fork River. We have partly addressed this with additions to the Basin Restrictions list, but inclusions do not address the main-stem of the lower Clark Fork River. Consequently, the Tribes propose that an enforceable hydrograph, maintained at the Clark Fork River below Cabinet Gorge Dam gage (USGS # 12391950), be included in the off-reservation water rights contained in the Compact. The elements of the enforceable hydrograph would include: a) a Tribal water right with a 5,000 cfs flow maintained for each day of the year at the noted gage; b) a time immemorial priority date; c) a water right purposed for maintenance of fish habitat; and d) call protection for uses other than junior surface water irrigation uses and junior groundwater irrigation uses with an appropriation right greater than 100 gpm. Additionally, the Tribes will not accept any cost for the continued operation and maintenance of this gage.

Habitat Enhancement Fund

The Tribes recognize that there are watersheds where existing uses of water are extensive, and the placement of senior Tribal water rights would be highly disruptive to water users. This practical recognition does not diminish the Tribes association with particular areas and water bodies, but leads the Tribes to propose an alternative approach to secure off-reservation water rights in highly appropriated basins. Specifically, the Tribes propose that a habitat enhancement

fund be established through the Compact and financed by the State and Federal government. The Tribes envision focusing this fund in select watersheds with particular religious, cultural and fisheries significance such as the Bitterroot Drainage, Dayton Creek and the upper Little Bitterroot Watershed. The Tribes would restrict application of a fund to watersheds west of the continental divide. The Tribes recognize that details related to a habitat enhancement fund would need to be addressed by the parties as a next step to secure this component of an off-reservation water settlement.

Protective Levels for the Entirety of Flathead Lake

In the negotiation process for on-reservation water rights, the Tribes have advocated for a right to all naturally occurring water necessary to maintain the minimum pool level of Flathead Lake at an elevation of 2,883 feet above mean sea level. This concept has been reviewed by the parties and a right to all naturally occurring water on the Reservation portion of the lake (south one half), with the elements above and a time immemorial priority date has been placed in the draft compact under consideration by the parties.

The Tribes propose that the same water right attributes be associated with the north half of Flathead Lake, and be included in the Compact as part of the Tribes off-reservation settlement. The Tribes view this as a logical extension of the on-reservation water right for Flathead Lake, and an important protection for this resource.

Placid Creek Instream Flow

The North Fork of Placid Creek, located off of the Reservation in the Clearwater Drainage, is a source of water for the Flathead Indian Irrigation Project. An agreement between the irrigation project and the Placid Lake Water Users Association was reached in the 1930s to leave a minimum flow of 10 cfs in the stream below the irrigation project diversion. The Tribes have monitored and enforced that instream flow since the late 1980s.

The Tribes propose that the Compact secure to the Tribes an instream flow water right on the North Fork of Placid Creek at the currently monitored instream flow point. The water right would be for 10 cfs, in the Tribes' name, and with a time immemorial priority date.

Conclusion

The Tribes have carefully evaluated the State of Montana proposal for resolution of off-reservation water rights. Preceding materials highlight areas of concurrence with the *Proposal*, areas where the Tribes have developed refinements to the *Proposal*, and new elements the Tribes consider as critical additions to the proposal prepared by the State of Montana. Components of this counter-proposal require work by the parties to develop additional information, and the Tribes are prepared to work toward that end.

Table 1: Streams in the lower Clark Fork Basin, identified for inclusion in the Basin Restrictions element of the Tribes' counter-proposal. All streams are designated critical bull trout habitat.

Stream	Critical habitat sub-unit
Bull River	Lower Clark Fork River
South Fork Bull River	Lower Clark Fork River
North Fork Bull River	Lower Clark Fork River
Rock Creek	Lower Clark Fork River
Swamp Creek	Lower Clark Fork River
Vermillion River	Lower Clark Fork River
Graves Creek	Lower Clark Fork River
Thompson River	Lower Clark Fork River
Fish Trap Creek	Lower Clark Fork River
Prospect Creek	Lower Clark Fork River
Saint Regis River	Middle Clark Fork River
Twelve Mile Creek	Middle Clark Fork River
Ward Creek	Middle Clark Fork River
Little Joe Creek	Middle Clark Fork River
North Fork Little Joe Creek	Middle Clark Fork River
South Fork Little Joe Creek	Middle Clark Fork River
Cedar Creek	Middle Clark Fork River
Trout Creek	Middle Clark Fork River
Fish Creek	Middle Clark Fork River
West Fork Fish Creek	Middle Clark Fork River
North Fork Fish Creek	Middle Clark Fork River
South Fork Fish Creek	Middle Clark Fork River
Cache Creek	Middle Clark Fork River
Petty Creek	Middle Clark Fork River
Albert Creek	Middle Clark Fork River
Grant Creek	Middle Clark Fork River
Rattlesnake Creek	Middle Clark Fork River