



Fort Belknap Indian Community

KNOW THE FACTS: Peoples Creek Basin Indian Reserved Water Rights

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Federal law governing Indian reserved water rights was established in 1908 in *Winters v. United States*, 207 U.S. 564 (1908). The case involved the Gros Ventre and Assiniboine Tribes (“Tribes”) and created water rights for Indian reservations. Treaties, Executive Orders, and Congressional Acts with the United States in the second half of the 19th Century included significant land cessations by the Tribes.¹ The Supreme Court concluded that the promises of the United States to create a permanent, livable homeland and agricultural economy for the Tribes were “practically valueless without irrigation—a barren waste.” This and subsequent federal cases established important characteristics of the FBIC’s Indian water rights, including: (1) rights to the waters running through, under, bordering or encompassed within the Ft. Belknap Reservation (i.e., surface and groundwater)²; (2) a senior priority date to the use of its water sources based on the date of the creation of a Reservation;³ (3) an amount of water (i.e., quantification) necessary to fulfill the purposes of the Ft. Belknap Reservation;⁴ and (4) historical, present, and future uses that cannot be lost or taken away because of non-use under state-law concepts such as abandonment and forfeiture.⁵

2001 FBIC-Montana Water Compact

In the late 1980s, the FBIC Council chose to negotiate and settle its Indian water rights with the State and United States. After over a decade of negotiations, the Fort Belknap-Montana Water Rights Compact (“Water Compact”) was entered into by the State, FBIC, and United States (2001).⁶ Congressional and Tribal Member approval of the Water Compact will provide for the Water Compact’s enforceability with the issuance of a court decree. Peoples Creek Basin is a significant source of FBIC Indian water rights that runs through the Reservation.

FBIC Peoples Creek Basin (40I) Indian Water Rights

Peoples Creek Basin is defined as the mainstem of Peoples Creek to its confluence with the Milk River, and its numerous tributaries, including Duck Creek, the South Fork of Peoples Creek,

¹ *Arizona v. California*, 373 U.S. 546, 595-601 (1963).

² COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[2][a]; see also *Cappaert v. United States*, 426 U.S. 128, 143 (1976), concluding that “the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.”; *Agua Caliente Band v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1271 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017) (“We hold that the Winters doctrine encompasses both surface water and groundwater appurtenant to reserved land”).

³ *Winters v. United States*, 207 U.S. 564 (1908).

⁴ *Winters*, 207 U.S. at 566-67, 577 (1908); see also *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 320, 35 P.3d 68, 81 (2001).

⁵ *Winters*, 207 U.S. at 577.

⁶ Mont. Code Ann., 85-20-10 (2001); FBIC Council Resolution No. 17-2001.



Little Peoples Creek, Jim Brown Creek, Lodge Pole Creek, Lone Tree Coulee, and Mud Creek. The FBIC's senior priority rights to the use of waters from Peoples Creek Basin is 1855.⁷

Quantification of FBIC's Peoples Creek Basin water rights is based on negotiations with the State. The FBIC agreed to allow upstream non-Indian water users to continue to use their historic water uses in the Upper Peoples Creek, and the FBIC will have the rights to all waters, including all the tributaries, of Peoples Creek on the Reservation. In addition, the State and Federal Government will construct a dam and reservoir on Upper Peoples Creek on the Reservation for the FBIC to use for any designated purpose.

The FBIC has a right to use all the waters generated in the Peoples Creek Basin on the Reservation. The State approved this in the Water Compact. The average annual flow of Peoples Creek is highly variable, as historical records demonstrate, and is about 25,000 acre-feet per year.⁸ Nevertheless, the FBIC water rights in the Water Compact include the senior rights to use all the tributary surface flows, where most of the Peoples Creek water supply is generated. This is essentially all the available, usable water supply in the Peoples Creek Basin on the Reservation.

The Negotiated Agreement on Upper Peoples Creek

There is one exception to the FBIC's senior use of its Indian water rights in Peoples Creek: the use of water rights in Upper Peoples Creek, upstream of the Reservation. During the negotiations for the Water Compact, the State asked the FBIC to allow non-Indian irrigators with state-based water rights on Upper Peoples Creek off the western boundary of the Reservation to continue to irrigate at their historical and current levels. The FBIC negotiators realized that its rights in Upper Peoples Creek would be very disruptive for our neighbors' livelihoods. However, the FBIC was concerned about ensuring that the interior of the Reservation gain as much benefit as possible from Peoples Creek.⁹ The FBIC wanted to be absolutely certain that it will always have access to the entire natural flow and negotiated a compromise with the State.¹⁰ Because the Upper Peoples Creek is considered to be one of the most variable flow regimes in the Western United States, varying from 0 cubic feet per second (cfs) to more than 400 cfs, the FBIC negotiators knew that a negotiated agreement would give the FBIC an opportunity to improve and stabilize the reliability of the Peoples Creek water supply.

Through compromise and negotiations, the Parties, first, agreed that the non-Indian irrigators on Upper Peoples Creek are allowed to continue only their current irrigation use without the FBIC calling that water down to the Reservation before these lands were irrigated, about 3,931 acres¹¹ and storage capacity of 1,578 acre-feet; that is, FBIC agreed to subordinate their senior priority rights to these irrigated lands.

⁷ FBIC Water Compact, Art. III.B.2., Peoples Creek Basin priority date.

⁸ 2000 Reserved Water Rights Negotiations at 6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ FBIC Water Compact, Appendix 3—Peoples Creek Agreements



Second, *in exchange* for the FBIC allowing the current non-Indian, upstream irrigators to continue to irrigate their existing lands, the State and Federal Government agreed to the following FBIC rights and benefits:

- (1) the State agreed that the FBIC will receive 20,000 acre-feet per year from Lake Elwell storage, under the authority of the Federal Government, for FBIC's own use;
- (2) the State and Federal governments agreed to build the FBIC storage in Upper Peoples Creek, the Upper Peoples Creek Dam and Reservoir, between Highway 66 and near the western reservation boundary; this reservoir will have a capacity of about 3,000 acre-feet, will reregulate and mitigate the impact on the water supply from the non-Indian irrigation use upstream so that the water can be used by FBIC throughout the year,¹² and can be used for whatever purposes the FBIC wants, such as stock, irrigation or recreation;¹³
- (3) the FBIC can convey up to 1,290 acre-feet per year from its Indian water rights in the Missouri River Basin 40EJ for use in the Peoples Creek Basin (with a priority date of July 24, 1893);¹⁴
- (4) the FBIC has the right to develop surface water from intermittent streams in the Peoples Creek Basin and the entire Milk River Basin within the Reservation for use by livestock if the maximum capacity of each impoundment or storage is less than or equal to 15 acre-feet, an amount that can be impounded twice a year, and the total amount impounded in each impoundment or storage may be less than or equal to 30 acre-feet per year. The priority date of the water rights for stock impoundments shall be the date of development of the right; and
- (5) the FBIC Comprehensive Water Development Plan proposes to restore the use of irrigable lands under the Ereaux Unit in the lower Peoples Creek—which has been inoperable since at least the 1970s—with the construction of water infrastructure that will distribute water from the proposed Ft. Belknap Reservoir to the Ereaux Unit lands, resolving a perennial problem of the unreliability of the water supply and flooding related to this unit.¹⁵ The new infrastructure will control flooding from Peoples Creek.

The FBIC retains the right to assert all its senior priority Indian water rights over any state-based water rights not specifically set forth in Appendix 3 of the Water Compact under Art. III.B. for the Upper Peoples Creek water users. Prior to the construction of the Upper Peoples Creek Reservoir, the FBIC may only assert the senior priority of water rights actually developed.¹⁶

Finally, FBIC's Indian water rights and use of all the tributaries to the mainstem of Peoples Creek, i.e., Duck Creek, the South Fork of Peoples Creek, Little Peoples Creek, Jim Brown Creek, Lodge Pole Creek, Lone Tree Coulee, and Mud Creek, are not affected by the Upper Peoples Creek agreement with the non-Indian irrigators.

¹² 2000 Reserved Water Rights Negotiations at 7.

¹³ FBIC Water Compact, Art. VI.C.

¹⁴ FBIC Water Compact, Art. III.D.

¹⁵ NRCE Map of Lower Peoples Creek-- Ereaux Unit lands (August 2020); Congress authorized the Secretary of the Dept. of Interior to transfer the Ereaux Unit to an association or organization of landowners in 1961, P.L. 87-237 (Sept. 14, 1961), 75 Stat. 509.

¹⁶ FBIC Water Compact, Art. III.B.2.a(2).

MAP OF RESERVATION SHOWING WATER COURT BASINS

