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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)

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**ORDER EXTENDING STAYS**

**BACKGROUND**

On February 1, 2023, the Water Court issued an order extending to September 29, 2023 the stays of adjudication proceedings in the Flathead River, to and Including Flathead Lake Basin (Basin 76LJ), and the Flathead River, Below Flathead Lake Basin (Basin 76L). The Court set a status conference for September 7, 2023 regarding the stays. On September 1, 2023, the State of Montana (“State”), the United States of America (“United States”), and the Confederated Salish and Kootenai Tribes (“Tribes”) (collectively, the “Governments”) filed a Joint Petition of the State of Montana, Confederated Salish & Kootenai Tribes, and the United States of America for an Extension of the Stay of Adjudication of All Claims in Basins 76L and 76LJ (the “Joint Petition”). The Tribes also filed a separate report to the Court. These filings are contained in the basin docket for both Basin 76L and Basin 76LJ.

The Court held the scheduled status conference on September 7, 2023 by Zoom. David Harder appeared for the United States. Melissa Schlichting and Daniel Decker

appeared for the Tribes. Chad Vanisko and Molly Kelly appeared for the State. A number of other persons attended the hearing. Nathaniel T. Ward, the Water Rights Bureau Chief for the Montana Department of Natural Resources and Conservation (“DNRC”) provided testimony in response to questions from the Court.

## **DISCUSSION**

The Joint Petition asks the Water Court to extend the stays on issuance of preliminary decrees in Basins 76L and 76LJ. The parties request a single eighteen month extension for both basins, or alternately that the Court issue separate extensions for each basin. The Joint Petition and the Tribes’ report state that extensions are warranted due to the extensive ongoing work necessary to respond to the hundreds of objections filed in the Water Court proceedings related to the Compact between Montana, the Tribes and the United States (the “Compact”). Specifically, over the past several months, the Governments have dedicated significant time to the Court-ordered mediation process for the Compact proceedings. This mediation process was not in place at the time the Court issued the most recent extension of the stays. The Governments also are concerned about the potential confusion to claimants if the Compact proceedings are ongoing at the same time as proceedings to adjudicate state-based claims in Basins 76L and 76LJ.

As outlined in the February 1, 2023 order and prior orders, the Court balances several factors in determining whether to issue or extend a stay. The factors “ include (1) the balancing of competing interests with a recognition the Court has inherent authority to control its docket; (2) that the party seeking the stay make out a clear case of hardship or inequity in proceeding, even if there is a fair possibility the stay will damage someone else; and (3) consideration of the promotion of public welfare or convenience, especially in cases of “extraordinary public moment.” February 1, 2023 Order, at 4.

Based upon the statements of the Governments in the Joint Petition, and the Tribes’ report, further extensions of the stays are warranted, though not for the full eighteen months requested. While the Governments’ interests in the extensions certainly are well taken, the Court also must consider the interests of water right claimants in these two basins. Additionally, the Montana Legislature has stated in the Water Use Act that it

is feasible for the Water Court to issue decrees in all basins by June 30, 2024. Section 85-2-270(2). Although this is not a hard deadline, it is a statement made in a statute for which claimants justifiably may rely. In considering extending of the stay, the Court is mindful of the need consider the interests of claimants seeking finality of their state-based water right claims.

The Court also takes seriously the hardship arguments made by the Governments based largely on the Compact proceedings. Those proceedings are extraordinarily complex and the time and effort necessary to complete them remain something of an unknown because the proceedings have not yet shifted from a settlement track to a hearing track. Adding basin proceedings to the mix will potentially magnify the hardship. Both sets of proceedings are cases of “extraordinary public moment” because the Water Court’s adjudication is the one unified opportunity to achieve some measure of finality through final decrees that include both state-based claims and reserved water rights.

In balancing these various factors, bifurcated extensions of the stays is appropriate because the two basins have some different characteristics. Basin 76LJ has more state-based claims to decree and is located mostly outside the exterior boundaries of the Flathead Reservation. Basin 76L has fewer claims and is mostly within the boundaries of the Flathead Reservation. In considering how best to balance all the competing interests, these distinctions provide some justification to issue the Basin 76LJ decree first, followed by the Basin 76L decree sometime later. Staggering the decrees allows more time for the Compact proceedings to move along, and also avoids possible simultaneous objection deadlines for the decrees in the two basins.

During the conference the Court asked DNRC about the status of summary reports for the two basins and the potential effect of delaying issuance. DNRC confirmed that relatively brief delays will not compromise the work it already has completed or require that it be done. When presented with potential extension dates, the Governments expressed some reluctance, but confirmed staggered extensions provides some relief to the concerns raised in the Joint Petition and the Tribes’ report.

The Court concludes good cause exists to extend the stays.

## ORDER

Therefore, it is ORDERED that the stay for Basin 76LJ is extended to **January 31, 2024**, and the stay for Basin 76L is extended to **May 31, 2024**. The extensions are subject to the following:

1. The State, through DNRC, shall continue work to complete summary reports for all State-Based Claims within Basins 76L and 76LJ.
2. The State, through DNRC, shall continue to defer any examination work on the Reserved Right Claims (as defined in the February 1, 2023 Orders) and shall not include any of the Reserved Right Claims in the summary reports for the two basins.
3. DNRC shall file with the Court any motions to amend state-based claims DNRC receives for Basins 76L or 76LJ upon receipt. The Court will address any such motions on a case by case basis and the stays shall not apply to the Court addressing such motions.
4. Nothing in this Order shall apply to ongoing or future proceedings arising out of the Compact Preliminary Decree.
5. The United States, the Tribes, and the State shall attend status conferences at 10:00 a.m. on **January 10, 2024** for Basin 76LJ, and at 10:00 a.m. on **May 9, 2024** for Basin 76L. The conferences shall take place via Zoom. Instructions for the Zoom conferences will be provided in separate orders. The parties are requested to be prepared to discuss factors, if any, for whether the applicable stay should be extended in full or in part.
6. The requirement to file quarterly status reports remains suspended, but any party may file reports or motions as they deem appropriate.

**ELECTRONICALLY SIGNED AND DATED BELOW**

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