

FLATHEAD COMPACT TRIBAL WATER RIGHT SUMMARY

The Confederated Salish and Kootenai Tribes of the Flathead Reservation (“Tribes”), the State of Montana, and the United States have entered into a Water Rights Compact (“Compact”) for the purpose of settling the water rights claims of the Tribes, their members, and Allottees of the Flathead Indian Reservation, and of the United States on behalf of the Tribes, their members, and Allottees, and to provide the necessary foundation for the establishment of a board composed of Tribal and State appointed representatives to provide for the unified administration of all water resources on the Reservation, in accordance with § 85-2-702, MCA. The Compact was ratified by the Montana Legislature on April 24, 2015 (codified at § 85-20-1901, MCA), by the Congress of the United States on December 27, 2020 (Pub. L. No. 116-260, Title V, Division DD) (“federal act”), by the Tribes by Resolution 21-023 of the Tribal Council on December 29, 2020 and signed by the Secretary of the United States Department of the Interior on September 17, 2021.

The Compact quantifies the Tribal Water Right in the following basins:

- Basin 76D, including the Kootenai River and its tributaries;
- Basin 76E, including Rock Creek and its tributaries;
- Basin 76F, including the Blackfoot River and its tributaries;
- Basin 76J, including the South Fork of the Flathead River and its tributaries;
- Basin 76K, including the Swan River and its tributaries;
- Basin 76L, including the Flathead River below Flathead Lake, and its tributaries;
- Basin 76LJ, including the Flathead River to and including Flathead Lake, and its tributaries;
- Basin 76M, including the Clark Fork River between the Blackfoot and Flathead Rivers, and its tributaries; and
- Basin 76N, including the Clark Fork River below the Flathead River, and its tributaries.

Some portion of the Tribal Water Right recognized could impact water rights in the following basins:

- Basin 76G, including the Clark Fork River above the Blackfoot River, and its tributaries;
- Basin 76GJ, including Flint Creek and its tributaries; and
- Basin 76I, including the Middle Fork of the Flathead River and its tributaries.

The Tribal Water Right means the water rights of the Tribes, including any Tribal member or Allottee, the basis of which are federal law, as set forth in the following Compact provisions:

- Article III.A, Religious and Cultural Uses which includes all traditional, religious, or cultural uses of water by Tribal members within Montana;
- Article III.C.1.a through j, various rights in Basins 76L and 76LJ and the Flathead Indian Irrigation Project (“FIIP”) Irrigation Water Diversions from Basins 76F and 76N;
- Article III.C.1.k.i, Wetlands Appurtenant to Lands Owned by Montana Fish Wildlife and Parks;
- Article III. C.1.l.i, Wetlands Appurtenant to Lands Owned by United States Fish and Wildlife Service;
- Article III.D.1 through 3, mainstem Instream Flow rights in the Kootenai River (Basin 76D), Swan River (Basin 76K), and Lower Clark Fork River (Basin 76N); and
- Article III.D.7 and 8, Instream Flow right on the North Fork of Placid Creek (Basin 76F) and Instream Flow rights on Kootenai River Tributaries (Basin 76D).

The term “Tribal Water Right” also includes those rights identified in Article III.H that are appurtenant to lands taken into trust by the United States on behalf of the Tribes.

Basins 76L and 76LJ and FIIP Irrigation Water Diversions from Basins 76F and 76N.

- The Tribal Water Right includes sufficient water for irrigation and other incidental purposes to supply the FIIP to serve up to, but no more than, 135,000 acres with a priority date of July 16, 1855 (see Appendix 5).
- The Tribal Water Right includes all Existing Uses by the Tribes, their members and Allottees that are not Water Rights Arising Under State Law and are not otherwise specifically quantified in other sections of Article III. To be valid and enforceable, the Tribes, their members or Allottees claiming such an Existing Use shall complete the process for registration set forth in the Law of Administration. Religious or cultural uses of the Tribal Water Right are exempt from the registration process.
- The Tribes have a direct flow water right from the Flathead River from the following sources: Flathead River, Flathead Lake, and the South Fork of the Flathead River up to Hungry Horse Reservoir with a point of diversion from Flathead Lake or the Flathead River, either on or off the Reservation. Such right is for any beneficial use with a diversion volume of 229,383 acre-feet per year (“AFY”) and a depletion volume of 128,158 AFY (Appendix 9). As part of this right and as provided by Congress in the federal act, the Tribes are entitled to an allocation of 90,000 AFY, as measured at the Hungry Horse Dam, of storage water in Hungry Horse Reservoir with a priority date of the water rights for the Reservoir of the Bureau of Reclamation (Appendix 9).
- The Tribes have Instream Flow rights on the Reservation as indicated in the abstracts appended to the Compact (*see* Appendices 10–14). The Tribes’ Instream Flow rights have a priority date of time immemorial.
- The Tribes have the right to water necessary to maintain Minimum Reservoir Pool Elevations for FIIP reservoirs as provided by the abstracts in Appendix 15. Such water rights carry a priority date of July 16, 1855.
- The Tribes have the right to all naturally occurring water that is necessary to maintain: the Wetlands identified in Appendix 16; the High Mountain Lakes (Appendix 17); and the level of the entirety of Flathead Lake at an elevation of 2,883 feet (Appendix 18). These rights have a time immemorial priority date.
- The Tribes have the right to the water necessary to operate the Boulder Creek Hydroelectric Project identified in Appendix 19 and the Hellroaring Hydroelectric Project identified in Appendix 20. Both have a priority date of July 16, 1855.
- The Tribes and Montana Fish Wildlife and Parks (“MFWP”) have a right to all naturally occurring water necessary to maintain the Wetlands identified in Appendix 21 with a priority date of time immemorial.
- The Tribes and the Department of the Interior’s Fish and Wildlife Service have the right to all naturally occurring water necessary to maintain the Wetlands identified in Appendix 23 with a priority date of time immemorial.

Instream Flow Water Rights Off of the Reservation.

- The Tribes have an Instream Flow water right for a portion of the mainstem of the Kootenai River (Basin 76D) as identified in Appendix 25 with a time immemorial priority date. The ability to enforce this right is suspended so long as the Libby Dam remains in existence and the Army Corps of Engineers operates the dam consistent with the Federal Columbia River Power System Biological Opinions identified in Appendix 25.

- The Tribes have an Instream Flow water right for a portion of the mainstem of the Swan River (Basin 76K) as identified in Appendix 26 with a time immemorial priority date. This right may only be enforced against junior surface water irrigators and groundwater irrigators with flow rates greater than 100 gallons per minute.
- The Tribes have a 5,000 cubic feet per second (“cfs”) Instream Flow water right for a portion of the mainstem of the Clark Fork River (Basin 76N) as identified in Appendix 27 with a time immemorial priority date. For so long as the Cabinet Gorge and Noxon dams remain in existence, the enforceable level of this right is a flow rate equal to the lesser of 5,000 cfs or the minimum flow level established by the Federal Energy Regulatory Commission as a condition on the license for the Cabinet Gorge and Noxon dams.
- The Tribes shall be added as a co-owner with MFWP of the Water Rights Arising Under State Law held by MFWP for Instream Flow and recreation purposes identified in Appendices 28 and 29 as amended by the federal act. This co-ownership does not change the priority dates or flow rates for these rights.
- Co-ownership of Water Right Number 76M 94404-00 (Milltown Dam). Upon ratification of the Compact by the Montana Legislature, Water Right 76M 94404-00 was split into two active and enforceable Water Rights Arising Under State Law: 76M 94404-01, (measurement point at Turah Bridge USGS Gage, Clark Fork River Basin 76G) and 76M 94404-02 (measurement point at Bonner USGS Gage, Blackfoot River Basin 76F) as identified in Appendix 30 and Appendix 31. Upon the Effective Date, these rights are co-owned by the Tribes and MFWP. These rights have a priority date of December 11, 1904. These rights have a purpose of maintenance and enhancement of fish habitat to benefit the instream fishery and to take the form of two enforceable hydrographs. These water rights shall not be exercised in conjunction with any artificial diversion. The Tribes and MFWP each retain the unilateral right to exercise these water rights as each deems appropriate, but neither has any affirmative duty to take any particular action. The ability to enforce shall be suspended for a period of 10 years from the date of ratification of the Compact by the Montana Legislature. For the legal availability analysis, these rights have a combined year-round flow rate of 2,000 cfs as measured below the confluence of the Blackfoot and Clark Fork Rivers.
- The Tribes have an Instream Flow water right for the upper reach of the North Fork of Placid Creek as identified in Appendix 35 with a time immemorial priority date.
- The Tribes have time immemorial Instream Flow water rights for Big Creek, Boulder Creek, Steep Creek, and Sutton Creek—tributaries of the Kootenai River—as identified in Appendix 36.

Call Protection.

- The Tribes (on behalf of themselves and the users of any portion of the Tribal Water Right) and the United States relinquished their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law: (1) whose purpose does not include irrigation; (2) whose purpose is irrigation and whose source of supply is Groundwater and whose flow rate is less than or equal to 100 gallons per minute; or (3) identified in Article III.G.3.b that is equal to the quantity of water established as the annual FIIP quota, or an equivalent farm delivery amount within the applicable FIIP River Diversion Allowance area, or the quantity of water allowed under a claim decreed by the Montana Water Court or water right granted by the DNRC, whichever is less, whose owner enters into a consensual agreement as described in Article III.G.3.
- The Tribes and the United States, generally, relinquished their right to exercise the Tribal Water Right to make a Call against any water right located upstream of the Flathead Reservation in Basins 76I, 76J, and 76LJ, except for those Water Rights Arising Under State Law: (1) whose purpose is irrigation and whose source of supply is from certain rivers and lakes (*see* Article III.G.4.a); or (2) whose purpose is irrigation,

whose source of supply is Groundwater connected to one of the sources identified in Article III.G.4.a, and whose flow rate is greater than 100 gallons per minute.

- The Tribes and the United States agree that the Tribal Water Right may not be exercised to make a Call against any Water Right Arising Under State Law upstream of the Flathead Reservation (Basins 76I, 76J, and 76LJ) and located on a tributary of the Flathead River not identified in Article III.G.4.a.
- The Tribes and the United States relinquished their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose point of diversion is outside the Flathead Reservation and whose source of supply is the Little Bitterroot River or its tributaries.
- Any Water Right Arising Under State Law the purpose of which is irrigation and that is susceptible to Call by the Tribes whose purpose is changed after the Effective Date to something other than irrigation shall remain susceptible to Call pursuant to the terms and conditions of the Compact as though the purpose was still irrigation.

Water Rights Arising Under State Law Appurtenant to Lands Acquired by the Tribes.

- For lands acquired by the Tribes within the Flathead Reservation, the Tribes have the right to any Water Right Arising Under State Law acquired as an appurtenance to the land. Upon the Effective Date, the Tribes may, pursuant to the process identified in the Article III.H, transfer these water rights to the Tribal Water Right with a priority date of July 16, 1855.

The Compact also provides:

- Information pertaining to the implementation of the Compact (Article IV).
- Establishment of the Flathead Reservation Water Management Board to be the exclusive regulatory body for water rights administration on the Flathead Indian Reservation, including the issuance of new water rights and change applications. Such administration is governed by the Law of Administration.
- Any user of a portion of the Tribal Water Right who proposes a change of such use must seek authorization from the Board to change the use of that portion of the right.
- After the Effective Date and the entry of a final decree by the Montana Water Court of the water rights quantified by the Compact, the Compact's terms shall be binding on the State, the Tribes, the United States, and any Person using, claiming or in any manner asserting any right under the authority of these three sovereigns, except as provided in the federal act.

This document summarizes key parts of a lengthy legal document, the Compact; reviewers should read the Compact on any issue of particular interest. All terms capitalized here are defined in the Compact.