

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

January 8, 2015

Introduction

The Confederated Salish and Kootenai Tribes (CSKT or Tribes), the State of Montana, and the United States (collectively the Parties) have negotiated a proposed water rights settlement that includes a Compact that will quantify 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.

The current agreement contains significant changes from the settlement components presented to the 2013 Montana Legislature. In 2013, the proposed settlement included a Compact negotiated by the Parties and a Flathead Indian Irrigation Project Water Use Agreement, negotiated by the Flathead Joint Board of Control, the Tribes, and the United States, which was appended to the Compact; however, the 2013 Montana Legislature did not ratify the Compact. The dissolution of the FJBC in 2013 meant that the Water Use Agreement was no longer valid. In 2014, the Parties agreed to a limited reopening of negotiations to resolve the issues that were addressed in the Water Use Agreement.

Changes include:

- The Compact sets River Diversion Allowances (RDAs) for the Flathead Indian Irrigation Project (FIIP) and allows for their evaluation and adjustment to meet historic farm deliveries as defined in the Compact.
- The Compact eliminates the concept of a Farm Turnout Allowance, leaving distribution of water within the FIIP to the Project Operator.
- The Compact contains an evaluation process to ensure that modeled RDAs meet Historic Farm Deliveries.
- The Compact provides a for FIIP delivery entitlement statement; assessed land within the FIIP is entitled to have water delivered by the Project Operator if in compliance with the applicable BIA rules and guidelines for FIIP. The delivery entitlement runs with the land and is valid so long as the land remains assessed.
- The Compact includes a shared shortage provision to meet both the RDAs and instream flows in low-water years.
- The Compact includes the low-cost block of power and net revenue provisions from the Water Use Agreement.
- The Compact includes a process to measure and allocate water and provide for within year adjustments in response to climatic and hydrologic conditions.
- The Compact includes a schedule for the implementation of Operational Improvements and Rehabilitation and Betterment projects and a process to incrementally increase instream flows as these projects are implemented.

- The Compact provides an opportunity for water saved through increased efficiency on the project to be split between instream flows and irrigation uses once target instream flows are satisfied.
- The Compact provides irrigators and the FIIP Project Operator a role in water management and the implementation of these projects.
- The Compact does not require irrigators to relinquish filed water rights claims or affect their ability to pursue those claims in the Montana General Stream Adjudication.
- The Parties made changes to various provisions in response to recommendations from the Montana Water Policy Interim Committee. For a summary of these changes, visit: http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/wpic/2014-12-12_revised_wpip_response.pdf.

The proposed Compact and Ordinance would:

- Protect valid existing water uses as those rights are ultimately decreed by the Montana Water Court or permitted by the DNRC.
- Provide legal protection for post-1996 domestic wells and permits that are currently not legally permitted on the Reservation.
- Establish a process to permit new uses such as domestic, stock, wetlands, municipal, hydropower, industrial, commercial, and agricultural uses on the Reservation.
- Provide a process for changes to existing water uses.
- Provide funding for improved water measurement and water supply forecasting.
- Provide funding for habitat and FIIP improvements.
- Quantify 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 the state.
- Provide 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 provide a process to lease portions of this additional water for new development.
- Recognize existing Tribal uses, including traditional Tribal cultural and religious uses.
- Establish a joint state-tribal board to administer water use on the Reservation under a Reservation-specific law.
- Provide flexibility, local control, and certainty.

The Montana Reserved Water Rights Commission will hold public meetings to explain the Compact and seek public comment on:

- **January 9, 2015** - Ronan Performing Arts Center - 35885 Round Butte Road, Ronan MT; at **4 pm** -Public meeting with technical staff for on-Reservation irrigators; at **7 pm** - Public meeting with the MT-RWRCC on Revised Compact
- **January 10, 2015** – at **9 am** at Hilton Garden Inn Kalispell - 1840 Highway 93 South - Kalispell MT.
- **January 12, 2015** – at 7 pm at the Great Northern Hotel - 835 Great Northern Blvd., Helena MT. The Montana Reserved Water Rights Commission will take public comment and consider approval of the Revised Compact.

Summary of Compact Provisions

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

The framework for the water rights settlement requires some historical background. In 1855, the Tribes entered into a treaty with the United States. In the 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. On the Reservation, the Tribes have 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 carries with it a “time immemorial” instream flow water right to sustain fisheries. Further, the United States Supreme Court has ruled that the language in the treaty that reserves the “right of taking fish at all usual and accustomed places, in common with citizens of the Territory...” means more than the ability to dip a net into water and have it come out empty. While it has not been finally determined in all cases whether this language also carries a right to instream flow water rights, it indubitably gives the Tribes substantial 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. Instream flows for fishery purposes are a “time immemorial” water right, senior to all other water rights

In 1908, the U.S. Supreme Court ruled that when the United States sets aside land for an Indian reservation, a quantity of water is reserved sufficient to fulfill the purposes of the reservation and the priority date of the water right to meet tribal consumptive needs is the date of the treaty (in this case, the Hellgate Treaty of July 16, 1855). Therefore, the Tribes’ consumptive rights are senior to all other water rights on the reservation.

Aboriginal and Indian reserved water rights differ from state-based water rights in significant ways: 1) the priority date for aboriginal water rights 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, 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. The Montana General Stream Adjudication requires the quantification and legal determination of *all* pre-1973 claims to water rights in Montana, including 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 “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. The Commission has negotiated compacts for Montana’s other six Indian reservations that have been ratified by the Legislature. The CSKT compact is the final compact remaining to be resolved in the State of Montana. Settlement allows for protection of existing junior uses that is not possible through litigation and leads to a more comprehensive and flexible outcome.

Key Elements of the Proposed Compact

Protection of Existing Uses of Water: The proposed Compact would provide measures to protect 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 would agree 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 that use less than 100 gallons per minute. The Tribes and the United States would also provide 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 would allocate this water among irrigators as it has always done. Internal FIIP operations would be left solely to the determination of the Project Operator. The concept of a farm turnout allowance is eliminated. 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 Fund.

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:

- Establishment of 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:

- Four million for water measurement activities;
- Four million for improving On-Farm efficiency;
- Four million for mitigating the loss of stockwater deliveries from the Project;
- Thirty million to provide an annual payment to offset pumping costs and related projects; and
- Thirteen 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.

Power Provisions: The Tribes will continue to supply the low-cost block of power from Kerr Dam while they are Kerr Dam licensee and propose to use net-revenue distributions, when available, to support the settlement.

Quantification of CSKT On-Reservation Water Rights: The Compact would quantify the Tribes’ aboriginal and reserved water rights. These include water rights for the Flathead Indian Irrigation Project, instream flow and existing uses by the Tribes, tribal members, and allottees, including religious and cultural uses. The Compact would also quantify water rights for wetlands, high mountain lakes, Flathead Lake, the Boulder and Hellroaring hydroelectric projects, and minimum pool elevations for FIIP reservoirs. The Compact does not include the hydroelectric water rights for Kerr Dam, which are the subject of entirely separate proceedings and are considered state law-based water rights.

The newly negotiated portion of the Compact addresses 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 streams outside the FIIP. The Tribes will defer the enforcement of these 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 lease 11,000 acre-feet of this water from Hungry Horse Reservoir at a fixed rate, to be administered by the State to mitigate for domestic, commercial, municipal, and industrial water development off the Reservation.

Water Rights on Land Acquired by the Tribes: The Tribes would own the state law-based water right 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 would be exercised in a manner consistent with their historic use.

Quantification of CSKT Off-Reservation Water Rights: Under the Hellgate Treaty, the CSKT claim off-reservation water rights to protect fishery resources. To settle these claims, the proposed 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 Columbia River Basin Fish and Wildlife Program), the Swan River, and the Lower Clark Fork River. The tribes would also have five additional off-reservation instream flow rights in small tributaries that would not adversely impact existing uses.

The Compact would provide 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 Basin, Bitterroot Basin, Kootenai Basin, and upper Flathead Basin. Co-ownership means parallel ownership—one water right with two owners that each has the independent ability to exercise the right. None of these rights would diminish the existing water supply available for new development. The Compact would also make the Tribes and MFWP co-owners of a water right formerly associated with the Milltown Dam. Ratification of the Compact by the Montana legislature would change the purpose of that right from hydropower to instream fishery, fulfilling the State's obligation under a separate legal document to maintain this right for non-consumptive instream uses. The Tribes and MFWP would work to develop joint management plans for the exercise of this right. The Compact would provide 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.

Administration of Water Rights: 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). It describes the process to 1) register existing uses of water; 2) change water rights; and 3) provide for new water development.

The Compact would establish a Water Management Board to administer the Compact and Ordinance on the Reservation. The Board would have 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 would appoint a sixth, non-voting member. The proposed 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 would extend off the Reservation.

Key Elements of the Proposed Unitary Administration and Management Ordinance

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

The Ordinance would be adopted in both Montana and Tribal law. It would become effective only when approved by both the Montana Legislature and the Tribes in connection with final ratification of the Compact by all three Parties. It cannot be changed by one party without the agreement of the other.

Registration: Water users do not need to register if they have already filed a claim in the adjudication or have received a permit or certificate of completion from the DNRC or are served by the FIIP.

The following water users would need to register their water uses with the Board:

- People with pre-1973 domestic or stock uses who did not file a claim for those uses in the adjudication.
- People with post-1973 domestic or stock uses who did not file completion forms with the DNRC (DNRC Form 602 or 605) or whose completion form was not processed by the DNRC.
- Tribal members and allottees using a portion of the Tribal water right.

Existing Domestic Wells: Domestic wells that have received a permit or certificate from the DNRC or 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 proposed Ordinance provides an expedited process for domestic allowances for new and replacement wells.

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

- Individual allowances would be available to serve one home or business using a maximum of 35 gallons per minute, 2.4 acre-feet per year. This allowance would provide for irrigation of up to 0.7 acres. NO metering is required for individual allowances.
- Shared allowances would be available for 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 would be 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 would allow a combined maximum use of 35 gallons per minutes, and 10 acre-feet per year. The amount of irrigated land would be limited to 0.25 acres for each home or business within the development. Development allowances would require a measuring device on each well or developed spring.

Replacement Wells: Existing water users would be able to construct a redundant or substitute well without a change of use authorization if the rate and volume of the new well is equal to or less than that of the well being replaced and the water is from the same groundwater source as the well being replaced. The proposed Ordinance describes the process for filing a notice for the substitute well with the Water Engineer.

Stock Water Allowances: The proposed 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.

Next Steps

- The Montana Reserved Water Rights Compact Commission is seeking public comment on the proposed Compact and Ordinance.
- The RWRCC has scheduled public meetings to explain the Proposed Compact and Ordinance, answer questions, and take public comment.
- The State and Tribes will conduct Legislative outreach and seek to present and explain the Proposed Compact and appendices to interested parties.
- The Montana Reserved Water Rights Compact Commission will meet on January 12, 2015 to decide whether to submit the Compact to the Legislature for approval.
- If approved by the Commission, the final Compact and Ordinance will be submitted to the 2015 session of the Montana Legislature.
- The U.S. Congress and the Tribes would also need to approve the settlement.
- After the three Parties act to approve the settlement, it would be submitted to the Water Court for final approval.

Submit written comments on the Proposed Compact or Ordinance to Mr. Chris Tweeten, Chair, MT RWRCC, 1625 11th Ave, Helena MT, 59620, or email to dnrrwrcc@mt.gov. Comments will be shared with all parties.

For copies of the proposed Compact and Ordinance and more information visit: **Montana:**

<http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/Default.asp> and

CSKT: http://www.cskt.org/tr/nrd_waternegotiations.htm or contact Rob McDonald, Confederated Salish and Kootenai Tribes (406) 675-2700 ext. 1222 or Arne Wick (406) 444-5700, Montana Reserved Water Rights Compact Commission.