

Montana Land and Water Alliance, Inc
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July 25, 2017

Mr. John Tubbs, Director
Montana Department of Land and Natural Resources
1539 Eleventh Ave.
Helena, MT 59601

Subject: Milltown Dam Water Right 76M 94404-00, 76M 94405-00

Dear Director Tubbs:

This letter is a follow up to our letter of November 17, 2015, regarding the DNRC's implementation of the Milltown Dam water right under the authority of the CSKT Compact (SB 262)¹.

At the time of our letter to you, the Abstract of the Milltown Dam water right indicated that the state of Montana, Department of Fish, Wildlife, and Parks (FWP) and the CSKT co-owned the water right. We questioned whether the right could be implemented under the Compact and as a co-owned water right given that the constitutionality of the legislature's vote on the CSKT Compact was being litigated. Additionally, we noted that the state's own report suggested the need for a hearing on the change in the purpose and place of use for the Milltown Dam water right if the Compact was not approved by the Montana legislature². Your response cited the passage of the Compact by the legislature and the authority granted in the Compact to implement this water right.

Revisiting the current Abstract of the Milltown Dam water right, we noticed that the language on the Abstract now reads that the owner of the water right is the State of Montana alone, with language added that the right will be co-owned by the CSKT after the effective date of the Compact:

THE CONFEDERATED SALISH AND KOOTENAI TRIBES BECOME COOWNERS OF THIS WATER RIGHT ON THE EFFECTIVE DATE OF THE COMPACT, WHICH IS THE DATE ON WHICH THE COMPACT IS FINALLY APPROVED BY THE TRIBES, BY THE STATE, AND BY THE UNITED STATES, AND ON WHICH THE LAW OF ADMINISTRATION (APPENDIX 4 OF THE COMPACT) HAS BEEN ENACTED AND TAKEN EFFECT AS THE LAW OF THE STATE AND THE TRIBES, WHICHEVER IS LATEST

¹ MLWA letter to Director John Tubbs, November 17, 2015, sent via email.

² Montana Reserved Rights Compact Commission, Mace, Ethan, 2015. Proposed 2015 CSKT Compact Off Reservation Impact Analysis, February 2015. See pages 4-8. http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/off-reservation_impact_analysis_2-2015.pdf

The notation on the Abstract to copy all communication to CSKT on this right as beneficial co-owner does not make it so legally. The state is the owner of this right until the *effective date* of the CSKT Compact which we can all agree is at some point in the distant future. While we are pleased to see that the Milltown Abstract accurately reflects the effective date, until that time the Milltown Dam water right is a state-owned water right. Notably, the language of the 2017 Abstract suggests that the CSKT Compact is no longer the authority under which the state can implement this water right.

The February 2015 DNRC report on the Milltown Dam water right proposed change of use indicated that the state has long planned to change the purpose and point of use for this water right, and had planned a hearing if the Compact was not passed. We believe that while the state waits for the Compact to be ratified and owns the right at the present, a standard hearing pursuant to 85-2-402 or other applicable statutes is required. A hearing would provide an opportunity to address all the issues identified in the 2015 DNRC report, including addressing enforcement of the right considering drought conditions and potential co-ownership with the United States/CSKT.

As an aside, we were under the impression that the Compact's Law of Administration applies only to waters *within* the exterior boundaries of the Flathead Indian Reservation, and not to off-reservation lands or waters. Why is this language regarding the Compact's Law of Administration in the Milltown Dam water right Abstract, an off-reservation, potentially co-owned water right?

We would appreciate your considered reply and, more importantly, the DNRC's action in holding a hearing on this important water right and its impacts upon local users.

Sincerely,

/s/ Catherine Vandemoer

Catherine Vandemoer, Ph.D.
Chair, Montana Land and Water Alliance

Attachments

cc: Water Policy Interim Committee

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1424 9TH AVENUE P.O.BOX 201601 HELENA, MONTANA 59620-1601

GENERAL ABSTRACT

Water Right Number: 76M 94404-00 STATEMENT OF CLAIM
Version: 2 -- CHANGE AUTHORIZATION

Version Status: ACTIVE

Owners: MONTANA, STATE OF DEPT OF FISH WILDLIFE & PARKS
PO BOX 200701
HELENA, MT 59620-0701

ALL COMMUNICATION SHALL BE COPIED TO THE CSKT TRIBAL CHAIRMAN AS THE BENEFICIAL OWNER AT PO BOX 278, PABLO, MT 59855-0278.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES BECOME COOWNERS OF THIS WATER RIGHT ON THE EFFECTIVE DATE OF THE COMPACT, WHICH IS THE DATE ON WHICH THE COMPACT IS FINALLY APPROVED BY THE TRIBES, BY THE STATE, AND BY THE UNITED STATES, AND ON WHICH THE LAW OF ADMINISTRATION (APPENDIX 4 OF THE COMPACT) HAS BEEN ENACTED AND TAKEN EFFECT AS THE LAW OF THE STATE AND THE TRIBES, WHICHEVER DATE IS LATEST.

Priority Date: DECEMBER 11, 1904

Purpose (use): INSTREAM FISHERY

Maximum Flow Rate:

Maximum Volume:

Source Name: CLARK FORK RIVER
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENE	20	13N	18W	MISSOULA

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: INSTREAM

Period of Use: JANUARY 1 to DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SENE	20	13N	18W	MISSOULA

Remarks:

WATER RIGHT 94404-00 HAS BEEN CHANGED FROM HYDROPOWER GENERATION TO INSTREAM FISHERY AND SPLIT INTO WATER RIGHTS 94404-01 AND 94404-02 BY THE MONTANA LEGISLATURE'S RATIFICATION OF THE WATER RIGHTS COMPACT ENTERED INTO BY THE CONFEDERATED SALISH & KOOTENAI TRIBES, THE STATE OF MONTANA, AND THE UNITED STATES OF AMERICA.

OWNERSHIP UPDATE CORRECTION PROCESSED 04/02/2015

OWNERSHIP UPDATE RECEIVED

OWNERSHIP UPDATE TYPE 608 # 21999 RECEIVED 06/02/2005.

OWNERSHIP UPDATE TYPE DOR # 94718 RECEIVED 12/16/2010.

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1424 9TH AVENUE P.O.BOX 201601 HELENA, MONTANA 59620-1601

GENERAL ABSTRACT

Water Right Number: 76M 94405-00 STATEMENT OF CLAIM
Version: 1 -- ORIGINAL RIGHT

Version Status: ACTIVE

Owners: MONTANA, STATE OF DEPT OF JUSTICE
NATURAL RESOURCE DAMAGE PROGRAM
PO BOX 201425
HELENA, MT 59620-1425

Priority Date: DECEMBER 11, 1904

Enforceable Priority Date: DECEMBER 11, 1904

Type of Historical Right: FILED

Purpose (use): UNKNOWN
UNKNOWN

Maximum Flow Rate:

Maximum Volume:

Source Name: CLARK FORK RIVER
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENE	20	13N	18W	MISSOULA

Period of Diversion: JANUARY 1 TO DECEMBER 31

JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Period of Use: JANUARY 1 to DECEMBER 31

Purpose (Use): UNKNOWN

Period of Use: JANUARY 1 to DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SENE	20	13N	18W	MISSOULA

Purpose (Use): UNKNOWN

Period of Use: JANUARY 1 to DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SENE	20	13N	18W	MISSOULA

Remarks:

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

OWNERSHIP UPDATE RECEIVED

OWNERSHIP UPDATE TYPE 608 # 21999 RECEIVED 06/02/2005.

OWNERSHIP UPDATE TYPE DOR # 94718 RECEIVED 12/16/2010.

ON JUNE 7, 1985 THE MONTANA POWER COMPANY FILED LATE OBJECTIONS TO THE PURPOSE OF RIGHT AND "OTHER". THESE WILL BE HEARD AFTER PROPER NOTICE ON THE NEXT OBJECTON LIST.

THE WATER COURT FINDS NO LEGAL BASIS FOR THIS PURPOSE TO BE CONSIDERED A BENEFICIAL USE OR AN APPROPRIATION OF WATER.