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BASIN-0001-76L-1985
December 13, 2022
Montana Water Court

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)

**JOINT PETITION OF THE CONFEDERATED SALISH & KOOTENAI TRIBES AND
THE UNITED STATES OF AMERICA FOR EXTENSION OF STAY OF
ADJUDICATION OF ALL CLAIMS IN BASINS 76L AND 76LJ**

I. INTRODUCTION

All proceedings to adjudicate water rights claims in basins 76L and 76LJ are currently stayed until January 10, 2023. *Order Extending Stay*, December 13, 2019 (“2019 Order”). The United States of America and the Confederated Salish and Kootenai Tribes (“Tribes”) have filed thousands of claims on and adjacent to the Flathead Indian Reservation in basins 76L and 76LJ. The United States and the Tribes have the most claims in these two basins and claim a substantial amount of water. All of these claims would be settled with the confirmation of the Confederated Salish and Kootenai–Montana Water Compact (“Compact”), §§ 85-20-1901, M.C.A., by the Water Court. The Water Court commenced special proceedings, Case No. WC-

0001-C-2021, on June 9, 2021, to incorporate the Compact into preliminary and final decrees. Over 400 objections have been received, and the deadline for submitting objections has been extended to February 9, 2023.

Continuing the stay to allow the Water Court to complete its work in other basins over 2023 will avoid substantial harm to the United States, the Tribes, and the State of Montana (“Compact Parties”), who negotiated the Compact, and to countless others in Montana, by settling thousands of claims that would otherwise only be resolved through lengthy and expensive litigation.

The Tribes and United States therefore request that this Court continue the existing stay until January 10, 2024, and continue to require the three governments to provide reports to the Court every six months regarding the Compact. Below, we describe the legal standards governing stays, the ample support to continue the stay under the criteria identified in the 2019 *Order*, a description of the proposed stay extension, and a request to hold a hearing on this petition.

II. LEGAL 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”). “A court determines whether to grant a stay by balancing competing interests and considering whether the public welfare or convenience will be benefitted by a stay.” *State v. Mont. First Jud. Dist. Court*, 361 Mont. 536, ¶ 10, 264 P.3d 518 (2011) (citing *Henry v. Seventeenth Jud. Dist. Court*, 198 Mont. 8, 13, 645 P.2d 1350, 1353 (1982)). More specifically, this Court has

outlined three criteria to assess stay requests from the Montana Supreme Court’s discussion of the stay standards in *Henry*:

1. A court has inherent power to stay proceedings in control of its docket – after balancing the competing interests.
2. The party seeking a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay will work damage to someone else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.
3. Especially in cases of extraordinary public moment, the individual may be required to submit to moderate delay if the public welfare or convenience will thereby be promoted.

2019 *Order* at 3 (citing *Henry*, 198 Mont. at 13-14, 645 P.2d at 1353).

III. ARGUMENT

An extension of the current stay is supported under all three criteria identified in the 2019 *Order*.¹ The first test is that the court has “inherent power” to “control ... its docket” and stay proceedings, if the competing interests favor a stay. 2019 *Order* at 3. As the remaining two criteria go to the balancing of the competing interests, the focus here is on the court’s inherent power to control its docket. This was a point that took on unusual prominence in 2018 as a Montana statute militated against a stay in basins 76L and 76LJ beyond early 2020. In mid-2018 when the Court last queried the Compact Parties at a hearing, the Montana legislature in section 85-2-270(2), M.C.A., directed the Water Court to issue all preliminary decrees by June 30, 2020. The Court perceived it could not stay the adjudication in basins 76L and 76 LJ beyond that date. *Order Extending Stay*, June 5, 2018 (“2018 *Order*”) at 2-3. However, the Montana legislature amended section 85-2-270(2), M.C.A. during the 2019 legislative session. The Montana

¹ The United States and the Tribes have addressed the need for a stay on numerous previous occasions, July 8, 2015, September 19, 2016, May 1, 2018, November 25, 2019, and December 12, 2019; the United States and the Tribes rely on and incorporate those pleadings by reference.

legislature extended the deadline from June 30, 2020, to June 30, 2024, for the Water Court to issue all preliminary decrees.

The United States and the Tribes acknowledge the current June 30, 2024, deadline for issuing a preliminary or temporary preliminary decree restrains the Water Court’s “inherent power” to “control ... its docket” to some extent. However, the United States and the Tribes contend that there is sufficient room in even that schedule to provide the Court with some discretion to extend the stay. Additionally, the Montana Legislature is meeting in early 2023, and we anticipate that there will be an effort to again extend the deadline. Therefore, we request the Court give the parties a one-year extension of the stay to allow the Montana Legislature to once again extend the deadline in light of the current status of the Compact.

The second element of the stay test focuses on the competing interests of the stay proponents and opponents. 2019 *Order* at 4. In the past, there has been no opposition to an extension of the stay and hence little weight on the opposing scale. We do not believe that has changed because the spotlight has now shifted to the Compact water rights review process. The Compact Parties are currently engaged in the Compact water rights review process that is pending before the Water Court in Case No. WC-0001-C-2021. Over 400 objections to the Compact have already been filed, and we expect many more before the deadline on February 9, 2023. Staff for the United States and Tribes will have extensive responsibility for reviewing these hundreds of objections and preparing necessary responses to be used in settlement discussions or litigation over the objections before the Water Court. This massive work will be ongoing in 2023 and 2024 at a minimum.

If preliminary decrees are issued in basins 76L and 76LJ, then approximately 12,000 water rights claims filed in the early 1980s under state law are subject to a 180 day objection

deadline. Staff from the United States and the Tribes will need to review many of those claims, determine if objections should be filed, and prepare those objections. This will be a very time intensive examination.

The United States and the Tribes do not have the resources to proceed simultaneously with both the Compact water right review and the review of the basin 76L and 76LJ preliminary decrees. The same attorneys and staff who are working on Case No. WC-0001-C-2021 are the same that are assigned to this action. Similarly, other parties likely impacted by the Compact water rights case are engaged in the preliminary decree process as well. Thus, there is a “clear case of hardship” on the Tribes and the United States and likely the parties affected by the Tribal water rights recognized in the Compact if the stay is not extended. The competing interests continue to tip markedly towards extending the stay.

The third *Henry* factor notes that “in cases of extraordinary public moment,” delay is appropriate “if the public welfare or convenience will thereby be promoted.” 2019 *Order* at 3. Here this criteria is clearly met. Twice before, this Court has recognized the Compact as an “extraordinary public moment” where “public welfare or convenience” justifies a delay. 2018 *Order* at 1, and 2019 *Order* at 4. The potential impact of litigation to hundreds of water users across two basins is a certain reality that has not changed – if the Compact water rights subject to review in Case No. WC-0001-C-2021 are not approved. Thus, extending the current stay to allow for completion of that process is plainly warranted under the third criteria as well.

In sum, the competing interests tilt heavily in favor of the benefits of a stay, and the public welfare would be enhanced by the greater likelihood that extensive litigation on the thousands of federal reserved water right claims that the Tribes and United States filed in 2015 would be avoided upon the Water Court’s review and approval of the Compact water rights.

Additionally, extending the current stay to give time for the Montana Legislature to extend the preliminary decree deadline will also allow the Court to more fully exercise its discretion to stay proceedings and manage its docket.

IV. REPORT ON ACTIVITY DURING THE CURRENT STAY

Since the 2019 *Order* significant progress has been made. In 2020 Congress approved the Compact through passage of the Montana Water Rights Protection Act, which was signed into law by President Trump on December 27, 2020.² On September 17, 2021, the Secretary of Interior formally executed the Compact in accordance with the Montana Water Rights Protection Act.³ Upon formal execution of the Compact by the Secretary, the Effective Date as defined by the Compact, the Compact Parties have spent considerable time and resources on Compact implementation activities, including, but not limited to, appointing members of the Flathead Reservation Water Management Board (“the Board”), and providing funding and technical assistance to the Board as it builds out a new entity.

Additionally, and in accordance with Article VII.B of the Compact, on March 14, 2022, the Compact Parties filed a joint motion for incorporation of the Compact into preliminary and final decrees. On June 9, 2022, Judge Brown issued an Order Commencing Special Proceedings and a Notice of Entry of Compact Preliminary Decree and Notice of Availability (“the Notice”) was sent to all potentially impacted water users. As provided for in the Notice, potentially impacted water users had until December 6, 2022, to file objections to the Compact. The Court on December 2, 2022 extended this deadline until February 9, 2023. Over 400 objections have already been filed.

² Division DD of the Consolidated Appropriations Act, 2020, Publ. L. No. 116-260, 134 Stat. 1182, 3008-38 (Montana Water Rights Protection Act).

³ <https://www.doi.gov/pressreleases/interior-department-executes-water-rights-settlement-agreement-confederated-salish>

V. LENGTH OF THE PROPOSED STAY

The United States and the Tribes move the Court for a one year stay, through January 10, 2024, and suggest that the Compact Parties provide written reports to the Court every six months regarding progress on the Montana Legislature's extension of the deadline for issuance of preliminary or temporary preliminary decrees in all basins. The stay will also provide additional time for the Compact Parties to spend on the Compact water rights review process.

VI. REQUEST FOR HEARING

The United States and the Tribes request a hearing and ruling on this petition prior to the expiration of the current stay on January 10, 2023. We suggest the Court schedule a hearing on the petition during the period January 4-6, 2023, or at such other time as the Court deems advisable. This suggested window of time would allow for the filing of briefs to be completed in December and time for the Court and parties to assess those submissions. In the alternative, if a hearing cannot be scheduled before the expiration of the stay, the United States and the Tribes request that a temporary extension of the stay issue until the Court rules upon this petition.

VII. CONCLUSION

For the foregoing reasons, the United States and the Tribes request that this Court extend the stay of the adjudication of all claims in basins 76L and 76LJ until January 10, 2024, and require that the United States, Tribes, and the State of Montana provide a written report at six month intervals regarding the status of efforts to have the Montana Legislature extend the preliminary decree deadline, and an update on the progress resolving the hundreds of objections in the Water Court regarding the Tribes' Compact water rights.

Dated this 13th day of December, 2022.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following persons by electronic mail or U.S. mail on this 13th day of December 2022.

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