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FILED

APR 19 2018

Montana Water Court

MONTANA WATER COURT, CLARK FORK DIVISION
JOCKO RIVER HYDROLOGIC SUB-BASIN (Basin 76L) AND
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)

**PETITION FOR EXTENSION OF STAY OF
ADJUDICATION IN BASINS 76L AND 76LJ
AND REQUEST FOR HEARING**

A. PETITION FOR EXTENSION OF STAY

The Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Indian Reservation request this Court to extend the stay of all proceedings to adjudicate water rights claims in Basins 76L and 76LJ until such time and the CSKT-Montana Water Rights Compact is approved by this Court. The current stay was issued under Order of this Court dated September 26, 2016. The Compact, approved in the 2015 Montana Legislative session, is codified at 85-20-1901 et seq., M.C.A.

B. BRIEF IN SUPPORT OF EXTENSION OF STAY

1. INTRODUCTION

On September 26, 2016, this Court issued an Order extending a stay of adjudication of all water right claims in Basins 76L and 76LJ until June 1, 2018. The CSKT request this Court to extend that stay.

The Montana Legislature, the United States government and the CSKT have repeatedly made clear their preference for a negotiated settlement of the pervasive CSKT aboriginal and reserved water right claims. This is so because the process of adjudicating them is lengthy, expensive and deeply socially and politically divisive. Adjudication can take decades. For example, multiple generations of litigants have been born and died during the approximately one hundred years of the Colorado River adjudication; an ongoing adjudication that only gets more contentious with time. That is so because while litigation may quantify claimed rights, it does little else. It doesn't provide a mechanism for resolving disputes between users, doesn't account for changes in climate, rainfall or technology. It ignores the changing values society or legislatures place on particular types of water use. It perpetuates overlapping and conflicting administrative and regulatory frameworks. Litigation neither provides for costly upgrades to water supply and distribution systems, nor does it compensate for damages one user may suffer as a result of other uses.

A negotiated settlement such as the Compact entered into between the CSKT, Montana and the United States, codified at 85-20-1901, et seq., not only quantifies the water rights of the CSKT, but also provides a solid framework to address all those contentious issues that a bare quantification leaves unresolved. Equally important, the Compact provides bankable certainty to scores of thousands of state-based water rights claimants on and off the Flathead Indian Reservation.

As the briefs supporting this Petition makes clear, the Compact has strong support from the agricultural community throughout Montana as well as support from the hydropower industry and other water users.

If the stay of adjudication of claims in Basins 76L and 76LJ is lifted and this Court issues preliminary decrees in the Reservation basins, the Compact will in all probability fail. As discussed within, this is so because the CSKT and United States and State-based claimants will have to litigate an unknowable number of the approximately one hundred and forty three thousand state-based claims that would be impacted should the stay of adjudication be lifted. Many of those claims are held by current supporters of the Compact. Compact supporters will become adjudication adversaries on and off the Reservation if the stay is lifted See, Affidavit of Mary B. Price, **Exhibit A**.

In the interests of statewide certainty pertaining to the aboriginal and reserved water rights of the CSKT, and in furtherance of litigant and judicial economy, the CSKT urge this Court to continue the stay of adjudication in Basins 76L and 76LJ until the Compact is ratified by Congress and approved by this Court and by the CSKT.

Alternatively, as discussed within, there is no Legislative mandate for all basins to be decreed by 2020. In fact, provisions of the Water Use Act dealing with claim reexamination effectively render that Legislative wish an impossibility. Therefore if the Court does not see fit to continue the stay until the Compact is final, it should continue the stay until after the Montana Department of Natural Resources and Conservation (“DNRC”) “must” have satisfied its Legislative mandate to complete reexamination of verified claims by June 30, 2023, the date specified in 85-2-271(2)(a) and (b)(iv), M.C.A.

2. LEGISLATIVE, TECHNICAL, AND POLITICAL ACTIONS PROMOTING COMPACT FINALIZATION

The CSKT, United States and the Montana Reserved Water Rights Compact Commission have spent more than a decade negotiating a balance between the competing claims to water on and off the Reservation. The parties held nearly one hundred public and Legislative sessions on the issues, many of which were quite contentious as between the parties as well as a sometimes contentious public. The 2013 Montana Legislature failed to approve the Compact. The parties spent the next two years working closely with the Water Policy Interim Commission and the public to resolve matters identified during the 2013 Legislative session.

After numerous Legislative committee hearings (one exceeding ten hours), the 2015 Legislature approved the Compact, codified at 85-20-1901 et seq., M.C.A. and provided funding for early groundwork on water measurement and conservation pursuant to the terms of the Compact. The Compact created a joint State/Tribal entity called the Compact Implementation Technical Committee (“CITT”). See, Compact Article IV. G. The CITT is authorized to engage in pre-Compact “planning for and implementation of Operational Improvements, Rehabilitation and Betterment, and Adaptive Management prior to the Effective Date” of the Compact”. Id. The capitalized words in the preceding quote are defined in Article II of the Compact.

As the affidavit of Seth Makepeace, Tribal Hydrologist and current chairman of the CITT, demonstrates, Montana and the CSKT have undertaken much-needed work on the federal Flathead Indian Irrigation Project (FIIP) to improve its utilization of a limited water supply. See Exhibit B. That State and Tribally funded pre-Compact work is ongoing. The parties anticipate seeking additional funding in the 2019 Legislative session to continue this much-needed work.

As discussed in detail in the prior CSKT Petition For Extension Of Stay Of Proceedings And Memorandum in Support And Request For Hearing, filed with this Court on September 2, 2016, Senator Jon Tester introduced Congressional SB 3013 to approve the Compact. The Senate Indian Affairs Committee held a hearing on the bill and the Department of Interior spoke to it favorably. Since then a new federal administration came in after the Presidential election in 2016. The new Congress has not taken any further action on the Compact. On the other hand, as the Affidavit of Ryan Rusche, Tribal Attorney working on federal approval of the Compact demonstrates, the CSKT, United States, and the new Administration are taking a very active role in advancing the Compact towards Congressional approval. See Exhibit C, Affidavit of Tribal Attorney Ryan Rusche.

When the parties to the Compact came before this Court in 2016, there was only one objector to the current extension of the stay, the Flathead Joint Board of Control ("FJBC"). As **Exhibit D** to this brief demonstrates, the Montana 20th Judicial District has ruled that the FJBC is not a lawfully formed entity and has not been since 2013. The Court found that the Board's expenditure of FIIP irrigator dollars to oppose the CSKT and the Compact were unlawful. The appeal deadline has run on that case. Accordingly, its objection in 2016 had no legal significance.

Of note, prior to the District Court decision declaring the FJBC to be an unlawfully created entity, the Montana Supreme Court ruled against the FJBC's Montana constitutional challenge to provisions of the Compact. See, Flathead Joint Board of Control et al v. State of Montana and Confederated Salish and Kootenai Tribes, 2017 MT 277.

3. THERE ARE SIGNIFICANT IMPLICATIONS TO THE STATE WATER RIGHTS ADJUDICATION SYSTEM SHOULD THE STAY TERMINATE

The Compact is of State-wide importance. It resolves numerous state and federal common law, statutory and constitutional questions. If the Compact isn't allowed to proceed through the approval process, those unsettled questions of law will need to be resolved in the several courts before the Water Court can begin the process of adjudicating the aboriginal and reserved water rights of the CSKT.

A. The Water Use Act Does Not Mandate A Date Certain For Issuance Of Decrees In All Basins

The Water Use Act contains no date upon which every basin must be decreed. Rather, the Legislature has established a non-binding "benchmark" for this Court. It has found it "realistic and feasible" for the Court to issue a temporary preliminary or preliminary decree in all basins by 2020, but premised that upon the availability of funds. 85-2-270, M.C.A. Of note, that statute, identified in the Code book as "Temporary," is set to terminate on June 30, 2028. That potentially leaves at least eight years after 2020 for this Court to either approve the Compact or issue decrees in Basins 76L and 76LJ.

There will be at best insignificant cost to the water adjudication account established under 85-2-280, M.C.A. if the Court continues the stay while the Compact moves to finalization. However, if the stay is lifted, the water adjudication account will be confronted with the costs attendant to the spectrum of litigation discussed throughout this brief. The cost to the State, its state-based water claimants, the CSKT and the United States of a negotiated resolution of CSKT water rights will be a drop in the bucket compared to the costs of litigating them.

B. Numerous Existing Decrees Will Have to be Redone

The CSKT and the United States, as the CSKT trustee, have each filed aboriginal and reserved water rights claims with DNRC in 54 adjudication basins in the State. See affidavit of Mary B. Price, CSKT Legal Department Staff Scientist, **Exhibit A**. The CSKT filed their claims with the Montana Department of Natural Resources and Conservation on June 25, 2015. The CSKT have filed 1,727 aboriginal and reserved water claims in the two basins on the Reservation

and 1,087 in 52 basins off the Reservation. The United States, acting as the CSKT trustee, has filed 6,098 reserved and aboriginal claims in the two basins on the Reservation and 1,069 claims in 52 basins off the Reservation. The United States filed its claims on June 25, 2015. Id.

There are 11 adjudication Basins impacted by the Compact. All of them are west of the Continental Divide. With the exception of a few locations, the Compact does not create any new water rights off of the Reservation. The CSKT and the United States filed claims for aboriginal and reserved water rights in 18 Basins west of the Divide and 36 Basins east of the Divide to protect their rights in the event the Compact fails. See, Price Affidavit. As stated in the Compact. See, Article VII.D.4, once the Compact is finalized the CSKT and the United States will dismiss all of those claims.

The Water Court has issued temporary preliminary or preliminary decrees in 52 of the 54 basins that contain claims filed by the United States and the CSKT. Id. Under 85-2-231(2)(a)(iii) M.C.A. the Water Court judge “must” base those decrees on either

the contents of compacts approved by the Montana legislature and the tribe or federal agency, or, lacking an approved compact, the filings for federal Indian and Indian reserved rights;

Furthermore, under 85-2-227 (1) M.C.A, the filing of such claims “constitutes prima facie proof of its content until the issuance of a final decree.” This is significant because the Legislature has mandated that these “filings must be used in formulation of the preliminary decree and must be given treatment similar to that given to all other filings.” 85-2-702(3), M.C.A. To meet these Legislative directives will require the Court to redo the decrees to include the Federal and CSKT claims.

Judicial interpretation of the McCarran Amendment, 42 U.S.C 666, requires a comprehensive *inter sese* adjudication of all claims, Tribal and non-Indian, to the “use of water of a river system or other source”. See, Colorado River Conservation District v. United States, 424 U.S. 800(1976); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). Under the Water Use Act, that means that all existing claims or rights with a pre-1973 priority date must be included in the general *inter sese* State adjudication process. The Water Use Act defines “existing right” or “existing water right” as a

right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law

85-2-102(12), M.C.A. Clearly, the reserved and aboriginal water rights of the CSKT are existing rights that must be properly treated under the Water Use Act. See, State ex rel Greely v Confederated Salish and Kootenai Tribes, 712 P2d 754, 219 Mont. 76 (1985). There, the Montana Supreme Court reiterated the San Carlos admonition that “State courts, as much as federal courts, have a solemn obligation to follow federal law” (Id at 766) and that “[A]ctual violations of procedural due process and other issues regarding the [Water Use] Act as applied are reviewable on appeal after a factual record is established.” (Id at 765).

Accordingly, absent a Compact, Indian aboriginal and reserved claims must be included in the decrees generated in the general adjudication in order for a state adjudication of Indian rights (as well as State-based claims) to pass legal muster. To leave them out, or to create a system that decrees them separately, will clearly violate the Water Use Act requirement for a general *inter sese* adjudication and therefore the protections afforded CSKT and the United States under the McCarran Amendment.

Should the Compact fail, those decrees in the basins where the CSKT and United States have filed claims will necessarily need to be re-decreed by this Court. These facts alone render a true, McCarran-qualifying, completion of all decrees by 2020 a very dim dream.

C. The DNRC Has No Rules For Examining Indian Reserved Or Aboriginal Water Right Claims

Before each State-based claim is included in a decree, DNRC subjects them to a claim examination process under rules implemented by DNRC pursuant to Order of the Montana Supreme Court. There are no promulgated claim examination rules for Indian reserved and aboriginal water right claims. Accordingly, a decree of those claims absent examination under properly promulgated rules will violate the Legislative mandate that they be afforded “treatment similar to that given to all other filings,” as required under 85-2-702(3), M.C.A.

D. There are Questions of Law that Must Be Resolved Prior to Claim Examination Rule Promulgation and Indian Claims Decreed

If the stay isn't extended, the CSKT will be the first tribe to have their water rights adjudicated in the Montana Water Court system. That assumes that the adjudication process adheres to McCarran requirements and this Court's "solemn obligation to follow federal law". Given the unique treaty, Congressional and federal case law treatment of the water rights of the CSKT, the numerous federal legal issues of necessity need to be defined before proper claim examination rules can be promulgated. Absent such rules, each claim would be subjected to inconsistent review standards and arbitrary and capricious treatment based upon an unguided, unregulated and inconsistent claim examinations.

Many of the unsettled legal questions raise issues of first impression. For example, what are the proper standards upon which to quantify aboriginal reserved water rights on and off the Flathead Indian Reservation? (See, Compact Articles III.C.1.d.ii and Article III. D)? Second, is there any reconciliation of the state-law analysis of "Walton rights" in the ORDER REJECTING MASTER'S REPORT, ORDER APPROVING STIPULATION, AND ORDER CLOSING CASE IN Neal et al v Neal et al, Water Court case number 430-8, dated January 15, 2015, verses the exclusively federal origin, nature and scope of "Walton rights" addressed in Colville Confederated Tribes v. Walton, 647 F2d 42, (9th Cir), cert. denied 454 U.S. 1092 (1981)? Third, there are no federal or state rules for quantifying CSKT claims of cultural and religious use of water. (Compact Article III.A.). Fourth, can any State-based claimant to irrigation water delivered by the federal FIIP overcome the defense of res judicata established in United States v McIntire and Flathead Irrigation District, 101F2d 650 (9th Cir, 1939) and United States v Alexander and Flathead Irrigation District, 131 F2d 359 (9th Cir, 1942)?

Fully litigating any one of these federal issues could take years to complete. Litigating all of them may rival the rule against perpetuities, cost unfathomable amounts of money, time and societal turmoil, and involve multiple governmental and private litigants, each with their attendant costs and expenses. In the end, claimants may have a paper right and all of the uncertainty described in the Introduction of this brief. On the other hand, time spent getting the Compact approval from Congress and this Court involves a mere handful of people, satisfies the greatest economy of the courts and the litigants and provides certainty, finality and wet water.

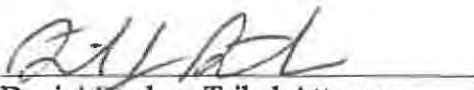
4. REQUEST FOR HEARING.

The CSKT request a hearing and ruling on this Petition prior to the expiration of the current stay, which is scheduled to expire on June 1, 2018. In the alternative, if a hearing cannot be scheduled before that date, the CSKT request a temporary extension of the stay Order until the Court rules upon this Petition.

Respectfully submitted this 17th day of April, 2018.



John Carter, Tribal Attorney



Daniel Becker, Tribal Attorney

CERTIFICATE OF SERVICE

I certify that the foregoing **"PETITION FOR EXTENSION OF STAY OF ADJUDICATION AND REQUEST FOR HEARING"** was mailed on the 17th day of April, 2018, to the Montana Water Court and service by U.S. mail to the following:

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MONTANA WATER COURT, CLARK FORK DIVISION
JOCKO RIVER HYDROLOGIC SUB-BASIN (Basin 76L) AND
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)

AFFIDAVIT OF MARY B. PRICE

EXHIBIT A

Mary B. Price, being duly sworn, deposes and says:

1. I am a staff scientist for the Confederated Salish and Kootenai Tribes.
2. As part of my work for the Tribal Government I am on the Tribal Water Rights Team.
3. One of my tasks with the team is to prepare abstracts of Tribal Water Rights quantified in the Water Rights Compact Entered into by the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States of America. January 2015.
 - a. For this affidavit I reviewed the Compact.
 - b. For the Court's information the Compact quantifies 306 Tribal Water Rights located in 11 adjudication basins located west of the Continental Divide.
4. Another of my tasks with the Tribal water rights team is to prepare the CSKT water rights claims filed with the Montana Department of Natural Resources and Conservation on June 25, 2015.
 - a. For this affidavit I reviewed Procedures for Completing Water Rights Claims Forms: Volumes 1 – V. Confederated Salish and Kootenai Tribes and DOWL. FINAL January 2016.
 - b. For the Court's information the CSKT filed 2,221 claims located in 18 adjudication basins west of the Continental Divide and 593 claims located in 36 adjudication basins east of the Continental Divide. Of the total number of claims located in adjudication basins west of the Continental Divide 1,727 claims are located in the two basins on the Reservation.
5. Another of my tasks with the team is to communicate with the United States regarding the water rights claims filed by the United States, as the CSKT trustee, with the Montana Department of Natural Resources and Conservation on June 25, 2015.
 - a. For the Court's information the U.S. filed 6,574 claims located in 18 adjudication basins west of the Continental Divide and 593 claims located in 36 adjudication basins east of the Continental Divide. Of the total number of claims located in adjudication basins west of the Continental Divide 6,098 claims are located in the two basins on the Reservation.
6. For this affidavit I reviewed the Montana General Adjudication Basin Status thru December 31, 2017 (<http://dnrc.mt.gov/divisions/water/adjudication>).
 - a. For the Court's information as of December 31, 2017 there are 34,618 claims filed by all others in the same 18 adjudication basins west of the Continental Divide where the CSKT and the U.S. also filed claims and there are 108,272 claims filed in the same 36

adjudication basins east of the Continental Divide where the CSKT and the U.S. also filed claims. Of the total number of claims located in adjudication basins west of the Continental Divide 8,342 claims are located in the two basins on the Reservation.

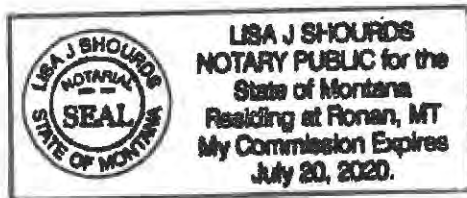
- b. As of December 31, 2017 the Water Court has issued temporary preliminary or preliminary decrees in 52 of the 54 adjudication basins where the CSKT and the U.S. have filed claims. For the two basins located on the Reservation the DNRC Kalispell Regional Office has issued Summary Reports.

Dated this 12th day of April, 2018



Mary B. Price

SUBSCRIBED AND SWORN to me before this 12th day of April, 2018




Notary Public for the State of Montana

Residing at: Ronan, MT

My Commission Expires: July 20, 2020

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MONTANA WATER COURT, CLARK FORK DIVISION
JOCKO RIVER HYDROLOGIC SUB-BASIN (Basin 76L) AND
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)

AFFIDAVIT OF SETH V. MAKEPEACE

EXHIBIT B

AFFIDAVIT of Seth V. Makepeace

STATE OF MONTANA)

)

COUNTY OF LAKE)

I, Seth V. Makepeace, of 58004 Juniper Lane, Saint Ignatius, MT., 59865, being duly sworn, depose and say as follows:

1. I have been employed by the Confederated Salish and Kootenai Tribes (CSKT) as the Tribal Hydrologist for the Natural Resources Department, Water Management Program (Program) since July 1989 and as the Supervisory Hydrologist and Program Manager for said program since November, 2014. I was designated by the CSKT as their representative for the water rights Compact Implementation Technical Team (CITT), and have served as chair of the CITT since May, 2016.

2. Below, I summarize the activities of the CITT since the formation of the technical team up to the present. The summary is sequentially organized to: a) describe the administrative record of the CITT; b) define CITT-related projects that are, or will be implemented in the identified short-term; and c) define CITT-related projects that are under review and consideration. Two attachments are appended - a table summarizing the CSKT water measurement network, with funding source attribution; and a summary budget table for CITT task orders.

3. The CITT is comprised of five members, with representation from: the CSKT; the State of Montana; the Bureau of Indian Affairs – the owner and current operator of the Flathead Indian Irrigation Project (FIIP); the project operator for FIIP; and a representative of the

irrigation community – currently a representative of the three individual irrigation districts that encompass the FIIP. The CITT functions under a set of Operating Rules that were developed and adopted through member vote on March 15, 2016. The CITT has infrequent, but recurrent, public meetings. The CITT maintains a website where various information, including CITT representative details and meeting information, is found.¹ If the CITT has an Item under consideration for a vote, the Item is posted to the CITT website two weeks prior to a CITT meeting.

4. The CITT has completed public meetings on the dates noted below. Agendas and summaries of meetings completed prior to deployment of the CITT website are maintained in the Program CITT file record. Meeting information after CITT approval and deployment of the CITT website (May, 2016) is summarized on the website, and also in the Program CITT file record. The CITT completed public meetings on: November 12, 2015; March 15, 2016; May 24, 2016; January 24, 2017; June 21, 2017; and January 30, 2018. The CITT has completed a limited number of phone call meetings (April 13, 2017 and September 18, 2017), and also in-person technical work sessions. Technical work sessions are open to the public. All voting items have been presented and acted upon in physical public meetings.

5. To date, CITT-approved projects have been effectuated using a task order process that is defined with and authorized through a Master Agreement between the State of Montana through the Department of Natural Resources and Conservation as its designee and the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation. Signatories to

¹ <http://cslt-montana-citt.org/>

this agreement include the Director of the Montana DNRC, the Montana State Attorney General, and the Chairman of the CSKT. The agreement came into force on October, 2016.

6. Task Order #1, executed in October 2016, authorized transfer of \$375,847.00 from the State of Montana to the CSKT. Funds were transferred to implement year 1 of a water measurement workplan developed by the CITT, and approved through vote at the May 24, 2016 public meeting. The measurement workplan is programmed over a ten-year time horizon, following the premise that effective water measurement requires an extended commitment and planning horizon. The measurement workplan was prepared to work in concert with water measurement and data management activities of the CSKT Water Management Program, which has been in operation since 1982. The primary objective for the measurement workplan is to build-out from the existing CSKT measurement platform and insure that natural flow, instream flow, and irrigation river diversion allowances, all water management administrative locations identified in the CSKT Compact, are measured with appropriate technology and that data are available to water managers and the public. Completion activities for Task Order #1 are fully documented in a technical Summary (Completion Report for Task Order One (November 2016 to November 2017)), completed in November, 2017 and maintained in Program CITT files. Primary completion activities for Task Order #1 included advertising and hiring a M.S.-level Hydrologist to support Program expansion, completion of a variety of tasks related to water measurement, and deployment of a set of stream and canal measurement data collection platforms. Attachment 1.0 identifies the current stream and canal gaging network. Coincident with the Task Order #1 effort, but funded from Tribal resources, the Water Management Program completed deployment of a new database (Aquatic Informatics Aquarius Time Series)

and a companion website for real-time publishing of data². The website is not restricted and is available to the public, but final quality control work is being completed before more formal notice of website availability.

7. Task Order #2 executed in January 2018, authorized transfer of \$92,809.00 from the State of Montana to the CSKT. Funds were transferred to implement year 2 (October 1, 2017 – September 30, 2018) of the water measurement workplan developed by the CITT. The task order continues the Program CITT-related staffing levels and supports additional water-measurement related work. This includes installation of a long-throated flume to measure flows in the Mission B Canal. The construction of this structure was started the first week of March, 2018 using CSKT construction work forces, and completed the week of April 9, 2018.

8. Task Order #3, executed in February 2018 authorizes the State to disburse funds up to, but not exceeding \$200,000.00, to the CSKT. Funds will support a scope of work titled Design of Ratable Hydraulic Structures for Canal Water Measurement on the FIIP. The scope of work defines a plan to develop hydraulic designs and construction design packages for measurement structures at twelve larger headworks locations on the FIIP. The project was offered to prospective Consultants under a Request for Qualifications following formal CSKT procurement procedures, including posting to the Montana Acquisition and Contracting System (eMACS). The CSKT/CITT ranking team selected a Consultant and anticipates a final contract in early May, 2018. The final disbursement of funds from Montana to the CSKT will equal the negotiated contract amount.

² <https://www.csktwaterdata.org/AQWebPortal>

9. Task Order #4, executed in March, 2018 authorizes the State to disburse funds up to \$48,000 for operation and maintenance of new and existing Bureau of Reclamation (USBR) AgriMet weather and irrigation water scheduling stations. The CITT anticipates that the USBR will complete the up-front installation of the stations under their Tribal Cooperative Program. This task order was approved by the CITT at their January 30, 2018 meeting and the CITT is awaiting USBR scheduling to implement the project.

10. Task Order #5, executed in March, 2018 authorizes the State to disburse funds up to but not exceeding \$200,000.00 to the CSKT. Funds will support a scope of work titled Topographic and Bathymetric Reservoir Surveying Services. This task will lead to updated reservoir capacity tables for fourteen reservoirs on the FIIP. The project is being offered to prospective Consultants under a Request for Qualifications following formal CSKT procurement procedures, including posting to the Montana Acquisition and Contracting System (eMACS). The closing date for bid responses is May 15, 2018, at which time a CSKT/CITT ranking team will select a Consultant and prepare a contract for services. The final disbursement of funds from Montana to the CSKT will equal the negotiated contract amount. This task order was approved by the CITT at their January 30, 2018 meeting.

11. The following technical projects have been developed and are under consideration with currently indefinite forward plans. Only projects where a written technical work product has been prepared are reported upon. The work products are maintained in the Program CITT file record. A) Development of stock-water mitigation maps. FIIP field personnel prepared a tract-by-tract summary of tracts that have historically received stock water during time periods outside the April 15 – September 15 irrigation season. This information has been prepared as a

set of maps, and forms the geographic area where water users may potentially benefit from stock-water mitigation strategies. B) A detailed effort was completed to define the requirements to measure irrigation diversions within the interior of the 26,000 acre Charlo service area. C) A reconnaissance-level evaluation was completed to look at piping alternatives for the lower 3.8 miles of the Jocko K Canal. Field work will be completed in 2018 to further examine this project. D) The CITT solicited a formal proposal and budget for the U.S. Geological Survey Montana-Wyoming Office to prepare a scope of work to complete remotely-sensed crop evapotranspiration models and real-time evapotranspiration work products. Two technical meetings were completed but the scope of work has not been acted upon. Other activities are under discussion, but have not been developed to a written work product end point.

Dated this 12th day of April, 2018.

Seth V. Makepeace

Seth V. Makepeace

SUBSCRIBED AND SWORN to me before this 12th day of

April, 2018.



Lisa J Shourds

Notary Public for the State of Montana

Residing at: Ronan, MT

My Commission Expires: July 20, 2020

Attachment 1.0: CSKT gaging network as of April, 2018

location	CSKT station ID	water body type	current administrative type	compact administrative type	equipment type	new/upgrade/redevelop	year	funding source	
Alder Diversion	3174.00	canal		RDA	well	new	2017	CITT	1
Jocko E Canal at Agency Creek	5167.90	canal		RDA	well	new	2017	CITT	2
McGinnis Diversion	3171.00	canal		RDA	well	new	2017	CITT	3
Twin Feeder Canal at Centipede Creek	0066.00	canal		RDA	well	new	2017	CITT	4
Jocko E Canal below Finley Creek	5169.10	canal		RDA	well	redevelop	2017	CITT	5
Jocko N Canal at East Fork Finley Creek	5162.00	canal		RDA	well	redevelop	2017	CITT	6
Pablo Feeder Canal below South Crow Creek	4868.10	canal		RDA	well	redevelop	2017	CITT	7
Revals R Canal at Revals Creek	5410.10	canal		RDA	well	redevelop	2017	CITT	8
Ronan B Canal at headworks	3567.10	canal		RDA	well	redevelop	2017	CITT	9
Upper Jocko J Canal at Agency Creek	5167.10	canal		RDA	well	redevelop	2017	CITT	10
Upper Jocko S Canal at Agency Creek	5167.50	canal		RDA	well	redevelop	2017	CITT	11
Upper Jocko S Canal at Big Knife Creek	5192.00	canal		RDA	well	redevelop	2017	CITT	12
Tabor Feeder Canal below Middle Fork Jocko River	5105.10	canal		RDA	well	upgrade	2017	CITT	13
South Crow Feeder Canal at Headworks	3529.00	canal		RDA	well	upgrade	2017	CITT	14
Mission DA Canal below Headworks	4828.10	canal		RDA	well	upgrade	2017	CITT	15
Mission F Canal at headworks	4829.00	canal		RDA	well	upgrade	2017	CITT	16
Hopkins Draw	3285.00	return flow		return flow	bubbler	new	2017	CITT	17
West Miller Coules	3570.00	return flow		return flow	bubbler	redevelop	2017	CITT	18
Revals Creek below Revals R Canal	5420.00	stream		MEF/TIF	staff gage	new	2017	CITT	19
Agency Creek below Upper J Canal	5169.00	stream	IIF	MEF/TIF	bubbler	upgrade	2017	CITT	20
Big Knife Creek below Jocko S Canal	5143.00	stream	IIF	MEF/TIF	bubbler	upgrade	2017	CITT	21
East Finley Creek below Jocko N Canal	5165.00	stream	IIF	MEF/TIF	bubbler	upgrade	2017	CITT	22
Jocko River below Lower S Canal	5180.00	stream	IIF	MEF/TIF	well	upgrade	2017	CITT	23
Middle Crow Creek below Pablo Feeder Canal	3519.00	stream	IIF	MEF/TIF	bubbler	upgrade	2017	CITT	24
Mud Creek below Ronan B Canal	3568.00	stream	IIF	MEF/TIF	bubbler	upgrade	2017	CITT	25
Agency Creek above Jocko S Canal	5167.00	stream		natural flow	bubbler	upgrade	2017	CITT	26
North Crow Creek at Campground	3512.00	stream		natural flow	well	upgrade	2017	CITT	27
Lower Jocko J Canal at Jocko River	5193.50	canal		RDA		deferred to structure install. TO#3		CITT pending	1
Mission 6C Canal at headworks	4831.50	canal		RDA		deferred to structure install. TO#3		CITT pending	2
Mission B Canal at headworks	4827.10	canal		RDA		deferred to structure install. TO#3		CITT pending	3
Mission H Canal at Mission Creek	4892.50	canal		RDA		deferred to structure install. TO#3		CITT pending	4
Lower Jocko S Canal at Jocko River	5179.50	canal		RDA		deferred to structure install. TO#3		CITT pending	5
Camas C Canal at headworks	3177.10	canal		NA	well	redevelop	2016	CSKT	1
Pablo A Canal at Round Butte Weir	4868.97	canal		NA	well	redevelop	2016	CSKT	2
Camas B Canal at headworks	3176.10	canal		NA	well	redevelop	2016	CSKT	3
Pablo A Canal below Pablo Reservoir	4868.91	canal		RDA	well	redevelop	2014	CSKT	4
Mission C Canal below headworks	4829.10	canal		RDA	well	redevelop	2014	CSKT	5
Post F Canal at headworks	4875.10	canal		RDA	well	redevelop	2016	CSKT	6
Placid Canal above Black Lake	5101.00	canal		RDA	well	upgrade	2015	CSKT	7
Tabor Feeder Canal below North Fork Jocko River	5105.20	canal		RDA	well	upgrade	2014	CSKT	8
Tabor Feeder Canal below Twin Lakes	5105.70	canal		RDA	well	upgrade	2015	CSKT	9
Jocko K Canal below headworks	5140.00	canal		RDA	well	upgrade	2014	CSKT	10
Upper S Canal at headworks	5131.00	canal		RDA	well	upgrade	2015	CSKT	11
Camas A Canal below Mill Creek	3111.00	canal		RDA	well	upgrade	2014	CSKT	12
Pablo Feeder Canal above Pablo Drop	4868.80	canal		RDA	well	upgrade	2014	CSKT	13
Kicking Horse Feeder above KH Reservoir	4869.20	canal		RDA	well	upgrade	2015	CSKT	14
Molise A Canal near headworks	3585.00	canal		RDA	well	upgrade	2014	CSKT	15
Pablo Feeder Canal below North Crow Creek	4868.30	canal		RDA	well	upgrade	2014	CSKT	16
Pablo Feeder Canal below Post Creek	4868.00	canal		RDA	well	upgrade	2014	CSKT	17
Mission A Canal below headworks	4814.10	canal		RDA	well	upgrade	2014	CSKT	18
Crow Creek below Crow Pump	3540.00	stream	IIF	MEF/TIF	well	upgrade	2015	CSKT	19
Crow Creek below Molise A Canal	3595.00	stream	IIF	MEF/TIF	well	upgrade	2014	CSKT	20
Jocko River below Upper S Canal	5131.50	stream	FIIP BA	MEF/TIF	staff gage	no change	2014	CSKT	21
Mission Creek at St. Ignatius	4831.00	stream	IIF	MEF/TIF	well	redevelop	2014	CSKT	22
Middle Fork Jocko River bl Tabor Feeder Canal	5100.00	stream	IIF	MEF/TIF	well	upgrade	2014	CSKT	23
North Fork Jocko River below Tabor Feeder Canal	5130.00	stream	IIF	MEF/TIF	well	upgrade	2014	CSKT	24
Finley Creek near mouth	5178.00	stream	IIF	MEF/TIF	well	upgrade	2014	CSKT	25
Jocko River below lower J Canal	5194.00	stream	IIF	MEF/TIF	well	upgrade	2014	CSKT	26
Jocko River bl K Canal	5149.00	stream	IIF	MEF/TIF	well	upgrade	2014	CSKT	27
Little Bitterroot River below Camas A Canal	3131.00	stream	IIF	MEF/TIF	well	upgrade	2014	CSKT	28
North Crow Creek below Pablo Feeder Canal	3515.00	stream	IIF	MEF/TIF	well	upgrade	2014	CSKT	29
Post Creek above Pablo Feeder Canal	4867.00	stream		MEF/TIF	well	upgrade	2017	CSKT	30
South Crow Creek below South Crow Feeder Canal	3530.00	stream	IIF	MEF/TIF	well	upgrade	2014	CSKT	31
Mission Creek below Mission A Canal	4815.00	stream	IIF	MEF/TIF	well	upgrade	2014	CSKT	32
Post Creek near Fort Connah	4876.00	stream	IIF	MEF/TIF	well	upgrade	2014	CSKT	33
Marsh Creek above Kicking Horse Feeder Canal	4870.55	stream	IIF	MEF/TIF	staff gage	no change	2001	CSKT	34
Post Creek above McDonald Reservoir	4860.00	stream		NA	bubbler	redevelop	2017	CSKT	1
Finley Creek below E Canal	5175.00	stream	IIF	NA	well	upgrade	2017	CSKT	2
Jocko River near mouth	5195.00	stream	IIF	NA	well	upgrade	2017	CSKT	3

Attachment 1.0: CSKT gaging network as of April, 2018

location	CSKT station ID	water body type	current administrative type	compact administrative type	equipment type	new/upgrade/redevelop	year	funding source		
Jocko Spring Creek near mouth	5187.00	stream		NA	well	upgrade	2017	CSKT	4	
Valley Creek near mouth	5192.00	stream		NA	well	upgrade	2014	CSKT	5	
Dayton Creek at mouth	1640.00	stream		NA	well	upgrade	2015	CSKT	6	
Little Bitterroot River near mouth	3198.00	stream		NA	well	upgrade	2014	CSKT	7	
Mud Creek above Crow Reservoir	3571.00	stream		NA	bubbler	upgrade	2017	CSKT	8	
Mission Creek at Bison Range	4895.00	stream		NA	well	upgrade	2014	CSKT	9	
Hellroaring Creek above reservoir site	0060.00	stream		natural flow	well	upgrade	2014	CSKT	10	
Placid Creek below Placid Canal	5000.00	stream	IFF	Off-Res. ISF	bubbler	upgrade	2017	CSKT	11	
Post F Canal above Hillside Reservoir	4875.90	canal		NA	well	redevelop	2016	FIIP	1	
Hillside Ditch at headworks	4890.00	canal		RDA	well	redevelop	2016	FIIP	2	
Jocko K Canal at Lamoose Creek	5140.90	canal		return flow	well	new	2016	FIIP	3	
Moiese Wasteway ab Pioneer Lane	3585.70	return flow	FIIP BA	return flow	well	new	2016	FIIP	4	
Dublin Gulch	4892.00	return flow	FIIP BA	return flow	well	redevelop	2015	FIIP	5	
Coleman Coulee near mouth	4897.00	return flow	FIIP BA	return flow	well	upgrade	2015	FIIP	6	
									total	79
									total w/ pending	83

Notes on column fields:

location - descriptive identification for gage location

station ID - CSKT unique numeric code for gage station

waterbody type - defines gages as stream, canal, or irrigation return flow. Return flows may occur along a natural stream course

current administrative type - defines if a gage is used for interim instream flows or compliance with FIIP biological assessment

compact administrative type - defines if a gage will be employed for compact administration after compact effective date

equipment type - staff gage, bubbler, well. Bubblers and wells (flow and counterweight) gages are all real-time

new/upgrade/redevelop - new gages have no prior record, upgrades indicate equipment upgrade to real-time, redevelop indicated previously operated CSKT gage

year - year gage was installed, upgraded, or redeveloped

procurement source - CITT indicates state legislative funding, CSKT indicates Tribal funding, FIIP indicates irrigation project funding

Attachment 2.0: CTT budget summary, Recent labor costs and Mission B flume costs not reflected in spent column

Category	Committed to Date	Spent to Date	Balance of \$3,000,000 State Contribution to Settlement							
Water Measurement	\$1,948,320.38	\$468,655.95								
On-Farm Efficiency	\$78,000.00	\$0.00								
Mitigation Stock Water	\$0.00	\$0.00			Uncommitted	Unspent				
TOTAL	\$2,026,320.38	\$468,655.95			\$973,679.62	\$2,531,344.05	color code = pending			
Category	Workplan	Task Order	CSKT Fiscal Year (10-1 to 9-31)	Specifics	Implementation Entity	Status	Obligated Amount	State Transfer	Carry-over	Spent
Water Measurement	10-year CSKT Water Measurement	1	2017	Gages/Staff	CSKT - Water Program	Completed	\$375,847.00	\$375,847.00		\$255,616.62
Water Measurement	10-year CSKT Water Measurement	2	2018	Gages/Staff	CSKT - Water Program	Active	\$213,039.33	\$92,808.95	\$120,230.38	\$213,039.33
Water Measurement	10-year CSKT Water Measurement	3	2018	Flume Engineering Contract	CSKT/Contractor	Obligated	\$200,000.00	not-to-exceed		
Water Measurement	10-year CSKT Water Measurement	—	2018	Hillside Flume Install	CSKT - Safety of Dams	Obligated	\$29,683.05			
Water Measurement	10-year CSKT Water Measurement	—	2019	Gages/Staff	CSKT - Water Program	Obligated	\$121,568.00			
Water Measurement	10-year CSKT Water Measurement	—	2020	Gages/Staff	CSKT - Water Program	Obligated	\$109,469.00			
Water Measurement	10-year CSKT Water Measurement	—	2021	Gages/Staff	CSKT - Water Program	Obligated	\$113,249.00			
Water Measurement	10-year CSKT Water Measurement	—	2022	Gages/Staff	CSKT - Water Program	Obligated	\$116,523.00			
Water Measurement	10-year CSKT Water Measurement	—	2023	Gages/Staff	CSKT - Water Program	Obligated	\$135,082.00			
Water Measurement	10-year CSKT Water Measurement	—	2024	Gages/Staff	CSKT - Water Program	Obligated	\$123,365.00			
Water Measurement	10-year CSKT Water Measurement	—	2025	Gages/Staff	CSKT - Water Program	Obligated	\$103,756.00			
Water Measurement	10-year CSKT Water Measurement	—	2026	Gages/Staff	CSKT - Water Program	Obligated	\$106,739.00			
On-Farm Efficiency	AgriMet Weather Station	—	2018	Equipment Purchase (3)	Reclamation AgriMet	Potential	\$30,000.00			
On-Farm Efficiency	AgriMet Weather Station	4	2018-2028	10-Year O&M	Reclamation AgriMet	Obligated	\$48,000.00			
Water Measurement	Bathymetry Mapping	5	2018	Survey Contract	CSKT/Contractor	Obligated	\$200,000.00	not-to-exceed		



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MONTANA WATER COURT, CLARK FORK DIVISION
JOCKO RIVER HYDROLOGIC SUB-BASIN (Basin 76L) AND
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)

AFFIDAVIT OF RYAN RUSCHE

EXHIBIT C

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MONTANA WATER COURT, CLARK FORK DIVISION
JOCKO RIVER HYDORLOGIC SUB-BASIN (Basin 76L) AND
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (Basin 76LJ)

AFFIDAVIT OF RYAN C. RUSCHE

STATE OF MONTANA)
 :
County of Lake)

Ryan C. Rusche, being duly sworn upon oath deposes and states as follows:

1. I am attorney for the Confederated Salish and Kootenai Tribes of the Flathead Reservation. In that capacity I am engaged in pursuing the settlement of the Tribes' water-related claims with the United States under the Criteria & Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223-9225, Mar. 12, 1990 ("Criteria and Procedures"), and the United States' ratification of the Reserved Water Rights Compact. The Criteria and Procedures are available online at:

http://www.usbr.gov/native/policv/12mar1990_fedreg_indianwaterrights.pdf

2. Historically, the catalyst for the Interior Department's engagement in an Indian water settlement follows the introduction of legislation in one house of Congress. Accordingly, the Tribes' initial objective in the federal settlement and ratification process was to secure

introduction of a settlement bill in the Senate. In 2016, Senator Tester introduced S. 3013 at the Tribes' request and a hearing was held on that bill before the Senate Indian Affairs Committee that same year. The Department engaged with the Tribes under the Criteria and Procedures immediately after introduction, through a meeting between Tribal representatives and the Chair of the Secretary's Indian Water Rights Working Group and the Director of the Secretary's Indian Water Rights Office.

3. Since that meeting the Tribes have been engaged extensively with a federal team (composed of attorneys and technical staff from the Interior and Justice Departments, as well as outside contractors specializing in, among other things, the economics of Indian water rights issues) to address the first two phases described in the Criteria and Procedures (fact-finding and assessment and recommendation). This engagement has included, among other things, numerous multi-day meetings between our team and theirs over the course of roughly two years. The federal team subsequently briefed the Secretary's Indian Water Rights Office (SIWRO) on the team's progress with regard to the first two phases under the Criteria and Procedures in February, 2018.

4. In order to achieve completion of the first two phases under the Criteria and Procedures, the Tribes submitted a confidential detailed description of the Tribes' water-related claims from a restoration or rehabilitation perspective as is customary for liability actions involving damages to natural resources. The Tribes' four-volume compilation includes preliminary-level engineering design and analysis, historical research, as well as legal, economic, and hydrologic analysis. In meetings with the federal team over the last two years, Tribal representatives have addressed questions and provided additional details for the purpose of assisting the federal team in their assessment and recommendation.

5. In April, 2018, the Tribes are scheduled to meet with representatives of the Working Group for the purpose of discussing the parameters of discussions under the third phase (negotiation) of the Criteria and Procedures. The Tribal team is prepared to engage in intensive negotiations following the April meeting.


6. In accordance with the Letter from Chairman Bishop to Secretary Zinke and Attorney General Sessions concerning Indian water settlements, introduction of a settlement bill in the U.S. House of Representatives requires written indication by Justice and Interior that, among other things, signifies the Administration's approval of the federal contribution to settlement. Accordingly, in the absence of a major policy shift in the House, the Tribal team does not anticipate seeking introduction in the House until after we've reached agreement with the Administration on the settlement amount. Chairman Bishop's letter is available online at: https://naturalresources.house.gov/uploadedfiles/04.27.17_ltr_to_ag_sessions_and_secretary_zinke_re_indian_water_rights_s....pdf

7. Thus, until we have completed work with the Interior Department under the Criteria and Procedures (or determined that effort to be futile), we have no reason to seek further introduction of federal legislation. Nevertheless, we have engaged in extensive education and outreach to Montana's Congressional Delegation, Congressional Committee staff, and outside organizations to settlement and ratification.

8. It should be noted that future settlement and ratification legislation may differ somewhat from S. 3013. Importantly, however, those changes will not alter the Compact itself. Indeed, the only method for changing any terms of the Compact would require approval by the Montana Legislature.

9. Finally, the Tribes continue to engage in public outreach relative to settlement and ratification. We have maintained our base of support throughout the federal ratification process and have picked up a number of supporters.

DATED this 16th day of April, 2018.



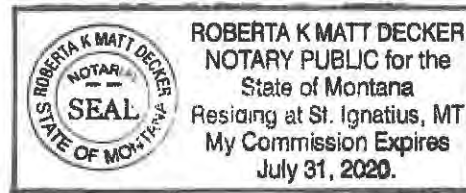
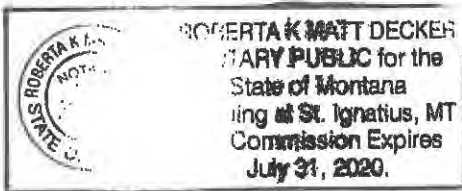
RYAN C. RUSCHE

Subscribed and sworn to before me this 16th day of April, 2018.



NOTARY PUBLIC FOR THE STATE OF MONTANA

[Notary Stamp]



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DISTRICT COURT JOINT BOARD OF CONTROL RULING

EXHIBIT D