

David W. Harder, Assistant Section Chief  
J. Nathanael Watson, Trial Attorney  
U.S. Department of Justice  
Indian Resources Section  
Environment & Natural Resources Div.  
999 18th St.  
South Terrace, Suite 370  
Denver, Colorado 80202  
(303) 844-1372  
(303) 844-1348  
**Attorneys for the United States**

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
JOCKO RIVER HYDROGLOGIC SUB-BASIN (BASIN 76L) AND  
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)

**Motion to Stay Proceedings to Adjudicate Aboriginal and Reserved Water Rights Claims**

The United States respectfully asks this Court to stay proceedings to adjudicate the aboriginal and reserved water rights claims that it filed on behalf of the Confederated Salish and Kootenai Tribes (“Tribes”), in its capacity as trustee. The claims were filed with the Montana Department of Natural Resources and Conservation in June of 2015. The United States requests that the Court enter a stay that will not be dissolved until each of the following events occur:

- 1) Passage of an Act of Congress ratifying the Compact and authorizing appropriations for monetary settlement to the Tribes;
- 2) Approval by the Tribes of the Compact and Act as described in Article VII D. 2 of the Compact;
- 3) The Montana Water Court issues a final water right decree or decrees imposing the water rights quantified pursuant to this Compact; and

- 4) All portions of the final Water Court decree or decrees survive exhaustion of all avenues of appeal.

The parties to the Compact will promptly inform the Court when these events have occurred. See Compact, Article VII D.2. If, however, the above events do not occur, the stay should dissolve in no later than five years, or if the conditions for a party to withdraw under the terms of the agreement, Compact, Article VII A 2, 4, are met and a party withdraws pursuant to the Compact, whichever is earlier.

### **Memorandum in Support of Stay**

There is good cause to grant the stay requested by the Tribes and the United States.<sup>1</sup> “The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” Landis v. N. Am. Co., 299 U.S. 248, 254-55 (1936). When considering whether to issue a stay, the Court’s “exercise of judgment [ ] must weigh competing interests and maintain an even balance.” Id. (Citations omitted). As the Montana Supreme Court has stated, a stay of proceedings is appropriate when the “balancing the competing interests” favors the movant and the movant “make[s] out a clear case of hardship or inequity . . . .” Henry v. Dist. Ct. of the Seventeenth Jud. Dist., 198 Mont. 8, 13, 645 P.2d 1350, 1353 (Mont. 1982) (citing Landis, 299 U.S. at 254-55).

The Montana Supreme Court noted several reasons a stay might be utilized: “[a] court has inherent power to stay proceedings in control of its docket-after balancing the competing interests;” “the suppliant for a stay must make out a clear case of hardship or inequity in being

---

<sup>1</sup> The Tribes have also filed a motion to stay their claims for aboriginal and reserved water rights claims.

required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else” and “in cases of extraordinary public moment, the individual may be required to submit to delay and not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.” Henry, 198 Mont. at 13-14 (quoting Landis, 299 U.S. at 256). All three bases for a stay are present here.

First, this is an extraordinary public moment and delay serves the public welfare and convenience. As a matter of Montana law, the Tribes and the United States were required to file by July 1, 2015 all aboriginal and reserved water rights claims with the Montana Department of Natural Resources and Conservation. §§ 85-2-217, 702 MCA. Those claims are now filed. Fortunately, the Montana legislature passed a compact between the Tribes, Montana, and the United States. It was signed into law on April 24, 2015. SB 262, 64th Leg., (MT 2015). This comprehensive settlement, if passed by the United States Congress and Tribes, will settle the federal and tribal claims. The Compact, which was enacted by the Montana legislature, also emphasizes the need for a stay. Article VII D.2 of the Compact requires the Tribes and United States to file a motion for a stay. To wit, “[u]pon filing [claims], the Tribes and the United States will request that the Montana Department of Natural Resources and Conservation stay any action on such claims . . . .” Compact, Article VII D.2. This language was enacted by the Montana legislature. To the extent that any Court questions whether the public interest and welfare are served by a stay, the Court should first defer to the legislature’s judgment that the Tribes and United States should seek a stay in order to serve the public welfare and convenience in this extraordinary moment.

Refusing to grant a stay on these claims would, in effect, allow the subject of a settlement entered into by the legislature of Montana to be litigated while the other settling sovereigns

obtain their own form of consent. The settlement and these claims concern a matter of significant public interest and involve claims filed in basins both east and west of the continental divide. The consideration of the settlement agreement, already passed by the Montana legislature and signed by Montana's Governor, is now pending before the United States Congress and the Tribes. In short, a stay is warranted because a settlement before three sovereigns to resolve water rights issues is an extraordinary public moment.

Second, it would work a substantial hardship and inequity on the United States to litigate thousands of claims when it has already invested substantial efforts in reaching a settlement. The United States filed 7,312 water claims prior to July 1, 2015. These claims were filed in the event that the Compact may not become final and fully enforceable. The public welfare and convenience are served by a stay because going forward with litigation of the thousands of tribal and federal claims will require expenditures by the Tribes, State of Montana, and United States, as well as those filing their own objections to those claims. See Augustine v. Simonson, 283 Mont. 259, 265, 940 P.2d 116, 119 (Mont. 1997) ("Obviously, settlement avoids litigation with its attendant expenses and resultant burden upon the legal system.") (citations omitted).

Third, to the extent that the Court wishes to maintain control over its own docket, it may reasonably find that staying these 7,312 claims will aid that effort. In particular, if this Compact is ratified and decreed, then it would be unnecessary to litigate these claims. "[P]ublic policy considerations, apart from the contract of the parties, generally favor settlements." Id. at 120; see also Miller v. State Farm Mut. Auto Ins. Co., 2007 MT 85, ¶ 14, 337 Mont. 67, ¶ 14, 155 P.3d 1278, ¶ 14 (Mont. 2007); Holmberg v. Strong, 272 Mont. 101, 106, 899 Mont. P.2d 1097, 1100 (Mont. 1995).

The United States respectfully requests that all proceedings to adjudicate its claims made on behalf of the Tribes and the very similar claims of the Tribes be stayed until the Compact has received final approval and survived final judicial challenge. Should the Compact succeed, the United States will file a motion to lift the stay and dismiss its 7,312 claims. Alternatively, the stay should be lifted in five years, or the stay should be lifted if the Tribes withdraw from the Compact after conditions allowing them to withdraw are met, Compact, Article VII A. 2, or if Montana withdraws from the Compact after the conditions allowing it to withdraw are met, Article VII A. 4, whichever is sooner.

Dated this 1st day of July, 2015.

/s/ David W. Harder

---

David W. Harder,  
Assistant Section Chief  
U.S. Department of Justice  
Indian Resources Section  
Environment & Natural Resources  
Division.  
999 18th St.  
South Terrace, Suite 370  
Denver, Colorado 80202  
(303) 844-1372  
[david.harder@usdoj.gov](mailto:david.harder@usdoj.gov)

/s/ J. Nathanael Watson  
J. Nathanael Watson, Trial Attorney  
United States Department of Justice  
Environment & Natural Resources  
Division  
Indian Resources Section  
999 18<sup>th</sup> Street  
South Terrace – Suite 370  
Denver, CO 80202  
[joseph.watson@usdoj.gov](mailto:joseph.watson@usdoj.gov)

Attorney for United States of America

CERTIFICATE OF SERVICE

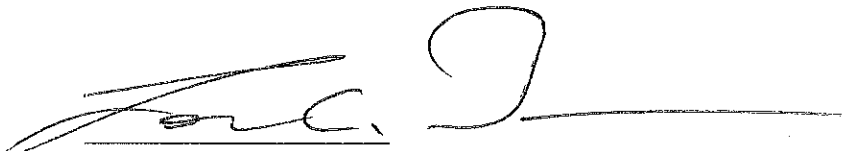
I certify that a copy of the foregoing **Motion to Stay Proceedings to Adjudicate Aboriginal and Reserved Water Rights Claims** was served upon the following persons by first class mail on this 1st day of July, 2015.

Jeremiah D. Weiner, Esq.  
Assistant Attorney General  
State of Montana  
215 North Sanders  
PO Box 201401  
Helena, MT 59620-1401

John Peterson  
Adjudication Bureau Chief  
Montana DNRC  
PO Box 201601  
Helena, MT 59620-1602

John B. Carter  
Confederated Salish & Kootenai Tribes  
Tribal Legal Department  
PO Box 278  
Pablo, MT 59855

Bruce A. Fredrickson  
Kristin L. Omvig  
Rocky Mountain Law Partners, PLLP  
1830 3<sup>rd</sup> Avenue East, Suite 301  
PO Box 1758  
Kalispell, MT 59903



Lorrin C. Dyer  
Secretary

Montana Water Court  
P.O. Box 1389  
Bozeman, MT 59771-1389  
(406) 586-4364  
1-800-624-3270 (In State)  
Fax: (406) 523-4131

**IN THE WATER COURT OF THE STATE OF MONTANA**

IN RE THE ABORIGINAL AND RESERVED )  
WATER RIGHTS CLAIMS OF THE )  
CONFEDERATED SALISH AND KOOTENAI )  
TRIBES, EAST AND WEST OF THE )  
CONTINENTAL DIVIDE )  
)

\*\*\*\*\*

**[Proposed] ORDER STAYING ALL PROCEEDINGS TO ADJUDICATE THE  
ABORIGINAL AND RESERVED WATER RIGHT CLAIMS**

Having reviewed the provisions of Article VII. D.2 of the water rights compact entered into by the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Montana, the State of Montana, and the United States, which was signed into Montana Law on April 24, 2015, this Court hereby ORDERS that The Montana Department of Natural Resources and Conservation stay any action on such claims pending occurrence of the following events:

- a. The passage of an Act of Congress ratifying the Compact and authorizing appropriations for monetary settlement to the Tribes;
- b. Approval by the Tribes of the Compact and the Act of Congress identified above;
- c. Issuance by the Montana Water Court of a final water right decree or decrees incorporating the water rights quantified pursuant to the Compact; and

d. All portions of the final Water Court decree or decrees survive exhaustion of all avenues of appeal.

The parties to the Compact shall promptly inform this Court when all of the conditions of this stay have been satisfied. If, however, the above events do not occur, the stay should dissolve in no later than five years, or if the conditions for a party to withdraw under the terms of the agreement, Compact, Article VII A 2, 4, are met and a party withdraws pursuant to the Compact, whichever is earlier.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2015.

---

Russ McElyea  
Chief Water Court Judge

Copies sent to:

John B. Carter  
Rhonda R Swaney  
Daniel J. Decker  
Tribal Legal Department  
Confederated Salish and Kootenai Tribes  
P.O. Box 278  
Pablo, MT 59855

Jeremiah D Weiner, Esq.  
Assistant Attorney General  
State of Montana  
215 N. Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

David Harder, Trial Attorney  
U.S. Department of Justice  
ENRD/IRS  
999 18<sup>th</sup> Street, South Terrace, Suite 370  
Denver, CO 80202

John Peterson  
Adjudication Chief  
Montana DNRC  
P.O. Box 201602  
Helena, MT 59620-1602

Bruce A. Fredrickson  
Kristin L. Omgvig  
Rocky Mountain Law Partners, PLLP  
1830 3<sup>rd</sup> Avenue East, Suite 301  
PO Box 1758  
Kalispell, MT 59903