

Proposed Water Rights
Settlement
Between the Confederated Salish
and Kootenai Tribes,
the State of Montana and the
United States

January 2015

Proposed Water Rights Settlement

- ◆ CSKT, Montana, and U.S. have negotiated a proposed Compact and Ordinance.
- ◆ Compact quantifies CSKT water rights on and off the Reservation.
- ◆ Ordinance provides for the administration of water rights on the Reservation.
- ◆ Provides for eventual waiver of all other Tribal claims in the State of Montana.

Legal Basis for Settlement

- ◆ Characteristics of Tribal reserved rights
- ◆ Legal precedent
- ◆ Montana Code Section 85-2-701 *et. seq*
- ◆ McCarran Amendment and Adjudication

Settlement Components

- ◆ Compact
- ◆ Unitary Management Ordinance
- ◆ State, Tribal, and Federal legislation
- ◆ Montana Water Court decree

Background

- ◆ In 2013
 - the Parties had reached agreement on a Compact.
 - FJBC, Tribes, and United States completed a Flathead Indian Irrigation Project Water Use Agreement.
 - Legislature did not ratify Compact, FJBC never ratified Water Use Agreement, FJBC later dissolved and Reformed.
- ◆ In 2014
 - The Parties agreed to and completed a limited reopening of negotiations.

Key Changes from 2013 Proposal

- ◆ RDAs satisfy FIIP Water Supply
- ◆ No FTA
- ◆ Evaluation of RDAs
- ◆ Shared Shortages
- ◆ Delivery Entitlement
- ◆ CITT
- ◆ Adaptive Management

Key Changes – FIIP Priority

Minimum Enforceable Flows



Minimum Reservoir Pool Elevations



River Diversion Allowances



Target Instream Flows



Once TIFs are satisfied, reallocated water is split between TIFs and RDAs

Timeline for Implementation

Operational Improvements

Period during which implementation of MEFs, RDAs, and TIFs is deferred. Interim instream flows (status quo) maintained

Incremental Implementation

As Operational Improvements make water available within a service area, MEF/RDA/TIFs will be implemented gradually

Full Implementation

Once Operational Improvements are completed, full implementation of MEF/RDA levels will occur, followed by TIFs

Key Changes (continued)

- ◆ Project autonomy and participation
- ◆ Filed claims
- ◆ WPIC Recommendations:
 - Court of Competent Jurisdiction
 - Disclaimers
 - Mitigation fund
 - Expansion of FIIP irrigable acreage

Quantification

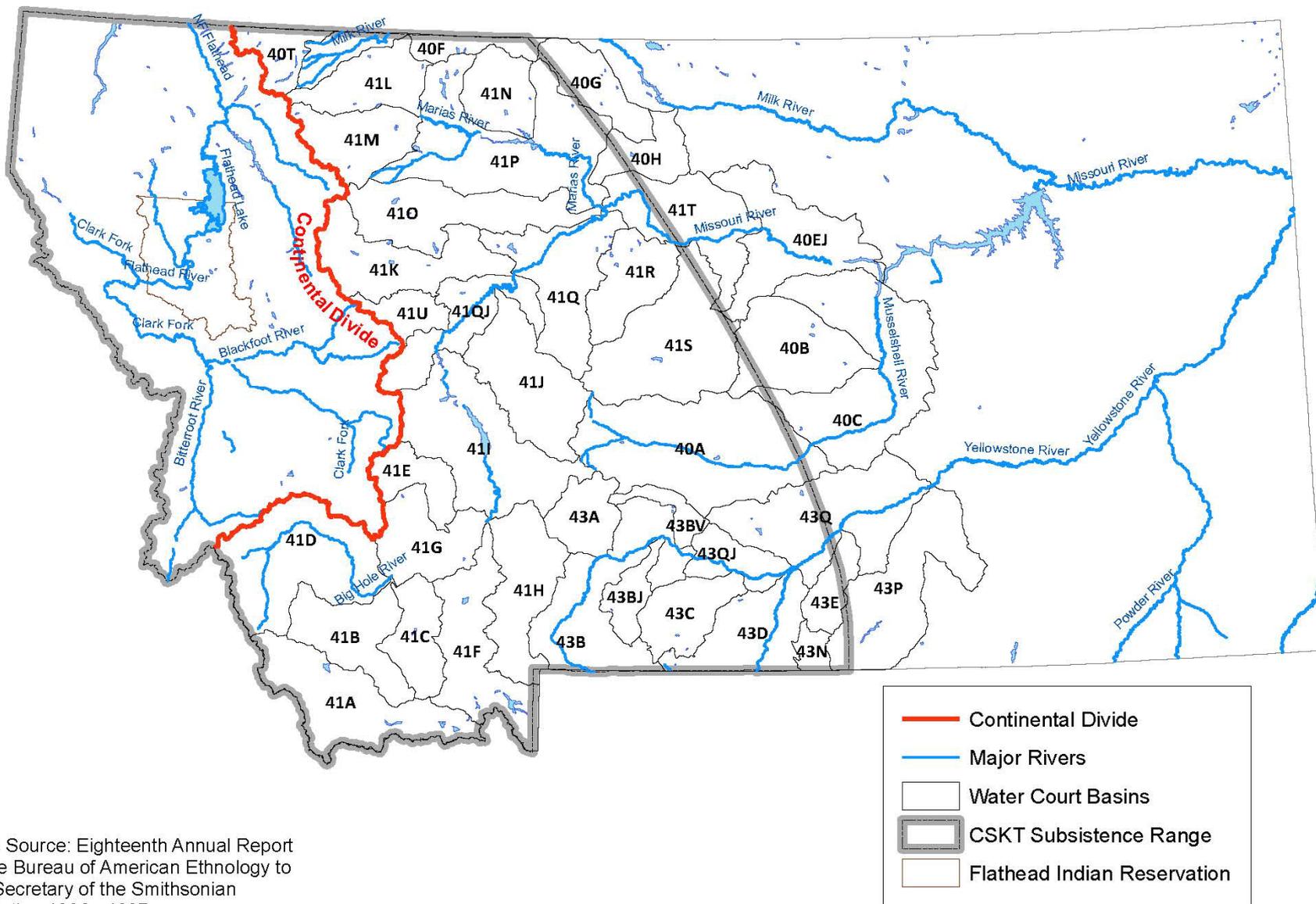
- ◆ Quantifies water rights for existing and future uses of water on Reservation.
- ◆ Quantifies rights for both consumptive and non-consumptive uses.
- ◆ Quantifies a limited number of instream flow rights off Reservation.

Quantification – Off Reservation Rights

“[T]he right of taking fish at all usual and accustomed places, in common with citizens of the Territory...”

- ◆ The right means more than the ability to dip a net into water and have it come out empty
- ◆ Non-consumptive right to maintain fishery flows

CSKT Subsistence Range



Data Source: Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution 1896 - 1897.

CSKT - MT Compact and Off Reservation Water Rights



Quantification – Off Reservation Rights

Right	Owner	Priority Date	Protections
Kootenai River Mainstem	Tribes	Time Immemorial	Libby Dam, call protections
Kootenai River Tributaries (4 rights)	Tribes	Time Immemorial	4 rights, all on public land, no upstream rights
Swan River Mainstem	Tribes	Time Immemorial	Few rights subject to call, water still legally available
Lower Clark Fork	Tribes	Time Immemorial	Tied to FERC license for Cabinet Gorge Dam
N. Fork Placid Creek	Tribes	Time Immemorial	Only 1 upstream FIIP right
DFWP rights to be decreed in compact (13 rights)	Tribes/ DFWP	1928-1970	Already existing and in force, no attributes change
DFWP rights not in compact decree (6 rights)	Tribes/ DFWP	1928-1971	Already existing and in force, no attributes change
Former Milltown Dam Hydropower Right	Tribes/ DFWP	1904	Shaped hydrograph, split rights, 10 year deferral pd.
Total reaches affected = 23, Water Court Basins affected = 15			

Protections for Existing Uses

- ◆ Protections for existing uses include call protection, quantification, and conditions.
- ◆ Legal recognition of existing wells for domestic and stockwater use.
- ◆ Expedited process for new domestic and stockwater wells and replacement wells.
- ◆ There is NO metering requirement for new individual or shared wells.

Protections for Existing Uses

- ◆ No call against:
 - *any* non-irrigation water right,
 - groundwater irrigators that use less than 100 gallons per minute, and
 - *all* water rights upstream of the Reservation, except for irrigation from Flathead mainstem.
- ◆ Other rights quantified and conditioned to protect existing uses

Administration of Water Rights

- ◆ Proposed Settlement provides the framework for the administration of water rights on the Reservation.
- ◆ Based on Montana Water Use Act.
- ◆ Describes the process to
 - Register existing uses of water;
 - Change water rights; and
 - Initiate new water uses.
- ◆ Establishes Water Management Board
 - To administer Compact and Ordinance on Reservation
 - Board's jurisdiction does not extend off Reservation

Water Management Board

- ◆ Joint State-Tribal board
- ◆ Five voting members:
 - Two selected by governor based on recommendations from county commissioners on the Reservation;
 - Two selected by CSKT;
 - One selected by other four members.
- ◆ Sixth non-voting member appointed by Department of the Interior.

Unitary Management Ordinance

- ◆ Unitary administration of water
 - Tribal and non-tribal water uses are intermingled
 - Separate administration would result in duplicative regulation and potential conflicts of law.
- ◆ Describes in detail
 - how water would be administered
 - Process for permitting new uses of water
- ◆ Would be adopted by both Montana and CSKT

Funding

- ◆ 30 million pumping fund
- ◆ 4 million stock water mitigation
- ◆ 4 million on farm improvement
- ◆ 4 million measurement
- ◆ 13 habitat conservation fund

Proposed Settlement

- ◆ Provides funding to improve water measurement, management, and water supply forecasting.
- ◆ Provides funding for fish habitat and FIIP improvements to ensure ESA compliance.
- ◆ Quantifies the Tribes' water rights for all time and provides for dismissal of their other claims.
- ◆ Satisfies with the State's duty under federal law to recognize Tribal water rights.
- ◆ Provides flexibility, local control, and certainty.

Next Steps

- ◆ The Montana Reserved Water Rights Compact Commission is seeking public comment on the proposed Compact and Ordinance.
- ◆ 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.

Next Steps

- ◆ 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 prior. Once this happens, the Compact will take effect.
- ◆ After the three Parties act to approve the settlement, it would be submitted to the Water Court for incorporation into a final decree.

Opportunities for Public Involvement

- ◆ Comments may be submitted to the Commission during public meetings and at:
1625 11th Ave., Helena, MT 59620 or
awick@mt.gov
- ◆ Multiple opportunities for comment and public testimony during legislative process.