

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

CASE NO. WC-0001-C-2021

**NOTICE OF ENTRY OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD
RESERVATION-STATE OF MONTANA-UNITED STATES COMPACT PRELIMINARY DECREE AND
NOTICE OF AVAILABILITY**

AS A WATER USER YOU MUST READ ALL OF THIS NOTICE

The Montana Water Court has been asked to approve a Compact settling the water rights claims of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (“Tribes”). The Tribes, the State of Montana, and the United States (hereinafter collectively referred to as the “Compacting Parties”) entered into a Compact (“Flathead Compact”) settling the reserved water right claims of the Tribes, members of the Tribes, and allottees, and the United States on behalf of the Tribes, members of the Tribes, and allottees, in accordance with § 85-2-702, MCA. The Flathead Compact was ratified by the Montana Legislature on April 24, 2015 (codified at § 85-20-1901, MCA), by the Congress of the United States on December 27, 2020 (Pub. L. No. 116-260, Title V, Division DD) (“Federal Act”), by the Tribes by Resolution 21-023 of the Tribal Council on December 29, 2020 and signed by the Secretary of the United States Department of the Interior on September 17, 2021. The Flathead Compact is available for your review before the Court determines whether to approve the Flathead Compact in accordance with applicable law.

The Flathead Compact defines the reserved water rights of the Tribes within the State of Montana and will entitle the Tribes to divert and use water in accordance with the Flathead Compact within all or part of the following basins: Basin 76D, Kootenai River; Basin 76E, Rock Creek; Basin 76F, Blackfoot 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). A summary of the Tribal water rights within these basins is enclosed with this Notice. Also, Tribal water rights can have an impact on water rights in Basin 76G, Clark Fork River (above Blackfoot River); 76GJ, Flint Creek; and Basin 76I, Middle Fork of the Flathead River.

You are receiving this Notice because the State’s water rights records indicate you have filed a statement of claim, applied for or received a permit to appropriate water, or own a water reservation in the vicinity of the area in which a reserved water right quantified in the Flathead Compact is located or in a basin that could be impacted by such rights. Since you may have an interest affected by the Flathead Compact, you should review the Compact. Accordingly,

YOU ARE HEREBY NOTIFIED that the Montana Water Court has entered a Preliminary Decree and Findings of Fact, Conclusions of Law, and Order for the Commencement of Special Proceedings for Consideration of the Confederated Salish and Kootenai Tribes of the Flathead Reservation-State of Montana-United States Compact (“Commencement Order”) in the affected basins, the Flathead Compact, in order to determine whether it should be

approved in accordance with applicable law. If the Court approves the Flathead Compact, it will enter a Final Decree adjudicating the water rights of the Tribes as they are recognized in the Flathead Compact and as limited by the Federal Act. That Final Decree will be binding on all water users in the Montana water rights adjudication.

*What Is a Preliminary Decree and What Are Your Rights
and Obligations to Object to the Flathead Compact?*

This Preliminary Decree is a decree entered by the Water Court in accordance with § 85-2-231(2), MCA. As explained in Article VII.B.2 of the Flathead Compact, the Water Court's review of the Compact is "limited to the contents of Appendix 38 [of the Compact] and may extend to other sections of the Compact only to the extent that they relate to the determination of water rights and their administration." The Preliminary Decree sets forth the entire Flathead Compact and the specific provisions of the Flathead Compact that the Court will review in the proceeding. The Court's review will be conducted pursuant to the standard previously identified for the review of Tribal-State water compacts, which treats a compact as "closely analogous to a consent decree." *Chippewa Cree Tribe Water Compact*, 2002 WL 34947007, *3, Case No. WC-2000-01 (June 12, 2002). The Court's review of a compact is to allow the Court "to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties" *Id.* (internal quotations omitted). "The purpose of this kind of judicial review is not to ensure that the settlement is fair or reasonable between the negotiating parties, but that it is fair and reasonable to those parties and the public interest who were not represented in the negotiation, but have interests that could be materially injured by operation of the compact." *Id.* at *4 (emphasis omitted).

At this stage in the adjudication, all affected persons are required to state any objections that they may have to the Preliminary Decree. Your water usage may be affected by the Flathead Compact. If you do not agree with the Tribal Water Rights recognized in the Flathead Compact, you may file an objection and request a hearing and the Water Court will hear your objection under the existing legal standards. **This will be your only opportunity to object to the Preliminary Decree. If you do not file an objection at this time, you will not be able to object to the Preliminary Decree in any other proceedings before the Water Court and you will be bound by any final decree entered by the Water Court approving the Tribal Water Rights quantified in the Flathead Compact.**

Right to Appeal

If you do not participate in Water Court proceedings, your right to appeal an adverse decision is limited. Section 85-2-235, MCA, provides that:

(1) A person whose existing rights and priorities are determined in a final decree may appeal the determination only if: (a) the person requested a hearing and appeared and entered objections to the temporary preliminary decree or the preliminary decree; (b) the person's rights or priorities as determined in the temporary preliminary decree or the preliminary decree were affected as the result of an objection filed by another person; (c) the person requested a hearing and appeared before the water court to finally resolve an issue remark, as defined in 85-2-250; or (d) the person is a claimant appealing an adverse decision when the water court issued the decision as the result of an evidentiary hearing or as the result of calling the claim in on the court's own motion.

(2) The attorney general may appeal a determination made in a final decree if the attorney general participated as an intervenor as provided in 85-2-248.

(3) An interlocutory ruling by the water judge upon a question of law may be appealed by any party who is affected by the decision and who participated in the matter in which the ruling was issued.

Should You File an Objection?

Only you can answer this question. To help you determine whether you should file an objection to the Preliminary Decree, you should examine the enclosed summary and the Flathead Compact. Your examination should not stop there, however. You should also compare the Tribal Water Rights with the claims that you have filed with the Water Court, the water right permits or certificates that you have received from the Montana Department of Natural Resources and Conservation ("DNRC"), and possibly the other claims, permits, certificates, and reservations of water within the basins affected by the Flathead Compact. All of the water rights claims filed and all of the water right

- The Tribes have an Instream Flow water right for a portion of the mainstem of the Swan River (Basin 76K) as identified in Appendix 26 with a time immemorial priority date. This right may only be enforced against junior surface water irrigators and groundwater irrigators with flow rates greater than 100 gallons per minute.
- The Tribes have a 5,000 cubic feet per second (“cfs”) Instream Flow water right for a portion of the mainstem of the Clark Fork River (Basin 76N) as identified in Appendix 27 with a time immemorial priority date. For so long as the Cabinet Gorge and Noxon dams remain in existence, the enforceable level of this right is a flow rate equal to the lesser of 5,000 cfs or the minimum flow level established by the Federal Energy Regulatory Commission as a condition on the license for the Cabinet Gorge and Noxon dams.
- The Tribes shall be added as a co-owner with MFWP of the Water Rights Arising Under State Law held by MFWP for Instream Flow and recreation purposes identified in Appendices 28 and 29 as amended by the federal act. This co-ownership does not change the priority dates or flow rates for these rights.
- Co-ownership of Water Right Number 76M 94404-00 (Milltown Dam). Upon ratification of the Compact by the Montana Legislature, Water Right 76M 94404-00 was split into two active and enforceable Water Rights Arising Under State Law: 76M 94404-01, (measurement point at Turah Bridge USGS Gage, Clark Fork River Basin 76G) and 76M 94404-02 (measurement point at Bonner USGS Gage, Blackfoot River Basin 76F) as identified in Appendix 30 and Appendix 31. Upon the Effective Date, these rights are co-owned by the Tribes and MFWP. These rights have a priority date of December 11, 1904. These rights have a purpose of maintenance and enhancement of fish habitat to benefit the instream fishery and to take the form of two enforceable hydrographs. These water rights shall not be exercised in conjunction with any artificial diversion. The Tribes and MFWP each retain the unilateral right to exercise these water rights as each deems appropriate, but neither has any affirmative duty to take any particular action. The ability to enforce shall be suspended for a period of 10 years from the date of ratification of the Compact by the Montana Legislature. For the legal availability analysis, these rights have a combined year-round flow rate of 2,000 cfs as measured below the confluence of the Blackfoot and Clark Fork Rivers.
- The Tribes have an Instream Flow water right for the upper reach of the North Fork of Placid Creek as identified in Appendix 35 with a time immemorial priority date.
- The Tribes have time immemorial Instream Flow water rights for Big Creek, Boulder Creek, Steep Creek, and Sutton Creek—tributaries of the Kootenai River—as identified in Appendix 36.

Call Protection.

- The Tribes (on behalf of themselves and the users of any portion of the Tribal Water Right) and the United States relinquished their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law: (1) whose purpose does not include irrigation; (2) whose purpose is irrigation and whose source of supply is Groundwater and whose flow rate is less than or equal to 100 gallons per minute; or (3) identified in Article III.G.3.b that is equal to the quantity of water established as the annual FIIP quota, or an equivalent farm delivery amount within the applicable FIIP River Diversion Allowance area, or the quantity of water allowed under a claim decreed by the Montana Water Court or water right granted by the DNRC, whichever is less, whose owner enters into a consensual agreement as described in Article III.G.3.
- The Tribes and the United States, generally, relinquished their right to exercise the Tribal Water Right to make a Call against any water right located upstream of the Flathead Reservation in Basins 76I, 76J, and 76LJ, except for those Water Rights Arising Under State Law: (1) whose purpose is irrigation and whose source of supply is from certain rivers and lakes (*see* Article III.G.4.a); or (2) whose purpose is irrigation,

whose source of supply is Groundwater connected to one of the sources identified in Article III.G.4.a, and whose flow rate is greater than 100 gallons per minute.

- The Tribes and the United States agree that the Tribal Water Right may not be exercised to make a Call against any Water Right Arising Under State Law upstream of the Flathead Reservation (Basins 76I, 76J, and 76LJ) and located on a tributary of the Flathead River not identified in Article III.G.4.a.
- The Tribes and the United States relinquished their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose point of diversion is outside the Flathead Reservation and whose source of supply is the Little Bitterroot River or its tributaries.
- Any Water Right Arising Under State Law the purpose of which is irrigation and that is susceptible to Call by the Tribes whose purpose is changed after the Effective Date to something other than irrigation shall remain susceptible to Call pursuant to the terms and conditions of the Compact as though the purpose was still irrigation.

Water Rights Arising Under State Law Appurtenant to Lands Acquired by the Tribes.

- For lands acquired by the Tribes within the Flathead Reservation, the Tribes have the right to any Water Right Arising Under State Law acquired as an appurtenance to the land. Upon the Effective Date, the Tribes may, pursuant to the process identified in the Article III.H, transfer these water rights to the Tribal Water Right with a priority date of July 16, 1855.

The Compact also provides:

- Information pertaining to the implementation of the Compact (Article IV).
- Establishment of the Flathead Reservation Water Management Board to be the exclusive regulatory body for water rights administration on the Flathead Indian Reservation, including the issuance of new water rights and change applications. Such administration is governed by the Law of Administration.
- Any user of a portion of the Tribal Water Right who proposes a change of such use must seek authorization from the Board to change the use of that portion of the right.
- After the Effective Date and the entry of a final decree by the Montana Water Court of the water rights quantified by the Compact, the Compact's terms shall be binding on the State, the Tribes, the United States, and any Person using, claiming or in any manner asserting any right under the authority of these three sovereigns, except as provided in the federal act.

This document summarizes key parts of a lengthy legal document, the Compact; reviewers should read the Compact on any issue of particular interest. All terms capitalized here are defined in the Compact.

FLATHEAD COMPACT TRIBAL WATER RIGHT SUMMARY

The Confederated Salish and Kootenai Tribes of the Flathead Reservation (“Tribes”), the State of Montana, and the United States have entered into a Water Rights Compact (“Compact”) for the purpose of settling the water rights claims of the Tribes, their members, and Allottees of the Flathead Indian Reservation, and of the United States on behalf of the Tribes, their members, and Allottees, and to provide the necessary foundation for the establishment of a board composed of Tribal and State appointed representatives to provide for the unified administration of all water resources on the Reservation, in accordance with § 85-2-702, MCA. The Compact was ratified by the Montana Legislature on April 24, 2015 (codified at § 85-20-1901, MCA), by the Congress of the United States on December 27, 2020 (Pub. L. No. 116-260, Title V, Division DD) (“federal act”), by the Tribes by Resolution 21-023 of the Tribal Council on December 29, 2020 and signed by the Secretary of the United States Department of the Interior on September 17, 2021.

The Compact quantifies the Tribal Water Right in the following basins:

- Basin 76D, including the Kootenai River and its tributaries;
- Basin 76E, including Rock Creek and its tributaries;
- Basin 76F, including the Blackfoot River and its tributaries;
- Basin 76J, including the South Fork of the Flathead River and its tributaries;
- Basin 76K, including the Swan River and its tributaries;
- Basin 76L, including the Flathead River below Flathead Lake, and its tributaries;
- Basin 76LJ, including the Flathead River to and including Flathead Lake, and its tributaries;
- Basin 76M, including the Clark Fork River between the Blackfoot and Flathead Rivers, and its tributaries; and
- Basin 76N, including the Clark Fork River below the Flathead River, and its tributaries.

Some portion of the Tribal Water Right recognized could impact water rights in the following basins:

- Basin 76G, including the Clark Fork River above the Blackfoot River, and its tributaries;
- Basin 76GJ, including Flint Creek and its tributaries; and
- Basin 76I, including the Middle Fork of the Flathead River and its tributaries.

The Tribal Water Right means the water rights of the Tribes, including any Tribal member or Allottee, the basis of which are federal law, as set forth in the following Compact provisions:

- Article III.A, Religious and Cultural Uses which includes all traditional, religious, or cultural uses of water by Tribal members within Montana;
- Article III.C.1.a through j, various rights in Basins 76L and 76LJ and the Flathead Indian Irrigation Project (“FIIP”) Irrigation Water Diversions from Basins 76F and 76N;
- Article III.C.1.k.i, Wetlands Appurtenant to Lands Owned by Montana Fish Wildlife and Parks;
- Article III. C.1.l.i, Wetlands Appurtenant to Lands Owned by United States Fish and Wildlife Service;
- Article III.D.1 through 3, mainstem Instream Flow rights in the Kootenai River (Basin 76D), Swan River (Basin 76K), and Lower Clark Fork River (Basin 76N); and
- Article III.D.7 and 8, Instream Flow right on the North Fork of Placid Creek (Basin 76F) and Instream Flow rights on Kootenai River Tributaries (Basin 76D).

The term “Tribal Water Right” also includes those rights identified in Article III.H that are appurtenant to lands taken into trust by the United States on behalf of the Tribes.

Basins 76L and 76LJ and FIIP Irrigation Water Diversions from Basins 76F and 76N.

- The Tribal Water Right includes sufficient water for irrigation and other incidental purposes to supply the FIIP to serve up to, but no more than, 135,000 acres with a priority date of July 16, 1855 (see Appendix 5).
- The Tribal Water Right includes all Existing Uses by the Tribes, their members and Allottees that are not Water Rights Arising Under State Law and are not otherwise specifically quantified in other sections of Article III. To be valid and enforceable, the Tribes, their members or Allottees claiming such an Existing Use shall complete the process for registration set forth in the Law of Administration. Religious or cultural uses of the Tribal Water Right are exempt from the registration process.
- The Tribes have a direct flow water right from the Flathead River from the following sources: Flathead River, Flathead Lake, and the South Fork of the Flathead River up to Hungry Horse Reservoir with a point of diversion from Flathead Lake or the Flathead River, either on or off the Reservation. Such right is for any beneficial use with a diversion volume of 229,383 acre-feet per year ("AFY") and a depletion volume of 128,158 AFY (Appendix 9). As part of this right and as provided by Congress in the federal act, the Tribes are entitled to an allocation of 90,000 AFY, as measured at the Hungry Horse Dam, of storage water in Hungry Horse Reservoir with a priority date of the water rights for the Reservoir of the Bureau of Reclamation (Appendix 9).
- The Tribes have Instream Flow rights on the Reservation as indicated in the abstracts appended to the Compact (see Appendices 10–14). The Tribes' Instream Flow rights have a priority date of time immemorial.
- The Tribes have the right to water necessary to maintain Minimum Reservoir Pool Elevations for FIIP reservoirs as provided by the abstracts in Appendix 15. Such water rights carry a priority date of July 16, 1855.
- The Tribes have the right to all naturally occurring water that is necessary to maintain: the Wetlands identified in Appendix 16; the High Mountain Lakes (Appendix 17); and the level of the entirety of Flathead Lake at an elevation of 2,883 feet (Appendix 18). These rights have a time immemorial priority date.
- The Tribes have the right to the water necessary to operate the Boulder Creek Hydroelectric Project identified in Appendix 19 and the Hellroaring Hydroelectric Project identified in Appendix 20. Both have a priority date of July 16, 1855.
- The Tribes and Montana Fish Wildlife and Parks ("MFWP") have a right to all naturally occurring water necessary to maintain the Wetlands identified in Appendix 21 with a priority date of time immemorial.
- The Tribes and the Department of the Interior's Fish and Wildlife Service have the right to all naturally occurring water necessary to maintain the Wetlands identified in Appendix 23 with a priority date of time immemorial.

Instream Flow Water Rights Off of the Reservation.

- The Tribes have an Instream Flow water right for a portion of the mainstem of the Kootenai River (Basin 76D) as identified in Appendix 25 with a time immemorial priority date. The ability to enforce this right is suspended so long as the Libby Dam remains in existence and the Army Corps of Engineers operates the dam consistent with the Federal Columbia River Power System Biological Opinions identified in Appendix 25.

permits, certificates, or reservations of water that have been granted in the basins where the Tribal water rights can be exercised are on record with the DNRC. You can also review the entire Preliminary Decree and Commencement Order. Some or all of the documents referenced in this paragraph can be reviewed during business hours at the following offices:

1. The Montana Water Court, 1123 Research Drive, Bozeman, MT 59718 (Preliminary Decree and Commencement Order only).
2. The Montana DNRC, Water Resources Regional Office, 2705 Spurgin Road, Bldg. C, Missoula, MT 59806-5004; (406) 721-4284 (all documents).
3. The Montana DNRC, Water Resources Regional Office, 655 Timberwolf Parkway, Ste 4, Kalispell, MT 59901-1215; (406) 752-2288 (all documents).
4. Lincoln County Clerk's Office, Libby, MT; Flathead County Clerk's Office, Kalispell, MT; Sanders County Clerk's Office, Thompson Falls, MT; Lake County Clerk's Office, Polson, MT; Mineral County Clerk's Office, Superior, MT; Missoula County Clerk's Office, Missoula, MT; Ravalli County Clerk's Office, Hamilton, MT; Granite County Clerk's Office, Philipsburg, MT; Powell County Clerk's Office, Deer Lodge, MT; Lewis and Clark County Clerk's Office, Helena, MT; Deer Lodge County Clerk's Office, Anaconda, MT; Silver Bow County Clerk's Office, Butte, MT (Preliminary Decree and Commencement Order only).
5. Bureau of Indian Affairs, Flathead Indian Irrigation Project Office, 220 Project Drive, St. Ignatius, MT 59865; 406-745-2661 (Preliminary Decree and Commencement Order only).
6. CSKT Natural Resources Department, 301 Main Street, Polson, Montana, 59860; (406) 675-2700 (Preliminary Decree and Commencement Order only).

You may obtain a paper or electronic copy of the Preliminary Decree and Commencement Order from the DNRC, Water Rights Bureau, P.O. Box 201601, Helena, MT, 59620-1601. The cost of a paper copy of the Preliminary Decree, Commencement Order, Summary of Water Rights, and this Notice (approximately 62 pages) is \$20.00. An electronic copy of those documents on CD is \$10.00.

The Preliminary Decree and Commencement Order are also available on the DNRC website at <http://dnrc.mt.gov/divisions/water/adjudication/confederated-salish-and-kootenai-tribes-compact>, The Flathead Compact is published in section 85-20-1901 of the Montana Code Annotated, which can be found on the Internet at https://leg.mt.gov/bills/mca/title_0850/chapter_0200/part_0190/section_0010/0850-0200-0190-0010.html. The Montana Code Annotated can also be found in many public offices and public libraries.

Public Meeting

The Water Court will host an online public meeting on July 11, 2022, at 6 p.m., Mountain Time. The public meeting is limited to providing information about the Water Court procedures and is not a hearing to provide testimony or to raise objections. The Water Court will explain the procedures and provide an opportunity for questions within the limited scope of the meeting. The meeting can be accessed by computer at: <https://mt-gov.zoom.us/j/86359692851?pwd=QXQyZGpiR2RnenlrbnNuTkkg3bmI2Zz09> or by telephone at +1 646 558 8656 or +1 406 444 9999. The meeting ID is 863 5969 2851 and the password is 333701.

How to File an Objection and Request a Hearing

An objection to the Flathead Compact must be filed on the form provided by the Montana Water Court. Objection forms can be found at the Water Court and the DNRC offices in Missoula and Kalispell and at <https://courts.mt.gov/courts/water/LegalResources>. Any objection to the procedure being followed in this matter may be filed in any format which is in compliance with the Montana Rules of Civil Procedure. All objections must be filed and received by the Montana Water Court, P.O. Box 1389, Bozeman, MT 59771-1389, or by email to watercourt@mt.gov, on or before **December 6, 2022**.

LATE OBJECTIONS WILL NOT BE CONSIDERED.

Extensions

The Water Judge may grant a request for an extension of the time for filing objections. A request for an extension must be received by the Water Court on or before **December 6, 2022**. Use the Water Court's Request for Extension form found at <https://courts.mt.gov/courts/water/LegalResources>. If an extension is granted, it will apply to everyone. Any extension will be posted at the offices listed above and will be advertised once in the *Anaconda Leader*, *Billings Gazette*, *Bitterroot Star*, *Blackfoot Valley Dispatch*, *Bozeman Chronicle*, *Char-Koonta News*, *Clark Fork Valley Press & Mineral Independent*, *Daily Inter Lake*, *Flathead Beacon*, *Great Falls Tribune*, *Helena Independent Record*, *Hungry Horse News*, *Kootenai Valley Record*, *Lake County Leader*, *Mineral Independent*, *Missoulian*, *Montana Standard*, *Philipsburg Mail*, *Ravalli Republic*, *Sanders County Ledger*, *Seeley Swan*, *Pathfinder*, *Silver State Post*, *The Montanian*, *The Western News*, *Tobacco Valley News*, *Valley Journal*, and *Whitefish Pilot*.

Any Questions?

Use the Water Court's toll-free number 800-624-3270; or call our regular office number of (406) 586-4364, which is not toll-free. Or call the Kalispell DNRC Regional Office at (406) 752-2288 or the Missoula DNRC Regional Office at (406) 721-4284.

DATED this 9th day of June, 2022.

/s/ Stephen R. Brown
Associate Water Judge
Montana Water Court