

IN THE WATER COURT OF THE STATE OF MONTANA
CONFEDERATED SALISH AND KOOTENAI TRIBES – MONTANA – UNITED
STATES COMPACT

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CASE NO. WC-0001-C-2021

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR THE
COMMENCEMENT OF SPECIAL PROCEEDINGS FOR CONSIDERATION OF
THE CONFEDERATED SALISH AND KOOTENAI TRIBES—STATE OF
MONTANA—UNITED STATES COMPACT**

THIS MATTER is before the Court on the motion of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (“Tribes”), the State of Montana, and the United States of America to commence the proceedings required under applicable law to review and approve the water rights of the Tribes, quantified in the Compact among the Tribes, State, and United States found at § 85-20-1901, MCA (“Flathead Compact”). The Court, based on the submissions of the Tribes, the State, and the United States, and being otherwise advised in these matters, FINDS, CONCLUDES, and ORDERS as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Tribes, the State, and the United States (the “Compacting Parties”) concluded a Compact settling the water right claims of the Tribes, its members, and allottees, and of the United States on behalf of the Tribes, its members, and allottees, in

accordance with § 85-2-702, MCA. The Flathead Compact was ratified by the Montana Legislature in 2015 (codified at § 85-20-1901, MCA), by the Congress of the United States on December 27, 2020 (P.L. 116- 260, Title V, Division DD) (“Montana Water Rights Protection Act”), and by the Tribe by Resolution 21-023 of its Council on December 29, 2020. The Secretary of the United States Department of the Interior approved the Flathead Compact on September 17, 2021, after completing the review process required by section 4 of the Montana Water Rights Protection Act.

2. On March 15, 2022, the Compacting Parties initiated the Water Court process required under the Montana Water Rights Protection Act and Montana law to settle the water rights of the Tribes by filing in the Water Court a Joint Motion for Incorporation of the Confederated Salish and Kootenai Tribes’ Compact into Preliminary and Final Decrees, for Commencement of a Special Proceeding on such Decrees, and for a Hearing on any Objections to the Preliminary Decree. The Compacting Parties asked the Water Court to adopt a procedure allowing consolidation of the nine basins encompassed by the Compact water rights and three additional basins that can be impacted by the Tribal water rights into a single judicial unit, in accordance with § 85-2-215, MCA, and to issue a Preliminary Decree within this judicial unit for the water rights defined in the Flathead Compact. This procedure is consistent with the requirements of Article VII.B of the Flathead Compact and has been utilized in the review of other water rights settled through compacts entered into between the State and the United States regarding federal agencies’ rights, and between several Montana Tribes, the State and the United States regarding various tribal rights. *See, e.g.*, Northern Cheyenne (No. WC-93-1); Fort Peck (No. WC-92-1); National Park Service (No. WC-94-1); Chippewa Cree (No. WC-2000-01); Red Rock Lakes (No. WC-2002-02); Benton Lakes/Black Coulee (No. WC-2002-04); Forest Service (No. WC-2007-3); Bureau of Land Management (No. WC-2008-10); National Bison Range (No. WC-2011-01); Crow (No. WC-2012-06); Bowdoin (No. WC 2013-04); Charles M. Russell (No. WC 2015-05); Upper Missouri Breaks (No. WC 2015-06); and Blackfeet (No. WC-0006-C-2018).

3. The Compacting Parties asked in their Joint Motion that the Court include the

water rights quantified in the Flathead Compact in the final decrees for the following nine basins:

- a. Basin 76D, Kootenai River;
- b. Basin 76E, Rock Creek;
- c. Basin 76F, Blackfoot River;
- d. Basin 76J, South Fork, Flathead River;
- e. Basin 76K, Swan River;
- f. Basin 76L, Flathead River, below Flathead Lake
- g. Basin 76LJ, Flathead River, Flathead Lake and above;
- h. Basin 76M, Clark Fork River, between Blackfoot and Flathead Rivers;
and
- i. Basin 76N, Lower Clark Fork River, below Flathead River.

4. The Compacting Parties also demonstrated that in three other basins the Tribal water rights can impact water users upstream. These basins are Basin 76G, Clark Fork River, above Blackfoot River; Basin 76GJ, Flint Creek; and Basin 76I, Middle Fork of the Flathead River. Thus, the Court should consolidate the review relating to the Preliminary Decree emanating from the Flathead Compact into a special proceeding pursuant to § 85-2-215, MCA, that encompasses all twelve of the basins where the Tribal water rights are and where impacts could be felt.

5. The Compacting Parties have established special circumstances as to why the Court should adopt procedures for consideration of the Flathead Compact as a single preliminary decree, rather than piecemeal in twelve separate preliminary decrees in the normal adjudication of the basins affected. While the Court is unable to accord priority status to all claims in the adjudication, significant reasons exist to prioritize the water rights quantified in the Flathead Compact in a separate proceeding.

First, the requested procedure is consistent with the procedures adopted for reviewing the water rights quantified in other compacts, such as Northern Cheyenne (No. WC-93-1); Fort Peck (No. WC-92-1); National Park Service (No. WC-94-1); Chippewa Cree (No. WC-2000-01); Red Rock Lakes (No. WC-2002-02); Benton Lakes/Black Coulee (No. WC-2002-

04); Forest Service (No. WC-2007-3); Bureau of Land Management (No. WC-2008-10); National Bison Range (No. WC-2011-01); Crow (No. WC-2012-06); Bowdoin (No. WC 2013-04); Charles M. Russell (No. WC 2015-05); Upper Missouri Breaks (No. WC 2015-06); and Blackfeet (No. WC-0006-C-2018).

Second, differences between the geographic and hydrologic divisions associated with the adjudication and the settlement process authorized by the Montana Legislature warrant special proceedings to allow integration of settlements into decrees. Section 85-2-702, MCA authorizes the Reserved Water Rights Compact Commission to enter into negotiations with Indian Tribes claiming reserved water rights in Montana on a government-to-government basis. This approach can lead to agreements that track political boundaries or are consistent with key legal documents rather than only the basin boundaries utilized in the adjudication. The Flathead Compact includes water rights in nine Water Court basins and those rights can affect water uses in three other basins. The Flathead Compact also includes general provisions that apply to water rights in each basin. Twelve separate considerations of the same provisions could lead to conflicting interpretations and to duplication of effort.

Third, the twelve basins affected by the Flathead Compact are in various stages of the adjudication process. Two of the twelve basins have not been decreed (Basins 76L and 76LJ), while in the other ten basins, the Water Court has issued various types of decrees over a long period of time and that are in various stages of having objections to claims resolved. Consideration of the Flathead Compact on a basin-by-basin approach would occur over an extended period of time. Background information necessary to evaluate the water rights settled in the Flathead Compact could become stale.

Fourth, time is of the essence in this matter. Under the Flathead Compact, Art. VII.B.1, the proposed decree must be approved by the Water Court within three years of submission or it becomes voidable. And under the Montana Water Rights Protection Act, §§ 10(b)(1)(A) and 10(f), if the Water Court has not “approved the Compact in a manner from which no further appeal may be taken” by January 2032, the federal and tribal waivers of claims are void and the federal approval of the settlement is no longer effective, absent

further agreement among the Parties. It is not clear whether the twelve basins will have final decrees issued within these two time frames. If the Court were to stay the proceeding on the Flathead Compact until all the decrees in the twelve basins were issued in the normal course of the adjudication process, the approval, ratification, and confirmation of the entire Flathead Compact could expire before the water rights quantified in the Compact could even be considered by the Water Court in all respects.

Fifth, expenditure of a large amount of the funds made available under the federal legislation for a significant number of important projects are not allowed until the Preliminary Decree has become final in the Water Court. Montana Water Rights Protection Act, §§ 8(b)(2), 8(e), 8(h)(3) – (13), and 9(a). A special proceeding on the Flathead Compact will allow for direct consideration of the Tribes' water rights.

Sixth, the United States, through the Department of Justice, is willing to pay the costs of mailing personal notice to the water rights holders in the twelve Basins, and for the publication of notice for a period of no less than once each week for three consecutive weeks in twenty-seven newspapers to have these water rights confirmed on a timely basis.

6. Issuance of a preliminary decree containing the Flathead Compact as authorized by § 85-2-231, MCA is a reasonable and appropriate measure to commence a process that will lead to the approval and incorporation of the Flathead Compact into Montana's general water right adjudication effort or to the Compact's disapproval.

7. The Compacting Parties have demonstrated good cause for entry of an order of commencement and a Preliminary Decree in this matter pursuant to § 85-2-218(1)(b), MCA.

8. Commencement of this proceeding is consistent with prior Water Court practice in approving and incorporating reserved water rights quantified in compacts into the Montana Adjudication.

9. Prioritization of this decree for issuance furthers the intent of the 2015 Montana Legislature in approving the Flathead Compact and incorporating it into the Montana Code. It is fitting and timely to issue the Preliminary Decree now to incorporate the relevant provisions of the Compact into the Montana general adjudication of existing

rights to water.

10. This Court has the authority to order the commencement of Special Proceedings under §§ 3-7-224(2) and 85-2-231, MCA.

11. The Compacting Parties have demonstrated good cause to make corrections to the Preliminary Decree attached to the Flathead Compact as Appendix 38 and several of the Appendices to the Compact. First, the Montana Water Rights Protection Act directed several changes to the Flathead Compact that must be reflected in the Preliminary Decree that is the subject of the special proceedings created herein. The Flathead Compact specifically authorized such changes by Congress for the component of the Tribal water rights that is an allocation of water from the Bureau of Reclamation's Hungry Horse project. Article III.C.1.c.vii. As to the changes to Appendices 28 and 29, to reduce the Tribal water rights, those are authorized by Congress' power under federal law. Regarding the requested corrections to the Preliminary Decree attached to the Flathead Compact as Appendix 38, these are warranted to have the Preliminary Decree more precisely track the Compact. This is consistent with Article VII.B of the Flathead Compact that directs that the Preliminary Decree include Article III of the Compact and any other portions of the Compact that control administration of the Tribal water rights. A more accurate recitation of the Tribal water rights and limitations on those rights from the Flathead Compact in the Preliminary Decree furthers the intent of the Compact.

Therefore, the Court hereby enters the following:

ORDER

1. The Compacting Parties' motion to commence these proceedings to consider the Flathead Compact is GRANTED. The Court sets forth in this Order the initial set of procedures necessary to commence the proceedings and to provide notice of the Flathead Compact in accordance with § 85-2-232, MCA.

2. The water rights quantified in the Flathead Compact shall be incorporated into a Preliminary Decree in those basins in which a source for a water right set forth in the Compact is located or in which the Tribal water rights could affect water users. Those basins are: Basin 76D, Kootenai River; Basin 76E, Rock Creek; Basin 76F, Blackfoot

River; Basin 76G, Clark Fork River (above Blackfoot River); Basin 76GJ, Flint Creek; Basin 76I, Middle Fork of the Flathead River; Basin 76J, Flathead River (South Fork); Basin 76K, Swan River; Basin 76L, Flathead River (below Flathead Lake); Basin 76LJ, Flathead River (to and including Flathead Lake); Basin 76M, Clark Fork River (between Blackfoot and Flathead Rivers); and Basin 76N, lower Clark Fork River (below Flathead River). These basins are hereinafter collectively referred to as the “CSKT Basins.”

3. For the purposes of these proceedings, the Court consolidates the CSKT Basins into a single judicial unit in accordance with § 85-2-215, MCA. In accordance with § 85-2-218(1) and (3), MCA, the Court hereby designates the CSKT Basins as a priority basin for the purposes of these proceedings.

4. For the purposes of these proceedings and in accordance with § 85-2-231(3), MCA, the Court hereby designates all of the water rights quantified in the Flathead Compact as a single class of claims within the CSKT Basins.

5. The following provisions of the Montana Water Rights Protection Act impose conditions on and clarify several of the water rights recognized in the Flathead Compact:

SEC. 6. STORAGE ALLOCATION FROM HUNGRY HORSE RESERVOIR

(a) STORAGE ALLOCATION TO TRIBES.—

(1) **IN GENERAL.**—Subject to paragraph (2), the Secretary shall allocate to the Tribes 90,000 acre-feet per year, as measured at the Hungry Horse Dam, of storage water in Hungry Horse Reservoir for use by the Tribes for any beneficial purpose on or off the Reservation under a water right held by the United States and managed by the Bureau of Reclamation.

(2) **LIMITATIONS.**—The allocation under paragraph (1) shall be subject to

(A) Appendix 7 to the Compact, entitled “Flathead Basin Tribal Depletions Study”, prepared by the Bureau of Reclamation, and dated September 2012; and

(B) Appendix 8 to the Compact, entitled “Hungry Horse Reservoir, Montana: Biological Impact Evaluation and Operational Constraints for a proposed 90,000-

acre- foot withdrawal”, prepared by the State, as revised on September 14, 2011.

(b) TREATMENT.—

(1) IN GENERAL.—The allocation under subsection (a) shall be considered to be part of the Tribal Water Right.

(2) ADMINISTRATION.—The Tribes shall administer the water allocated under subsection (a) in accordance with, and subject to the limitations of, the Compact and this Act.

(c) ALLOCATION AGREEMENT.—

(1) IN GENERAL.—As a condition of receiving the allocation under subsection (a), the Tribes shall enter into an agreement with the Secretary to establish the terms and conditions of the allocation, in accordance with the Compact and this Act.

(2) INCLUSIONS.—The agreement under paragraph (1) shall include provisions establishing that—

(A) the agreement shall be without a limit as to a term;

(B) the Tribes, and not the United States, shall be entitled to all consideration due to the Tribes under any lease, contract, or agreement entered into by the Tribes pursuant to subsection (d);

(C) the United States shall have no obligation to monitor, administer, or account for—

(i) any funds received by the Tribes as consideration under any lease, contract, or agreement entered into by the Tribes pursuant to subsection (d); or

(ii) the expenditure of those funds;

(D) if the capacity or function of any facility of Hungry Horse Reservoir or Hungry Horse Dam is significantly reduced, or is anticipated to be significantly reduced, for an extended period of time, the Tribes shall have the same storage rights as other storage contractors with respect to the allocation under subsection (a);

(E) the costs associated with the construction and operation of the storage facilities at Hungry Horse Reservoir and Hungry Horse Dam allocable to the Tribes

shall be nonreimbursable;

(F) No water service capital charge shall be due or payable for the agreement or any water allocated under subsection (a), regardless of whether that water is delivered for use by the Tribes or under a lease, contract, or by an agreement entered into by the Tribes pursuant to subsection (d);

(G) the Tribes shall not be required to make payments to the United States for the agreement or any water allocated under subsection (a), except for each acre-foot of stored water leased or transferred for industrial purposes;

(H) for each acre-foot of stored water leased by the Tribes for industrial purposes—

(i) the Tribes shall pay annually to the United States an amount sufficient to cover the proportionate share of the annual operation, maintenance, and replacement costs for the Hungry Horse Project allocable to that quantity of water; and

(ii) the annual payments of the Tribes shall be reviewed and adjusted, as appropriate, to reflect the actual operation, maintenance, and replacement costs for the Hungry Horse Project; and

(I) the costs described in subparagraphs (G) and (H) shall not apply to any lease or transfer for industrial purposes to—

(i) any entity of the Tribes; or

(ii) any entity wholly owned by the Tribes.

SEC. 10. WAIVERS AND RELEASES OF CLAIMS.

(a) WAIVERS AND RELEASES.—

(4) CERTAIN OFF-RESERVATION WATER RIGHTS.—

(A) IN GENERAL.—Notwithstanding the confirmation of the water rights of the Tribes described in Appendices 28 and 29 to the Compact, as consideration for recognition of the Tribal Water Right and other benefits described in the Compact and this Act, the Tribes shall relinquish any right, title, or claim to the water rights located within the Flathead basin and described in those appendices.

(B) REQUIREMENT.—The water rights described in subparagraph (A) shall be held solely by the State.

6. In order to present the appropriate Preliminary Decree and abstracts of the Tribal water rights, the Court directs that the Preliminary Decree that is the subject of the special proceedings authorized in this Order is the document attached to the Compacting Parties' Joint Motion as Exhibit 5. The appendices to the Preliminary Decree shall be the three appendices attached to the Compacting Parties' Joint Motion, Exhibit 2. The Court further orders that Appendices 9 and 28 that are attached to the Compacting Parties' Joint Motion as Exhibit 4 should be substituted for the same documents in Exhibit 2, Appendix 2.

7. The Court, in a separate order, shall outline the necessary process to provide notice to the potentially affected water users in the CSKT Basins.

8. All proceedings following the issuance of this Order shall be pursuant to the further order of the Court.

9. Nothing herein constitutes approval of the Flathead Compact, the Preliminary Decree of the Compact, or any objections thereto.

Stephen R. Brown
Associate Water Judge

Service via Electronic Mail:

Todd Kim
Assistant Attorney General
David W. Harder
Senior Attorney for Legal Issues
U.S. Department of Justice
Indian Resources Section
Environment & Natural Resources Div.
999 18th St.
South Terrace, Suite 370
Denver, Colorado 80202
david.harder@usdoj.gov
efile_denver.enrd@usdoj.gov

Daniel J. Decker
Melissa Schlichting
Christina M. Courville
Confederated Salish & Kootenai Tribes
Tribal Legal Department
PO Box 278
Pablo, MT 59855
Melissa.Schlichting@cslt.org
Christina.Courville@cslt.org
daniel.decker@cslt.org

Molly M. Kelly
Joslyn Hunt
Montana Department of
Natural Resources and Conservation
1539 Eleventh Avenue
PO Box 201601
Helena, MT 59601
(406) 444-5785
Molly.kelly2@mt.gov
Joslyn.Hunt@mt.gov

Interested Parties:

Emily Jones
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: (406) 384-7990
emily@joneslawmt.com

Austin Knudsen
Attorney General
Timothy Longfield
Assistant Attorney General
215 N. Sanders St
P.O. Box 201401
Helena, MT 59620-1401
edo@mt.gov
timothy.longfield@mt.gov

Service via USPS Mail:

Walter E. Congdon
Attorney for Lake County
106 4th Avenue East
Polson, MT 59860
(406) 883-7231
(406) 925-1351
sseegers@latemt.gov
****Service List Updated 4-11-2022****