

Jeffrey H. Wood
Acting Assistant Attorney General
David W. Harder, Assistant Section Chief
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
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)

**THE UNITED STATES' RESPONSE TO THE PETITION FOR EXTENSION OF STAY
OF ADJUDICATION IN BASINS 76L AND 76LJ**

The United States of America supports the "Petition for Extension of Stay of Adjudication in Basins 76L and 76LJ and Request for Hearing" filed by the Confederated Salish and Kootenai Tribes ("Tribes") on April 19, 2018, (hereafter "CSKT Petition"), requesting that this Court continue the stay of all proceedings to adjudicate water rights claims in Basins 76L and 76LJ until such time as the Confederated Salish and Kootenai-Montana Water Compact ("Compact"), M.C.A. §§ 85-20-1901 (2015), is approved by this Court. The United States supports the CSKT Petition and submits this responsive memorandum to provide additional reasons to extend the stay and not start litigation in these basins and in other parts of Montana affected by claims filed by the CSKT and United States. Continuing the stay will avoid substantial harm to the three sovereigns who participated in the negotiation of the water rights compact, the United States, the Tribes, and the State of Montana, and to countless others in the State, by settling thousands of claims that would otherwise only be resolved through lengthy and

expensive litigation. There is no pressing need to commence litigation on the 10,000 Tribal water rights claims, and the potential rewards from allowing the sovereigns and others to pursue settlement in Congress are enormous for the Court, the three sovereigns, and the people of Montana.

I. Standard

“[T]he 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) (“exercise of judgment [] must weigh competing interests and maintain an even balance”). In Henry v. Dist. Ct. of the Seventeenth Jud. Dist., 198 Mont. 8, 13, 645 P.2d 1350, 1353 (Mont. 1982), the Montana Supreme Court cited and echoed Landis, holding that a stay of proceedings is appropriate when “balancing the competing interests” favors the movant and the movant “make[s] out a clear case of hardship or inequity” Id. A further stay extension in this instance also advances another important Montana policy, that “[c]ompromises are favored by the Court.” State Highway Comm’n v. Arms, 163 Mont. 487, 490, 518 P.2d 35, 37 (Mont. 1974). An extension of the current stay is well supported under the above standards.

II. Factual Background¹

The CSKT Petition outlines the basic options – allow the three sovereigns and other leaders in Montana to continue to work on preliminary implementation steps and securing approval of the Compact by Congress -- or plunge a large geographic portion of the State into complex, divisive, and expensive litigation. That litigation would require resolution of

¹ The United States has addressed the need for a stay pending congressional approval of the Compact on two occasions, July 8, 2015, and September 19, 2016, and relies on and incorporates those pleadings by reference.

innumerable difficult legal issues that would consume critical resources of the Court, the three sovereigns,² and many private parties. The tribal petition logically requests that the Court turn its attention to resolution of other water rights claims and allow the sovereigns to focus on the resolution of more than 10,000 claims by way of a congressionally sanctioned settlement. See CSKT Petition at 2-3 and Exhibit A at 1.

The Court correctly is cognizant of the parties' attention to and prospects for favorable action on the Compact by the federal government. The CSKT Petition aptly describes the extensive activity of the Tribes' in support of Compact approval and the specific, intensive current interaction with the Interior Department on the critically important executive branch recommendations to the legislative branch of how to proceed on the Compact. See CSKT Petition at 3 and Exhibit C at 2-3. The United States briefly reports on its unique developments related to that process as well.

When last before the Court in September 2016, the United States described the position of the previous Administration regarding the CSKT Compact: general support for Indian water rights settlements; specific support for the CSKT Compact and unique water administration provisions; but uncertain regarding the overall federal monetary contribution as a part of Compact approval. "United States's Motion for Extension of Stay of Proceedings and Memorandum in Support," September 19, 2016, at 2-3 (hereinafter, Federal Motion). The Administration's Indian water rights negotiations leader told Senator Jon Tester shortly before that Motion that several more years would be needed to finish the legislative approval process

² A current estimate of Montana's legal expenses in a similar sized or more likely smaller suit with Wyoming is \$6 million. http://www.charkoosin.com/news/the-ongoing-tribe-cases-for-the-cskt-water-compact/article_2b239378-23e8-11e8-ad02-c7516c5816a2.html

“barring unforeseen developments.” *Id.* at 3 (quoting testimony of Counselor Letty Belin). Since that time, a new political party won the presidential election and the federal executive branch changed composition. As a result, there have been common delays as a new administration begins assuming power. However, the overall support for the CSKT Compact remains strong and work on its approval continues.

The Interior Department’s review of the CSKT Compact is currently led by Montanans who support tribal water rights settlements. The Secretary of the Interior is Ryan K. Zinke, who strongly supported Congress’s approval in 2016 of the Blackfoot-Montana Compact. As a Congressman, he urged the relevant components of the executive branch (the Departments of Interior and Justice and the Office of Management and Budget) to analyze and determine whether and how the Blackfoot Compact could be supported. *See* Statement of Congressman Zinke, at 20 and question to Blackfoot Tribal Chairman at 68 (May 24, 2016).³ The Blackfoot Compact was one of three Indian water rights settlements that passed Congress in 2016. Water Infrastructure Improvements for the Nation Act of 2016, P.L. 114-322, 130 Stat. 1816, title III, part 1, subtitle D (Pechanga Settlement Act), subtitle F (Choctaw and Chickasaw Settlement Act) and subtitle G (Blackfoot Settlement Act).⁴ As the Court well knows from its annual extension of

³ *H.R. 4366, "San Luis Unit Drainage Resolution Act"; H.R. 5217, "San Luis Unit Drainage Resolution Act"; and Discussion Draft of H.R. ___, "Blackfoot Water Rights Settlement Act of 2016"; Hearing Before the Subcomm. on Water, Power & Oceans of the H. Comm. on Nat. Res., 114th Cong. 20, 22, 68 (2016) (statements of Rep. Zinke), <https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg20277/pdf/CHRG-114hhrg20277.pdf>.*

⁴ Most of the Indian water rights settlements since 2000 have occurred in the last year of a congressional session, including those listed in the text. White Mountain Apache Tribe Water Rights Quantification Act of 2010, Pub. L. No. 111-291, tit. III, 124 Stat. 3064, 3073; Crow Tribe Water Rights Settlement Act of 2010, Pub. L. No. 111-291, tit. IV, 124 Stat. 3064, 3097; Taos Pueblo Indian Water Rights Settlement Act, Pub. L. No. 111-291, tit. V, 124 Stat. 3064, 3122 (2010); Aamodt Litigation Settlement Act, Pub. L. No. 111-291, tit. VI, 124 Stat. 3064, 3134 (2010); Soboba Band of Luiseno Indians Settlement Act, Pub. L. No. 110-297, 122 Stat. 2975 (2008); Snake River Water Rights Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809, 3431 (div. J, title X of Consolidated Appropriations Act of 2005); Gila River Indian Community Water Rights Settlement Act of 2004, Pub. L. No. 108-451, 118 Stat. 3478, 3504 (title II of Arizona Water Rights Settlement Act of 2004); Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act of 2000, Pub. L. No. 106-263, 114 Stat. 737; *contra* Navajo-Gallup Water Supply

stays on the Blackfeet water rights litigation, it took more than seven years for the Blackfeet Compact to win Congressional approval after passage in the Montana legislature in early 2009. § 85-20-1501, MCA.

The Interior Department has continued the bipartisan consensus of at least the last three decades that Indian water rights settlements are preferable to protracted Tribal water rights litigation. Secretary Zinke, in his first testimony to Congress as the Secretary of the Interior, highlighted as a key accomplishment during his congressional tenure the passage of the Blackfeet Compact. Testimony of Ryan K. Zinke before the United States Senate Committee on Indian Affairs in March 2017.⁵ The current Administration testified favorably about its continued support for Indian water rights settlements that is consistent with the governing Interior Department standards. Mikkelsen Testimony on S. 664, Navajo Utah Water Rights Settlement Act of 2017, and S. 1770, Hualapai Tribe Water Rights Settlement Act of 2017.⁶

Those standards are found in the Criteria and Procedures. 55 Fed. Reg. 9223, March 12, 1990. The Criteria and Procedures “are applicable to all negotiations involving Indian water rights claims settlements in which the Federal Government participates.” Criterion 1. The Working Group on Indian Water Rights Settlements oversees implementation of the Criteria and Procedures. The Working Group is composed of the Interior Department leadership on water

Project and Navajo Nation Water Rights, Pub. L. No. 111-11, 123 Stat. 991, 1379 (title X, subtitle B, parts III-IV of Omnibus Public Land Management Act of 2009); Shoshone-Paiute Tribes of the Duck Valley Reservation Water Rights Settlement, Pub. L. No. 111-11, 123 Stat. 991, 1405 (title X, subtitle C of Omnibus Public Land Management Act of 2009); Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, 117 Stat. 782

⁵ *Identifying Indian Affairs Priorities for the Trump Administration: Hearing Before the S. Comm. on Indian Affairs*, Mar. 8, 2017, 115th Cong. 7 (2017) (Statement of Ryan Zinke, Sec’y, U.S. Dept. of the Interior) (<https://www.gpo.gov/fdsys/pkg/CHRG-115shrg28358/pdf/CHRG-115shrg28358.pdf>).

⁶ *Hearing on S. 664 and S. 1770 Before S. Comm on Indian Affairs*, Dec. 6, 2017, 115th Cong. 20 (2017) (Statements of Alan Mikkelsen, Deputy Comm’r, Bureau of Reclamation) (<https://www.gpo.gov/fdsys/pkg/CHRG-115shrg28891/pdf/CHRG-115shrg28891.pdf>).

rights matters, all of the Assistant Secretaries, and the Solicitor representing all Interior agencies affected by Tribal water rights settlements. The Working Group is the body at Interior that provides recommendations to the Secretary on how to settle Tribal water rights. 55 Fed. Reg. 9223, March 12, 1990.

In the past two months, sufficient leadership positions at the Interior Department have been filled to allow the Working Group to start addressing the pending backlog of Indian water rights issues. It is anticipated that the Working Group will begin its review of analysis and recommendations regarding the amount of federal contribution to support the CSKT Compact, consistent with the Criteria and Procedures and the standing request to the Interior Department and Justice Department from the House Natural Resources Committee's Chairman. See CSKT Petition, Exhibit C, at 3 (describing legislative branch request to the executive branch). Interior and Justice Department staff have been working extensively on relevant analysis and recommendations to inform the Working Group and to provide necessary information to the new leaders of the two executive branch departments.

III. Continuing the Stay Supports Settlement, Compromise, and Efficient Use of the Resources for All Interested Parties

Continuing the stay of adjudication for all claims will preserve the substantial progress made towards federal approval of the Compact over the last year under evolving circumstances while preserving the benefit of the bargain reached by three sovereigns after over a decade of continuous work. The three sovereigns—the Tribes, the State of Montana, and the United States have devoted substantial resources to pursuing settlement and compromise. Those efforts have not ceased. A continuance of the stay will allow the new Administration and the Tribes to negotiate a settlement of the Tribes' claims against the United States and will allow Congress time to consider the legislation.

The prior Administration had stated that it would take two to three years to complete the necessary work and resolve issues with Congress. Thereafter, an election and a change in leadership ensued. Changes of administration in Washington, D.C., unavoidably involve delayed decision-making as new leadership positions are filled and those new leaders are briefed and deliberate on critical topics. The change in Administration here has not diminished interest in approving the CSKT Compact. Indeed, given their backgrounds on the Flathead Reservation and experiences with the Blackfeet Compact legislation, the current Administration's leaders on this issue are unusually suited to provide incisive analysis regarding the CSKT Compact to the legislative branch.

Without approval of the Compact, this Court will need to adjudicate over ten thousand claims filed by the United States and the Tribes and the objections to all of those claims. Resolving thousands of claims and the thousands of objections that they likely draw will require voluminous discovery, resolution of discovery disputes, extensive briefing of innumerable legal issues and disputes, and require many written opinions and possible appeals. It is no exaggeration to state that these disputes will be contentious, resource intensive, and potentially interminable. Settlement avoids all of these consequences. Continuance of the stay allows the Tribes, Montana, the United States Administration and Congress to consider the delicately balanced Compact and to preserve the agreement so carefully negotiated by the three sovereigns.

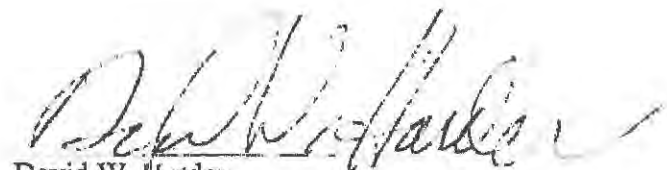
The passage of substantial Indian Water Rights settlements, like the CSKT Compact, takes time as evidenced by the more than seven years it took to pass the Blackfeet Compact. Congress and the executive branch demonstrated at the end of 2016 that they could solve critical water rights problems, including some in Montana. See page 3 above. In 2018, veterans of that process are at work in the executive branch to complete analysis for use in negotiations with the

legislative branch to pass the CSKT Compact. The three sovereigns who negotiated the CSKT Compact are actively supporting a stay of litigation in order to devote their energy to seeking approval of the Compact in Congress. The opponent of the last stay request is not a viable organization. CSKT Petition, Exhibit D. Moreover, to the extent that the Court is concerned that it faces two mandates — the desire for settlement as expressed by the Montana legislature and courts and the desire to issue preliminary decrees by 2020 — continuing the stay provides a far more expeditious route to resolving all the disputes settled by the Compact than litigating thousands of objections to claims and adjudicating innumerable legal issues. There is good cause to continue the stay.

IV. Conclusion

The United States requests that in the interest of the three sovereigns' and other interested parties' limited resources and judicial economy, that the Court continue the stay of adjudication of all water rights in Basins 76L and 76LJ to allow those parties to focus on passage of the CSKT Compact in Congress.

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David W. Harder,
Assistant Section Chief
Bradley S. Bridgewater
Katherine M. Kane
Trial Attorneys
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

Attorneys for United States of America

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following persons by first class mail on this 1st day of May, 2018.

Jeremiah D. Weiner, Esq.
Melissa Schlichting
Assistant Attorney General
State of Montana
215 North Sanders
PO Box 201401
Helena, MT 59620-1401
406-444-2026
jweiner2@mt.gov
mschlichting@mt.gov

John Peterson
Adjudication Bureau Chief
Montana DNRC
PO Box 201602
Helena, MT 59620-1602
406-444-6618
johpeterson@mt.gov
(Via Email Only)

John B. Carter
Rhonda R. Swaney
Daniel Decker
Confederated Salish & Kootenai Tribes
Tribal Legal Department
PO Box 278
Pablo, MT 59855
406-675-2700
John.carter@cslt.org
Rhonda.swaney@cslt.org
Daniel.decker@cslt.org

Bruce A. Fredrickson
Kristin L. Omvig
Rocky Mountain Law Partners, PLLP
1830 3rd Avenue East, Suite 301
PO Box 1758
Kalispell, MT 59903
406-314-6011
bruce@rmtlawp.com
kristin@rmtlawp.com

Duane Mecham
US Department of Interior
Bureau of Indian Affairs
805 SW Broadway, Suite 600
Portland, OR 97205
503-231-6299
duane.mecham@sol.doi.gov

Flathead Irrigation District
Paul Guenzler
PO Box 639
St. Ignatius, MT 59865
406-261-3566

Jocko Irrigation District
Boone Cole
PO Box 639
St. Ignatius, MT 59865
406-544-4247

Mission Irrigation District
Ray Swenson
PO Box 639
St. Ignatius, MT 59865
406-830-0902

R. Blair Strong
Ramlow & Rudbach, PLLP
542 Central Ave
Whitefish, MT 59937
406-862-7503
rbs@ramlowrudbach.com

Colleen Coyle
Coyle Law Firm
PO Box 1326
Bozeman, MT 59771
406-551-4868
406-570-2740 (Cell)
colleen@coylelawmt.com



Lorrin C. Dyer
Litigation Support Assistant