

## **The CSKT Compact “Boiled Down”**

1. All stock rights 100% protected on- and off-Reservation – Tribes CANNOT call. Compact Art. III.G.1.<sup>12</sup>
2. All municipal rights 100% protected on- and off-Reservation – Tribes CANNOT call. Compact Art. III.G.1.
3. All domestic rights 100% protected on- and off-Reservation – Tribes CANNOT call. Compact Art. III.G.1.
4. All commercial and industrial rights 100% protected on- and off-Reservation – Tribes CANNOT call. Compact Art. III.G.1.
5. All other non-irrigation rights 100% protected on- and off-Reservation – Tribes CANNOT call. Compact Art. III.G.1.
6. All groundwater irrigators with flow rates of 100gpm or less 100% protected on- and off-Reservation – Tribes CANNOT call. Compact Art. III.G.2.
7. The Compact does NOT change regulatory jurisdiction over anything off the Reservation – the Tribes get NO new say over management of water rights, water quality, wildlife, or anything else off the Reservation. Compact Art. IV.C.1, V.B.22.

### **Off-Reservation Impacts**

8. In Basin 76D (Kootenai), the Tribes’ instream flow rights:
  - a. Cannot be enforced at all so long as Libby Dam remains in place (and no one is talking about removing Libby Dam). Compact Art. III.D.1.e.
  - b. Are set at an enforceable daily flow level that allows them to be satisfied with minimal risk to existing irrigators in the unlikely event that Libby Dam were ever removed. Cannot be enforced against irrigators on tributaries of the Kootenai River. Compact Art. III.D.1.g, and Appx. 25.
  - c. Will not impact existing uses on Big Creek, Boulder Creek, Steep Creek, and Sutton Creek because the enforcement points for these rights are upstream of all irrigation uses. Art. III.D.8, Appendix 36.
9. In Basin 76N (Lower Clark Fork), the Tribes’ instream flow right:
  - a. Is set at the identical level of the FERC license condition on Cabinet Gorge Dam (5000cfs) – therefore as long as Avista is in compliance with its FERC license, the Tribes’ right is satisfied and cannot be used to make a call. Compact Art. III.D.3.g.

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<sup>1</sup> References are to 2013 Compact and Appendices, none of which will change substantively as a result of the recently concluded negotiations and which may be accessed at: <http://dnrc.mt.gov/rwrcc/Compacts/CSKT/Default.asp>. Terms that will change as a result of the 2014 negotiations are noted on p.4, and all references will be updated when drafting of these provisions is complete.

<sup>2</sup> Making a “call” means a request by a water right holder for water to which they are entitled; such a call will force those upstream users with junior rights to cease or diminish their diversions and pass the requested amount of water to the downstream senior making the call. A call generally lasts until the senior’s water right is satisfied.

- b. Will change to track the enforceable level of the FERC license condition should that level ever change; again, FERC compliance = right satisfied = no call. Compact Art. III.D.3.g.

10. In Basin 76K (Swan), the Tribes' instream flow right:

- a. Is measured at the mouth of Swan Lake, dramatically reducing the likelihood of call. See Swan Mainstem Abstract, Appx. 26.
- b. Is set at a sufficiently low level that under most conditions Pacific Power would be entitled to call to satisfy its hydro power right before the Tribes could make a call to satisfy their instream flow right, Appx. 26
- c. Can only be enforced against surface water irrigators and groundwater irrigators with flow rate greater than 100gpm (tributaries are in play here). Compact Art. III.D.2.e.

11. In Basin 76H (Bitterroot), the Tribes are settling for *no* water rights of their own, instead:

- a. FWP will have to manage their contracts for stored water out of Painted Rocks and Como in a biologically responsible manner (as they are currently required to do) – NO change for existing irrigators. Compact Art. III.D.6.a. through c.
- b. Tribes to become co-owners with FWP of existing FWP recreation rights in mainstem of Bitterroot – NONE of the other attributes of those rights (including priority date and flow rate) would be changed. Compact Art. III.D.4.a.ii., Appx. 29.

12. In Basin 76I (Middle Fork Flathead), 76J (South Fork Flathead) 76L (Flathead below the Lake) and 76LJ (Flathead above and including the Lake), the Tribes are agreeing to NO new off-reservation instream flow rights (Compact Art. III) and:

- a. Have agreed not to make a call to satisfy their on-Reservation rights or Flathead System Compact Water Right on any irrigator on any tributary upstream of the Reservation (e.g. Stillwater, Whitefish, Little Bitterroot – all 100% protected). Compact Art. III.G.4.c.
- b. Have agreed that any call could only be enforced against mainstem surface water irrigators and groundwater irrigators with flow rates greater than 100gpm or those on the North, South or Middle Forks (just under 100 water rights in total) – there are no historic recorded flow conditions that have been identified that come close to the level that would allow the Tribes to make a call up the Flathead. Compact Art. III.G.4.a., b.
- c. Have agreed to become co-owners of some FWP rights on the mainstem of the Flathead and the N/S/M Forks - NONE of the other attributes of those rights (including priority date and flow rate) would be changed. Compact Art. III.D.4.a.i.,ii, Appx. 28, 29.

13. In Basin 76M (Middle Clark Fork), 76E (Rock Creek), 76F (Blackfoot) and 76GJ (Flint Creek), the Tribes have agreed to NO new off-reservation water rights and instead:

- a. Would become co-owners with FWP of the former Milltown Dam hydro power right. Compact Art. III.D.5.b, Appx. 30-31.

- b. Under co-ownership, the enforceable level of the Milltown right would be reduced from the current 2000 cfs flatline hydro power level to a shaped hydrograph that bottoms out at 500 cfs measured at the USGS gage at Turah (for the Upper Clark Fork, including Rock and Flint Creeks) and 700 cfs at Bonner (for the Blackfoot). Compact Art. III.D.5.a.v., Appx 30, 31.
  - c. The 700 cfs is the same flow rate as the FWP Murphy right that currently is the trigger for the Blackfoot Drought Response Plan (though with a significantly earlier priority date – 1904 rather than 1971).<sup>3</sup>
  - d. For the first 10 years after the legislature ratifies the Compact, neither FWP nor the Tribes could enforce this right (intent is to allow for stakeholder planning). Compact Art. III.D.5.c.
  - f. After the 10 year planning period, call may only be made on the day following a five consecutive day period in which four out of five average daily river flows fall below their respective daily enforceable hydrograph values, and must be lifted when at least two average daily flows of the previous five day period are in excess of their respective enforceable hydrograph values. Compact Art. III.D.5.a.vi.
  - g. Tribes also to become co-owners with FWP of FWP Murphy and Recreation rights in the Blackfoot – NONE of the other attributes of those rights (including priority date and flow rate) would be changed. Compact Art. III.D.4.a., Appx. 28-29.
14. In exchange for the foregoing, the Tribes have agreed to relinquish any other claim they might have under federal law to off-reservation water rights ANYWHERE in Montana. Compact Art. VII.D.1., 2.

### **On-Reservation Jurisdiction**

15. Proposed Water Management Board (WMB) will have jurisdiction only ON the Reservation – NO jurisdiction over any water rights (or anything else) off the Reservation. Compact Art. IV.C.1., V.B.22.
16. Proposed WMB fills regulatory void that currently exists on the Reservation and keeps the State at the table for future development of water on the Reservation, unlike in every other State-Tribal compact, in which the Tribe retained exclusive control over all future on-reservation permitting, while the State retained control only of *existing* state-based permits. See §§ 85-20-201, 301, 601, 901, 1001, 1501, MCA.
- a. WMB composed of five voting members – two appointed by governor, two by Tribes and the fifth by the other four. Compact Art. IV.C.2.a. As a result of a recommendation from the Montana Water Policy Interim Committee, the two members appointed by the governor will be selected from a group of nominees chosen by the county commissions of the counties having land within the Reservation.

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<sup>3</sup> See Blackfoot Drought Response Plan, available at MTFWP website: <http://fwp.mt.gov/doingBusiness/reference/managementPlans/waterbodies.html>

- b. WMB must apply Unitary Management Ordinance (drafted jointly by State and Tribes and based on Montana Water Use Act. Ordinance can only be amended if *both* MT Legislature and Tribes enact the amendment). Compact Art. IV.C.4., IV, D, and Appx. 4: Proposed Administration and Management Ordinance § 1-1-101(3).
- c. Everyone comes before the WMB equally – no special rules for tribal members. Compact Art. IV.C.8., Proposed Administration and Management Ordinance, Appx. 4.

### **On-Reservation Irrigators**

17. Recently concluded negotiations have resolved issues involving allocation of water between CSKT instream flows on the Reservation and Flathead Indian Irrigation Project (FIIP) water rights. The agreement in principle:
- a. Defines and protects historic farm delivery volumes while ensuring that CSKT instream flows are met through water savings from project efficiency improvements. Status quo is maintained until operational improvements are complete.
  - b. Provides State and federal funding to accomplish operational and rehabilitation and betterment improvements on the FIIP.
  - c. States that FIIP irrigators are entitled to have an equitable share of water delivered through the project and allows them to obtain a “delivery entitlement statement” providing that the right to have project water delivered runs with the land and is transferrable.
  - d. Provides that once target instream flows are met, additional water savings will be split equally between project irrigators and instream flows.
  - e. Establishes an evaluation process to ensure that modeled river diversions are sufficient to meet historic farm delivery volumes.
  - f. Provides that in the driest of years, irrigation deliveries will be satisfied before CSKT target instream flows and alternative sources of water will help ensure that both minimum instream flows and irrigation deliveries can be met.
  - g. Provides as part of the State contribution to settlement a 30 million dollar pumping fund, the income of which will be used in perpetuity to:
    - i. Offset pumping costs incurred by irrigators as a result of the compact;
    - ii. Pay for additional pumping to meet historic farm delivery volumes in the unlikely event that modeled river diversions are insufficient;
    - iii. Provide additional water to meet historic farm deliveries in dry years;
    - iv. Excess income not needed for pumping will be used to establish a pumping reserve account, fund alternative stockwater sources, fund on-farm efficiency and measurement programs, help mitigate potential impacts to groundwater users, and

help fund fish and wildlife mitigation that may be required as a result of FIIP upgrades.

- h. Provides, through the State contribution to settlement, funds for measurement, on-farm efficiency upgrades, and alternative stockwater development.
  - i. Provides for adaptive management to allow instream flow and irrigation project allocations to be adjusted in real time in response to climatic and hydrologic conditions.
  - j. Provides a technical team with irrigator input to implement the compact and adaptive management provisions relating to the FIIP.
18. Non-Project irrigators on lands interspersed with Project sources and place of use:
- a. Voluntary process for these irrigators to enter into agreement with Tribes and Project to use water on the same terms as Project users – if agreement is entered into, irrigation use is protected from call. Compact Art. III.G.3.c.
  - b. Irrigators who choose not to enter into voluntary agreements are susceptible to call by both CSKT instream flows and FIIP rights.
19. Non-Project irrigators away from Project
- a. Tribes agree to defer enforcement of their instream flow rights for on-reservation streams identified as “Other Instream Flows” until after final Basin 76L and 76LJ decrees are issued. Compact Art. III.C.1.d.iii, Appx. 4, Unitary Management Ordinance § 2-1-115(3), Appx. 12, “Other Instream Flow Abstracts” issue remarks.
  - b. Any enforceable instream flow schedule developed after decrees are final must be set at levels that protect all decreed or permitted water rights, including irrigators – water users will have an opportunity to object to any proposed flow schedule on adverse effect grounds. Appx. 4, Unitary Management Ordinance § 2-1-115(3), (8), (9).

### **Other**

In response to Water Policy Interim Committee (WPIC) recommendations, the Compact will define various additional terms, increase the acreage limit on future FIIP irrigation, provide assurances that property ownership won't change as a result of the compact, and provide for legislative outreach efforts, among other terms. To view the complete list of WPIC recommendations and the Commission's response, please visit the following link: [http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/wpic\\_documents.asp](http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/wpic_documents.asp)