

Montana Water Court
PO Box 1389
Bozeman MT 59771-1389
(406) 586-4364
1-800-624-3270 (IN-STATE)
FAX: (406) 522-4131

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DNRC WATER RESOURCES

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Montana Water Court

IN THE WATER COURTS OF THE STATE OF MONTANA
CLARK FORK RIVER DIVISION (BASIN 76L)
JOCKO RIVER HYDROLOGIC SUB-BASIN

IN RE EXAMINATION OF CLAIMS PERFORMED
BY MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION IN THE
JOCKO RIVER HYDROLOGIC SUB-BASIN IN
BASIN 76L WHOLLY OR PARTLY WITHIN THE
FLATHEAD INDIAN RESERVATION

BASIN 76L

SECOND AMENDED CLAIM EXAMINATION ORDER

The confederated Salish and Kootenai Tribes (“Tribes”), the United States and the State of Montana acting through the Montana Reserved Water Rights Compact Commission (“State”) are in active negotiation to resolve the claims of the United States in trust for the Tribes, Tribal members and allottees and the Tribes’ claims for reserved and aboriginal water rights under the provisions of the Water Use Act. As such, pursuant to the terms of §§ 85-2-701, et seq., MCA, all proceedings to adjudicate the water rights of the Tribes and the United States in trust for the Tribes, Tribal members and allottees are presently stayed. However, the Tribes, the United States and the State (hereafter the “Parties”) believe that a competent examination of certain claims to water on the Flathead Indian Reservation may provide information useful to the negotiation process.

Accordingly, and pursuant to consent of all Parties, this Court issued Orders on July 3, 2003, November 18, 2003, and December 9, 2005 directing examination of selected water rights claims in a portion of Basin 76L, within the Jocko River hydrologic sub-basin, that lies wholly or partly within the Flathead Indian Reservation. The Jocko River is a tributary to the

Flathead River. The DNRC is responsible for conducting the claim examination process pursuant to the terms of those orders. The examination of claims in the Jocko sub-basin is presently nearing completion, and the Parties collectively believe that timely examination of additional claims within the exterior boundaries of the Flathead Indian Reservation will facilitate the negotiation process. Consequently, by letter dated January 30, 2008, the Parties requested the Court to supersede the Court's order of December 9, 2005 with an Order directing a more comprehensive examination regimen for the remaining water right claims in Basin 76L.

The Court recognizes that the Tribes claim that a limited waiver of sovereign immunity is necessary for this Order to issue and that the Tribes consent to a limited waiver of sovereign immunity only for the purposes expressly set out in this Order as consented to by all Parties as a precondition to its submission to the Court and do not waive immunity for any other purpose. The Court also recognizes that the State does not agree that a waiver of sovereign immunity by the Tribes is necessary to proceed with entry of this Order.

Accordingly, it is ORDERED that the following procedures shall apply to the examination of claims:

1. Subject to the availability of funds, DNRC shall provide eight full time employees to examine claims in Basin 76L under the current Montana Supreme Court Claims Examination Rules, as the same may be amended from time to time.

2. DNRC shall examine all existing water rights claims on file with DNRC that lie in whole or in part within Basin 76L. Provided, however, that no examination shall take place for claims identified pursuant to paragraph 3 that are held in the name of the Tribes, Tribal corporations, agencies of the Tribes or other Tribal organizations or entities, or for claims for federal reserved or aboriginal water rights claimed by the Tribes or by the United States on behalf of the Tribes or itself.

3. DNRC shall furnish the Tribes and the United States with an abstract of each claim not yet examined in Basin 76L prior to the commencement of any examination of those

claims. These abstracts shall be provided to John Carter, Tribal Attorney, or his successor, and to David Harder, United States Department of Justice, or his successor. The Tribes and the United States shall have 120 days following receipt of the abstracts to notify DNRC's Helena Water Adjudication Office (office location: 910 Helena Ave.; mailing address: P.O. Box 201602, Helena, Montana 59620-1602), in writing, of which claims fall within the limitations identified in paragraph 2 of this Order and which therefore should not be examined. If the Tribes and/or the United States do not notify DNRC's Helena Water Adjudication Office concerning specific claims not to be examined within the 120-day period, DNRC shall proceed to examine all claims identified in the abstracts provided pursuant to this paragraph.

4. DNRC shall proceed southeast to northwest across Basin 76L in the course of examining the claims, recognizing that the vagaries of the claims examination process may necessitate minor variances from this linear progression.

5. For each examined claim making a claim to reserved water rights or to a right with a priority date earlier than April 1, 1910, the following issue remark shall be added:

NO REVIEW OR DETERMINATION OF THE ORIGIN OF THE CLAIMED TYPE OF HISTORICAL RIGHT OR OF ITS PRIORITY DATE, QUANTITY, VOLUME OR FLOW RATE HAS BEEN MADE. ADDITIONAL EVIDENCE WILL BE REQUIRED BEFORE THE CLAIM CAN BE DECREED.

6. The Tribes and/or the United States, at any time, including during final review of the claims examination, may notify in writing DNRC's Helena Water Resources Office that a claim is of a type that falls within the exclusions identified in paragraph 2 above. Upon receipt of such written notice, DNRC shall cease examination of any such claim(s) so identified and shall remove information relating to any such claim(s) from all reports to the Court.

7. For claims not examined or included in any report to the Court, DNRC shall include the following information remark:

PURSUANT TO WATER COURT ORDER, THIS CLAIM HAS NOT BEEN EXAMINED IN ACCORDANCE WITH MONTANA SUPREME COURT RULES AS THE TRIBES OR THE UNITED STATES HAS DETERMINED THAT THIS CLAIM IS MADE BY THE TRIBES, TRIBAL CORPORATIONS, AGENCIES OF THE TRIBES OR OTHER TRIBAL ORGANIZATIONS OR ENTITIES OR IS MADE FOR FEDERAL RESERVED OR ABORIGINAL WATER RIGHTS CLAIMED BY THE TRIBES OR THE UNITED STATES ON BEHALF OF THE TRIBES.

8. Any field examination of a claim on land within the Flathead Indian Reservation shall be arranged by DNRC. The DNRC shall provide the Tribes and the United States with no less than 7 days advance notice of such field examination and the Tribes and the United States shall be entitled to attend any such field examination.

9. For every claim located in whole or in part within the exterior boundaries of the Flathead Indian Reservation, DNRC shall include the following issue remark, which shall become a permanent part of the right, if any right should be finally adjudicated:

THIS CLAIM IS LOCATED IN WHOLE OR IN PART WITHIN THE EXTERIOR BOUNDARIES OF THE FLATHEAD INDIAN RESERVATION.

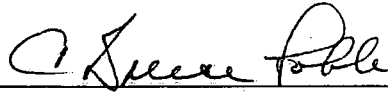
10. Throughout the claims examination process, the United States and the Tribes shall be afforded access to claims examination information which was and is developed, utilized or produced by DNRC or is otherwise in the possession of DNRC pursuant to this Order. Following completion of claims examination pursuant to this Order, DNRC shall furnish the Tribes and the United States with a complete copy of the examination materials for each claim examined. The claim examination materials shall be furnished to the Tribes and the United States through their respective representatives identified above.

11. DNRC shall perform its duties in accordance with the Supreme Court Claims Examination Rules and Orders of the Court, except that DNRC shall not forward to the Court the Summary Report of results of the claim examination process or other reports or information which may be used by the Court to issue a decree of any nature regarding any claim or claims to water in Basin 76L without the consent of the Tribes and the United

States; or unless compact negotiations among the Commission, the Tribes, and the United States conclude pursuant to Mont. Code Ann. § 85-2-704 (2007); or upon further order of this Court after notice to the Parties and an opportunity to be heard.

12. Claim examination work done under the Orders of July 3, 2003, November 18, 2003, and December 9, 2005 will be incorporated with work under this Order rather than being separately provided to the Water Court.

DATED this 3 day of *March*, 2008.



C. Bruce Loble
Chief Water Judge

John Carter, Legal Counsel
Confederated Salish and Kootenai Tribes
PO Box 278
Pablo MT 59855

David Harder, Attorney
US Department of Justice
999 18th Street, Suite 945
Denver CO 80202-2449

Jim Gilman, Bureau Chief
Water Rights Adjudication Bureau
MT Department of Natural Resources
and Conservation
PO Box 201602
Helena MT 59620-1602

Courtesy Copies to:

Jon Metropoulos, Attorney
Gough, Shanahan, Johnson & Waterman
PO Box 1715
Helena MT 59624

Jay Weiner, Attorney
Montana Reserved Water Rights
Compact Commission
PO Box 202601
Helena MT 59620-1601

John Peterson
Water Resources Specialist
PO Box 201602
Helena MT 59620-1602

Bill Schultz
Regional Manager
DNRC Missoula Regional Office
PO Box 5004
Missoula MT 59806-5004