SENATE JUDICIARY
Exhibit No. 1
Date: 2/10/15
Bill No. SB262

STATE OF MONTANA

Proposed 2015 CSKT Compact:

Analysis of Potential Impacts to Off-Reservation Water Users

February 2015

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The water rights Compact between the Confederated Salish and Kootenai Tribes (CSKT or Tribes), the State of Montana, and the Federal Government, currently before the 2015 Montana Legislature as SB 262 includes water rights located outside the Flathead Indian Reservation. The limited reopening of negotiations between the Parties in 2014 did not encompass these off-Reservation rights, which remain substantively the same as those included in the 2013 proposed Compact. This document provides a summary and hydrologic analysis of the off-Reservation water rights included in the Compact. The analysis considers the probability, timing, and magnitude of those potential impacts. For purposes of this analysis, potential for call is identified as the frequency with which hydrologic conditions supporting call occur, and should not be read as indicating the likelihood that a call will be made under such conditions. Nothing requires a senior water right holder to make call and most do not do so every time hydrologic conditions would support one.

Overview:

In exchange for the Tribes relinquishing their option to file potentially extensive and senior instream flow water rights both on and off the Reservation in the Montana general stream adjudication, the settlement includes a more limited variety of water rights and interests, some on- and some off- the Reservation. The water rights that have potential to affect off-Reservation water users include:

- Three time immemorial priority date instream flow water rights on the Kootenai, Swan, and Lower Clark Fork Rivers;
- Four time immemorial priority date headwater instream flow water rights in the Kootenai Basin that are located on National Forest land upstream of any existing water users;
- One time immemorial priority date instream flow water right on the North Fork of Placid Creek;
- Co-ownership of the former Milltown Dam instream hydropower water right as bifurcated (split into two water rights) and conditioned by the Compact;
- Co-ownership of 36 existing Montana Fish, Wildlife and Parks (MT FWP) instream fisheries water rights in the Flathead, Rock Creek, and Blackfoot Drainages that will be decreed as part of the Compact;
- Co-ownership of 47 existing MT FWP instream fisheries water rights in the Bitterroot, Flathead, and Blackfoot Drainages that will not be decreed as part of the Compact;
- Co-ownership of existing MT FWP instream fisheries water delivery contracts from Painted Rocks Reservoir and Como Lake;
- Flathead System Compact Water, a large water right sourced from the mainstem and south fork of the Flathead River and Flathead Lake; includes water stored in Hungry Horse Reservoir;
- Two Flathead River mainstem "other" instream fishery flow rights; these water rights are located on the Reservation, but are geographically situated downstream of off-Reservation water users; and
- Flathead Lake water right that protects the natural fill level, below and not including the 10 feet of water impounded and stored by Kerr Dam.

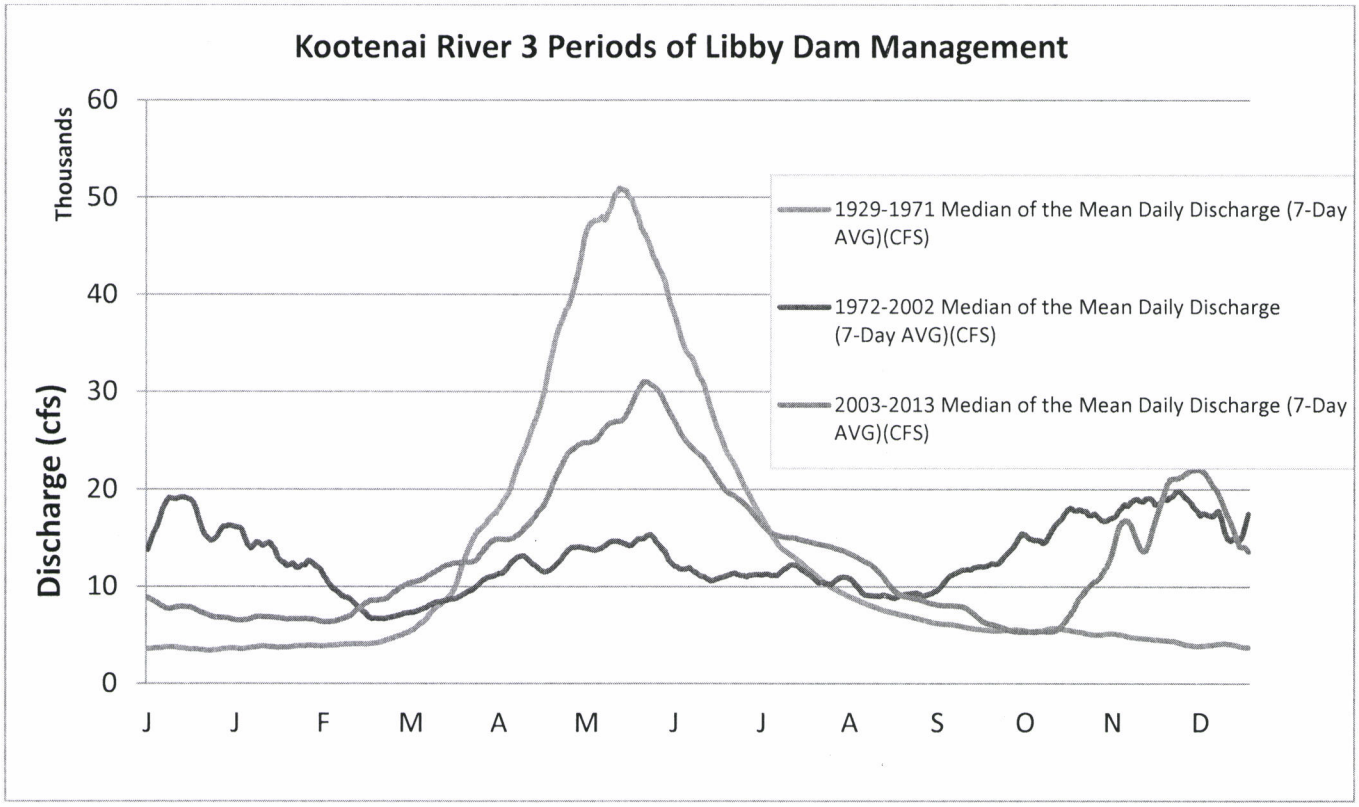
Kootenai River Basin Instream Flows:

The Compact includes five individual Kootenai Basin instream flow water rights with time immemorial priority dates. Four of these rights, as set forth in Appendix 36 of the Compact, are located in headwater streams (Big Creek, Boulder Creek, Steep Creek, and Sutton Creek), above any existing water users on Forest Service lands

in drainages absent private in-holdings. These water rights functionally serve to protect those streams, which are important fish spawning streams, from impact due to future upstream water developments, but do not affect any existing water users.

The water right located on the mainstem of the Kootenai River, as set forth in Appendix 25 to the Compact, is to be enforced using the USGS gauge located at Leonia, Idaho. This water right takes the form of an enforceable hydrograph[1] that roughly approximates pre-Libby Dam 20th percentile flow[2] values. Although there are many conditions on the exercise of this water right, the most substantial limitation is that enforcement is suspended entirely so long as Libby Dam remains in existence and the Army Corps of Engineers' (ACOE) operation of that dam are conducted consistently with the 2008 Federal Columbia River Power System Biological Opinion, and the 2010 Updated Biological Opinion. These water right conditions not only protect existing water users, but also perpetuate the biologically beneficial changes in Libby Dam flow management set forth in 2003 and formalized by subsequent Biological Opinions. Independent of the Compact, Montana and the Tribes worked as partners to compel the federal government to adopt the 2003 established Libby Dam naturalized flow management regime that more adequately mimics a channel maintaining spring flow. The three flow regimes: pre-dam natural flows, early-dam non-natural flows, modern-dam closer approximation of natural flows are graphed below (Figure 1).

Figure 1



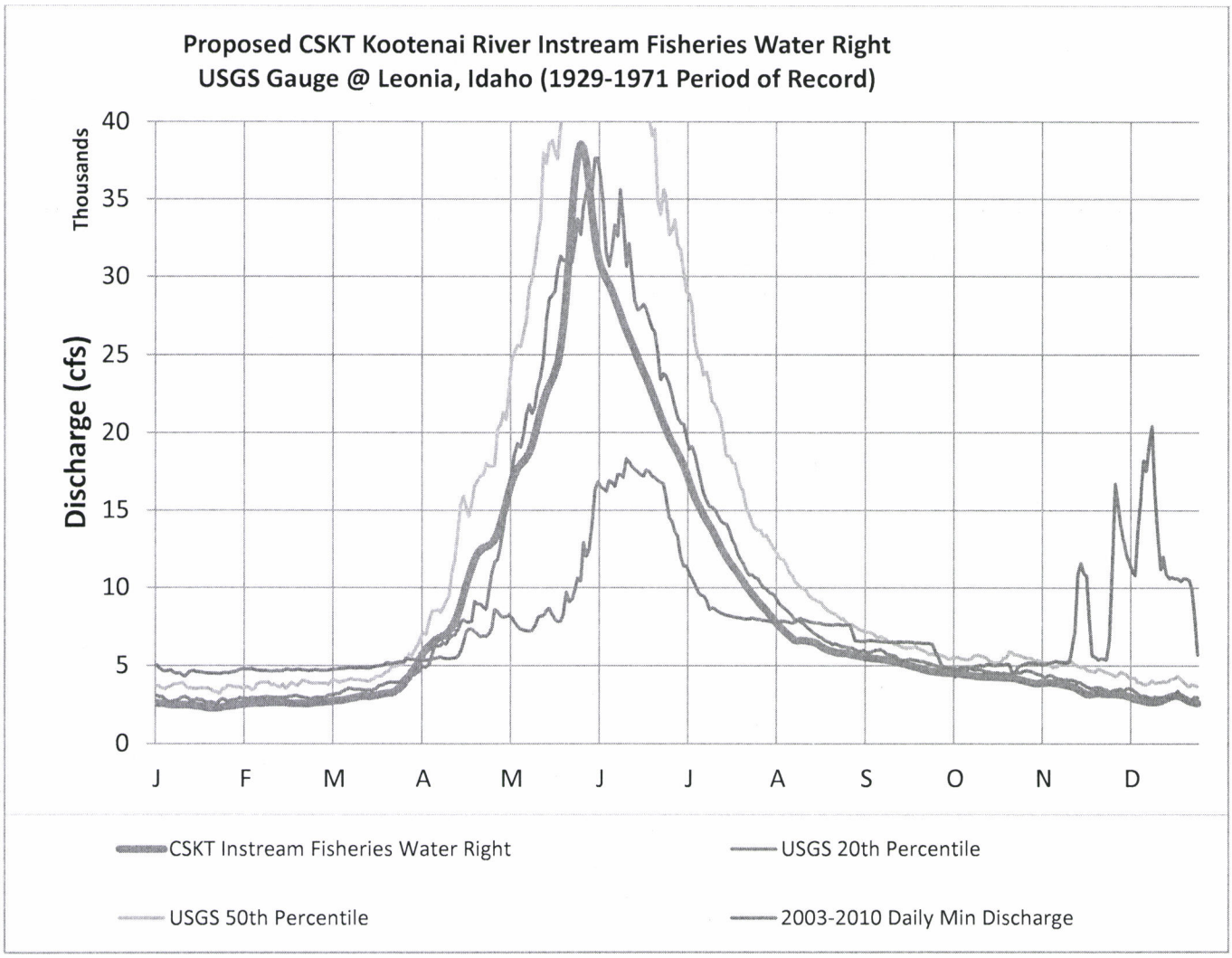
[1] An **enforceable hydrograph** is a water right that takes the form of static distributions of unique daily flow values, one each for every day of the year. The daily enforceable value distribution approximates a pre-chosen daily statistical magnitude and therefore resembles the shape of a hydrograph of flows measured in the same area

[2] A **percentile flow** is the value below which a given percentage of observations in a group of observations fall. For example, the 20th percentile daily flow (as is presented in this document) is the value below which 20 percent of the daily observations may be found during the given period of record.

In the unlikely event that Libby Dam is removed and the Kootenai River reverts to a natural flow regime, then the call probability on junior irrigators, which includes all surface water irrigators and irrigators using more than 100 GPM from groundwater, is best illustrated by graphing the Kootenai River enforceable hydrograph against the USGS 20th and 50th percentile flows (Figure 2). As would be expected from a water right that was largely designed to mimic 20th percentile flow statistics, the probability of call would be 2 in 10 years for any given day of the year, in the absence of Libby Dam. If, however, the water right becomes viably enforceable because of a failure of Libby Dam to comport with its FERC licensing requirements, the additionally graphed value depicting the minimum Kootenai River flows from 2003-2010 demonstrate that the proposed enforceable hydrograph would not be enforceable on junior irrigators during the irrigation season and therefore would not impact existing uses.

In the unlikely event that Libby Dam is removed, approximately 27 irrigation water rights, representing approximately 430 claimed acres of irrigation, would be potentially subject to call during the driest 20th percentile flow periods.

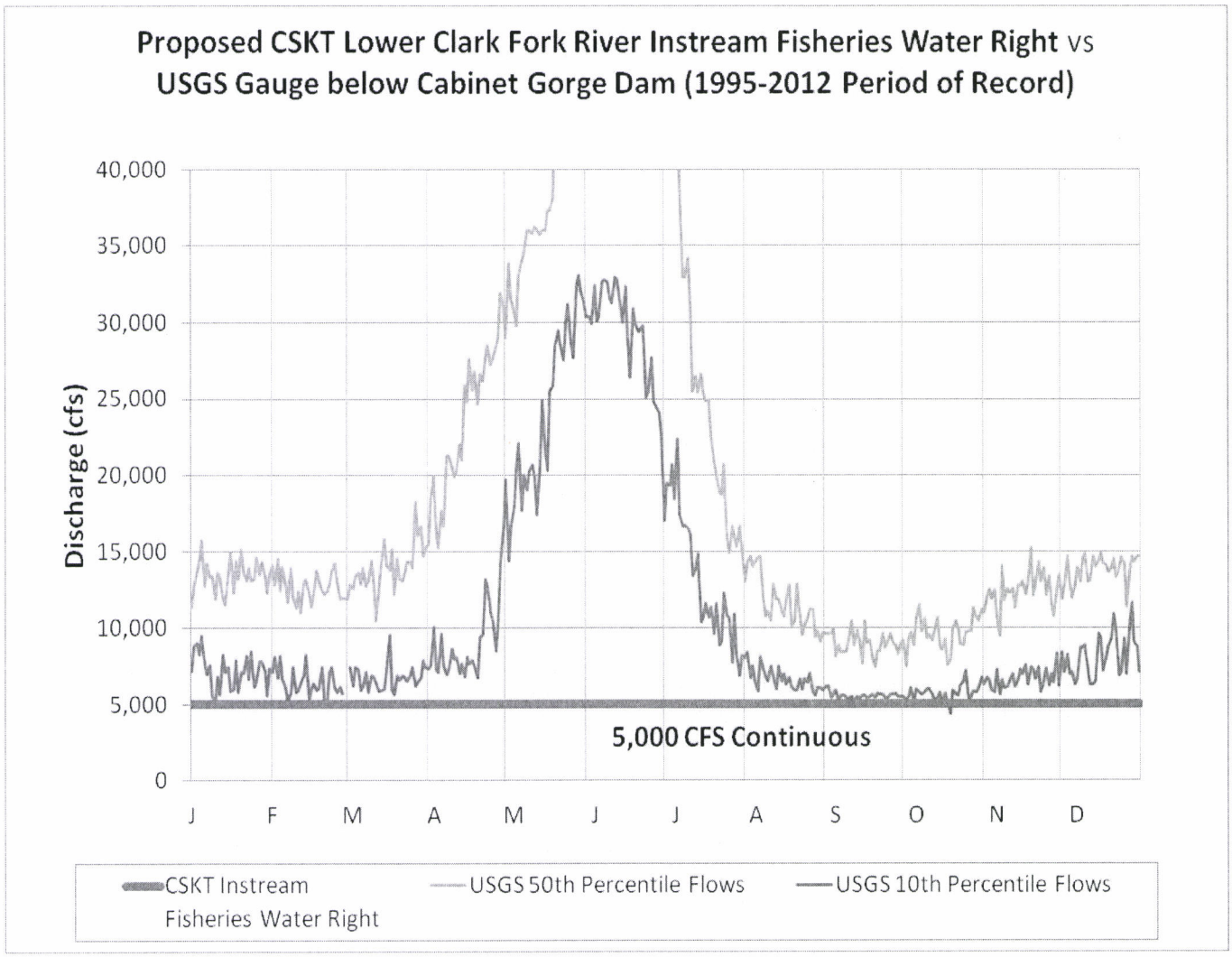
Figure 2



Lower Clark Fork River mainstem Instream Flow:

The water right proposed for the Lower Clark Fork River, as set forth in Appendix 27 to the Compact, has a priority date of time immemorial. So long as the Cabinet Gorge and Noxon Dams remain in existence, the enforceable level of this right is an annual (static) flow rate equal to the lesser of 5,000 cfs or the minimum flow level established by the FERC as a condition on the license for the Cabinet Gorge and Noxon Dams as that license condition may be modified over time. Tenth *percentile* flows graphed in comparison to the 5,000 cfs enforceable level demonstrate that historic flows conditions during dry periods remain in excess of the enforceable levels of this water right and therefore constitute little or no potential to affect existing water rights (Figure 3). Examination of minimum daily flow values since the 1995 FERC agreement that set 5,000 cfs as the minimum flow required to be maintained by dam operators, depict one single day in which flow values dropped below the proposed 5,000 cfs enforceable value of this water right. Accordingly, the proposed 5,000 cfs water right has no effect on existing water users when compared against the FERC requirements of Cabinet Gorge Dam.

Figure 3



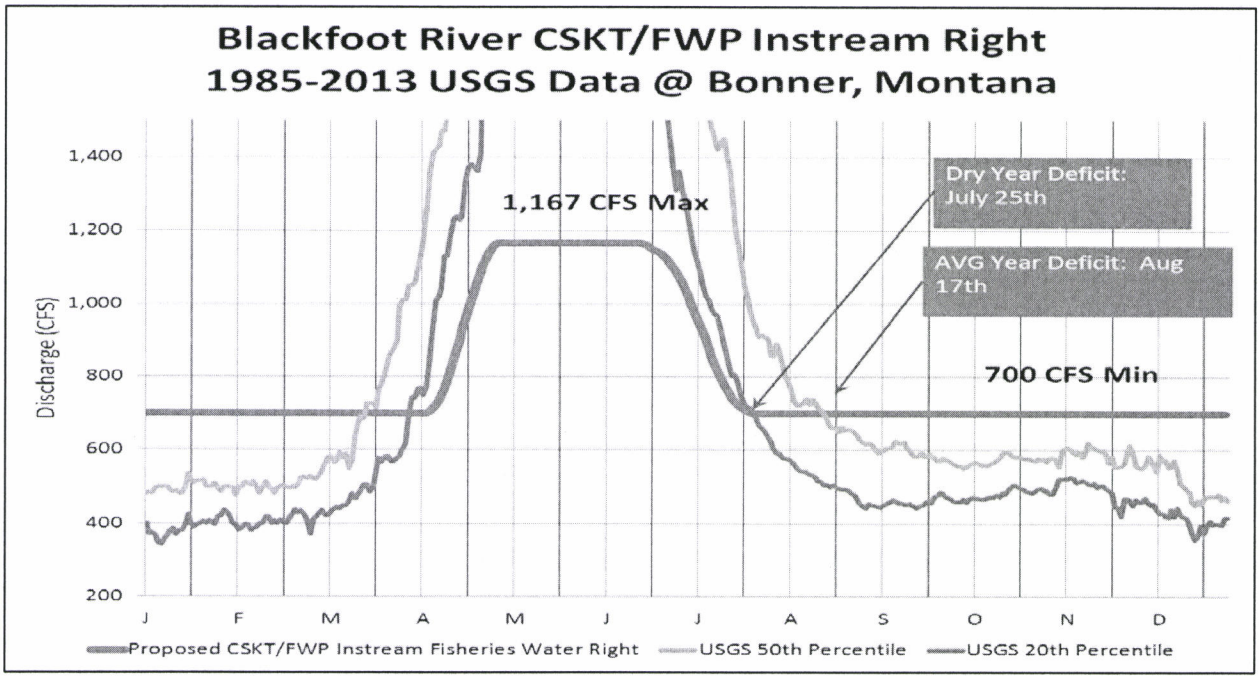
Former Milltown Dam Water Right on the Upper Clark Fork and Blackfoot Rivers:

If the Compact is approved, the Tribes will become co-owners of the former Milltown Dam water right and the water right will be proportionally bifurcated, or split, into two water rights to be enforced upstream of the current water right location below the confluence of the Blackfoot and Clark Fork Rivers. 58.33% of the parent water right is moved up the Blackfoot River and 41.67% is moved up the Clark Fork. The new enforcement locations are collocated with existing USGS streamflow gages at Bonner on the Blackfoot River and at Turah Bridge on the Clark Fork River. The water right's enforceable flow rates are reduced from a static instream hydropower water right of 2,000 cfs to two instream fisheries *enforceable hydrograph* water rights as set forth in Appendices 30 and 31 of the Compact as described below. Beyond the Compact, these water rights cannot be changed in the future to a consumptive or other use; nor can they be leased, sold, or transferred.

Elements of Proposed Blackfoot River Instream Fisheries Water Right at Bonner:

- Co-owned by CSKT and MT FWP with a priority date of December 11, 1904;
- Minimum = 700 cfs ; Maximum = 1,167 cfs
- Daily enforceable values between the minimum and maximum flows approximate 10th *percentile* flows;
- Purposed for the maintenance and enhancement of fish habitat;
- Enforced using real-time Blackfoot River USGS stream flow gage at Bonner
- Call limited to junior surface water irrigation purposed water rights and groundwater source irrigation purposed water rights using more than 100 GPM;
- Period of diversion is Jan 1 to Dec 31; point of diversion and place of use is in-stream;
- Call may be initiated on the day following a five-consecutive-day-period in which four out of five average daily river flows fall below their respective daily *enforceable hydrograph* values;
- Call may persist until such time as two average daily flows of the previous five-consecutive-day-period are in excess of their respective EH values.

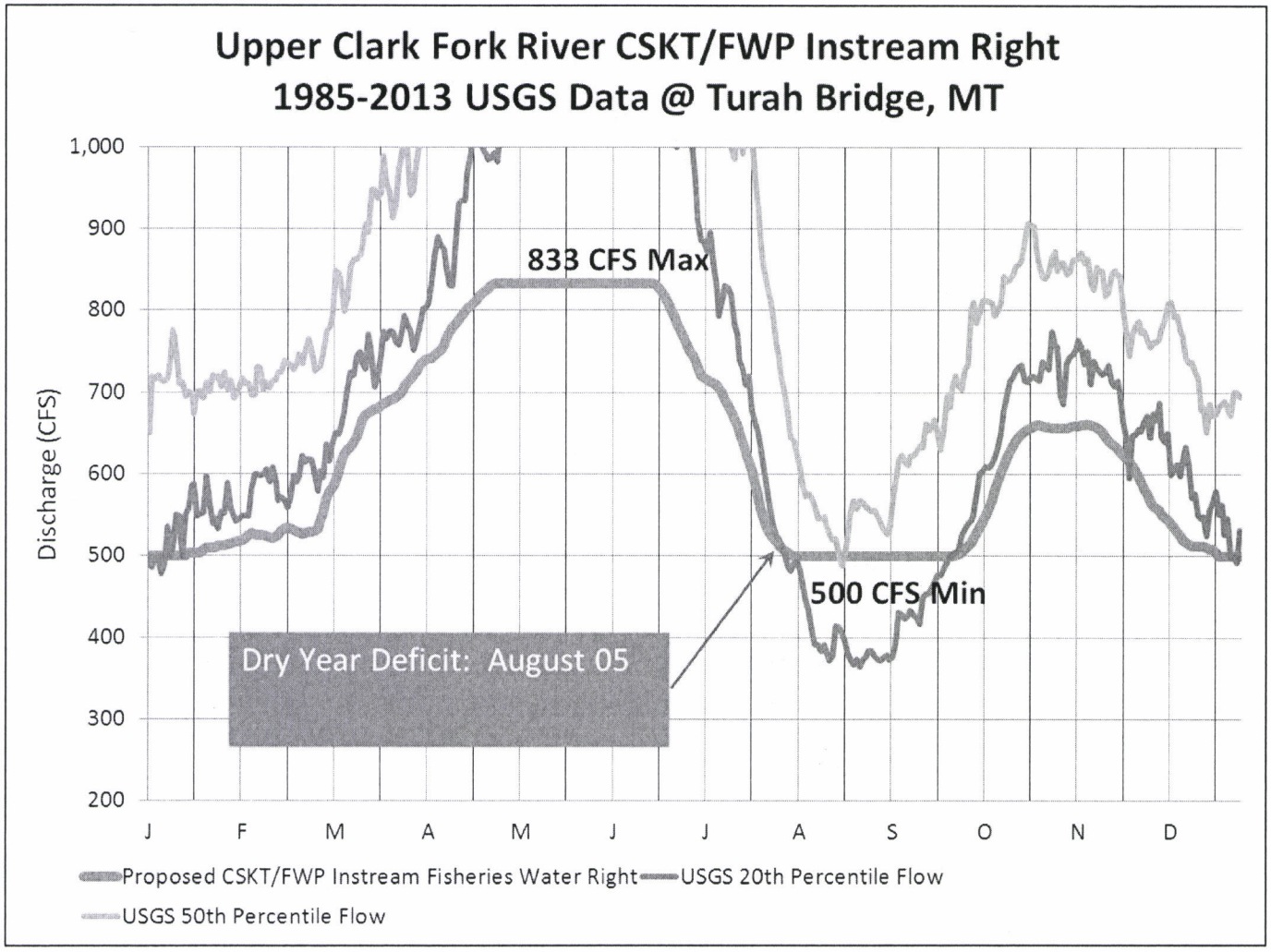
Figure 4



Elements of Proposed Upper Clark Fork River Instream Fisheries Water Right:

- Co-owned by CSKT and MT FWP with a priority date of December 11, 1904;
- Minimum = 500 cfs; Maximum = 833 cfs;
- Intermediate daily enforceable values are derived from 17-day moving average of 10th *percentile* flow;
- Purposed for the maintenance and enhancement of fish habitat;
- Enforced using real-time Clark Fork River USGS stream flow gage at Turah;
- Call limited to junior surface water irrigation purposed water rights and groundwater source irrigation purposed water rights using more than 100 GPM;
- Period of diversion is Jan 1 to Dec 31; point of diversion and place of use is in-stream;
- Call may be initiated on the day following a five-consecutive-day-period in which four out of five average daily river flows fall below their respective daily EH values;
- Call may persist until such time as two average daily flows of the previous five-consecutive-day-period are in excess of their respective *enforceable hydrograph* values.

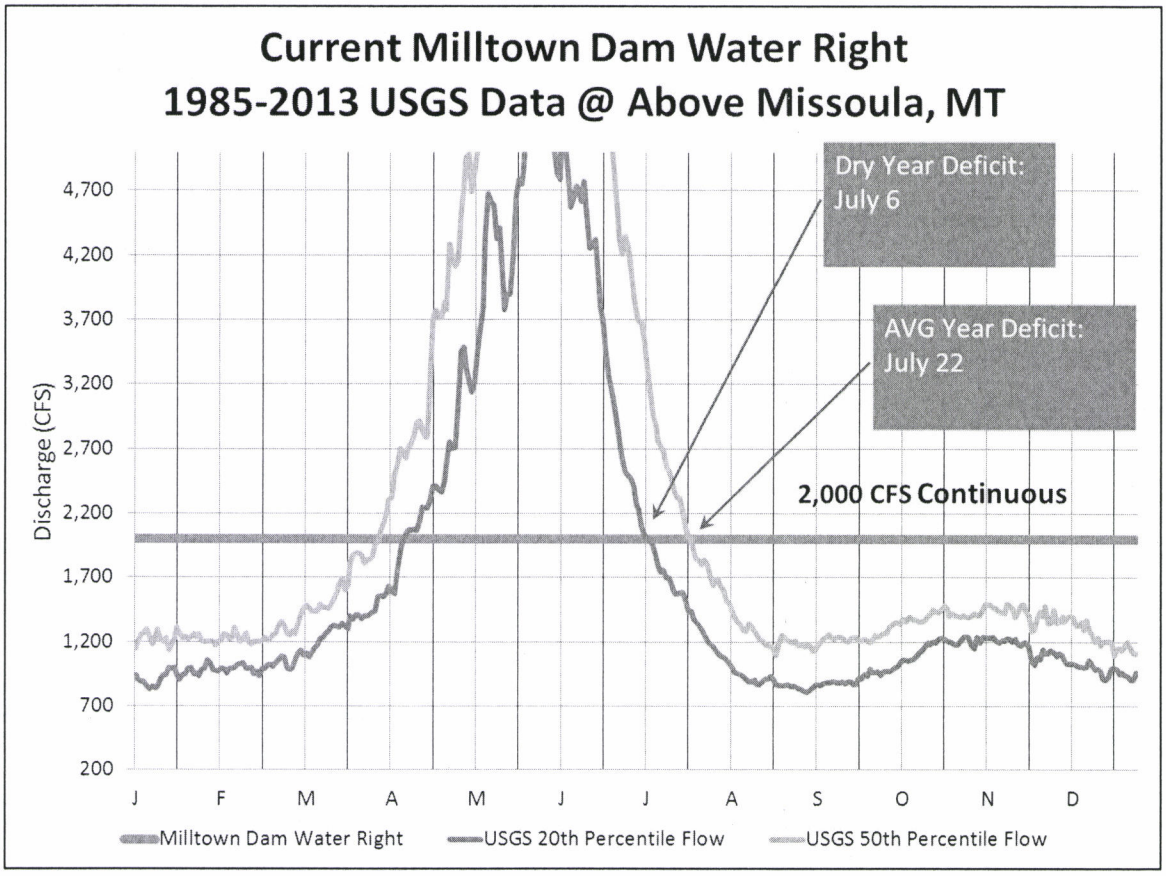
Figure 5



The State obtained the Milltown Dam hydropower right as part of the resolution of the natural resources damages claims brought against the Atlantic Richfield Company and Northwestern Energy, in the Milltown consent decree[3], to which the Tribes are a party. In the absence of a settlement the State will seek to change the former Milltown Dam water right to an instream flow fisheries water right through the DNRC change authorization process, consistent with the terms of the consent decree. Had the State refused to accept this water right, the Tribes and United States would have been offered ownership of these rights. The consent decree requires any subsequent owner, whether the State, the United States, or the Tribes, to assure that the water right will not be changed to a consumptive use. In other words, either with or without a Compact, the former Milltown Dam water right will undergo some type of change authorization process to ensure that it can continue to be exercised non-consumptively.

It is impossible to predict how a water right might look after being changed through the DNRC water right change process, including any associated litigation and ensuing court order(s) regarding contested aspects of a water right change. There are, however, some certainties about the Milltown Dam water right that would be considered during a change proceeding. First and foremost, there are historic use records that are clear and continuous. Continuous FERC licensing up until the removal of the dam, along with a chain of clear intent for the destination of the water right are indicative of clear intent not to abandon the water right. For the purposes of this analysis, a 2,000 cfs instream flow water right is assumed for the sake of comparison (Figure 6); this by no means constitutes recognition or endorsement of any final value by the State.

Figure 6



[3] *United States of America v. Atlantic Richfield Company and Northwestern Corporation*, Civil Action No. CV89-039-BU-SHE.

Comparing the enforceable flow rates for the proposed water rights depicted in Figures 4 and 5 to the existing 2,000 cfs flow rate of the current Milltown right as depicted in Figure 6 yields notable differences as to the time of year conditions supporting a call would be likely to occur (Table 1). The Compacted water rights significantly shorten the period during which hydrologic conditions supporting a call are likely to occur, especially when considering average water years on the Clark Fork River.

Table 1

Typical Date Initiating Call Susceptibility		
	Dry Years (20th Percentile)	**Average Years (50th Percentile)**
2,000 cfs below Blackfoot/Clark Fork Confluence	July 6th	July 22nd
700 cfs on Blackfoot River at Bonner	July 25th	August 17th
500 cfs on Clark Fork River at Turah	August 5th	N/A

The Blackfoot portion of the proposed Milltown right includes a minimum enforceable flow that is identical to the existing 700 cfs flow rate MT FWP 1971 Murphy instream flow right, which shares the same point of administration. These two water rights, as with all discrete instream flow water rights, are enforced concurrently and are not additive (i.e. the same water satisfies the 700 cfs Murphy right as the Compacted right). The Milltown 1904 priority date is 67 years senior in priority to the existing 1971 Murphy water right. This difference in priority equates to 187 additional irrigation purposed water rights that are junior and could be potentially subject to call under the Compact. The Clark Fork portion of the proposed Milltown right has no accompanying existing instream flow. Junior users sourcing water from the mainstem would be most susceptible to call as mainstem water supplies are more reliable and less susceptible to call by other State-based senior water rights on tributaries.

Table 2

Upper Clark Fork and Blackfoot Irrigation Water Rights (3,156) as Compared to the Former Milltown Dam as changed by the Proposed CSKT-Montana Compact					
Drainage	Number of Senior Water Rights	Number of Junior Water Rights	Water Rights already Junior to Existing DFWP Murphy Water Right	Additional Water Rights Subject To Potential Call	Additional Water Rights Subject to Potential Call w/ POD on Mainstem
Blackfoot	543	409	222	187	52
Upper Clark Fork	1,043	1,164	0	1,164	95
Total	1,586	1,573	222	1,351	

All water right counts are estimated from the DNRC Water Rights Database and may vary depending on the nature of the query.

To better understand the potential ramifications of the junior to 1904 water right counts (Table 2), supplemental water rights must also be considered, as many of the water rights potentially subject to call are associated with water rights that are senior to the 1904 Milltown priority date (Table 3) and would therefore be sheltered from the full ramifications of a potential call by the proposed Milltown water rights. Forty Seven percent of all junior water rights, representing over 50% of the associated irrigated acres, in the Blackfoot and Clark Fork Basins, have and average of seven senior to 1904 supplemental water rights associated with their places of use.

Table 3

Water Rights with Supplemental Senior Water Rights					
	Drainage	**Source**	**Count**	**Supp**	**Avg # Supp**
Total	Blackfoot	SW	392	total	5
w/supp			128	w/supp	
w/out supp			264	w/out supp	
% w/out supp			67%		
Total	Blackfoot	GW	14	total	9
w/supp			7	w/supp	
w/out supp			7	w/out supp	
% w/out supp			50%		
Total	Upper CF	SW	941	total	7
w/supp			417	w/supp	
w/out supp			524	w/out supp	
% w/out supp			56%		
Total	Upper CF	GW	223	total	8
w/supp			116	w/supp	
w/out supp			107	w/out supp	
% w/out supp			48%		
Total	Basin	SW/GW	1,570	total	7
w/supp			668	w/supp	
w/out supp			902	w/out supp	
% w/out supp			57%		

All water right counts are estimated from the DNRC Water Rights Database and may vary depending on the nature of the query.

If the Milltown Dam water right is changed through the Compact there are some tangible benefits to all water users, whether junior or senior to the 1904 priority date. By changing the water right directly through the authority of the Montana Legislature, more options are available to condition the use and enforcement of the right so as to protect existing users relative to the DNRC change process. Elements of the proposed change that cannot be achieved through the standard DNRC change authorization process include:

- The water right would be proportionally bifurcated, or split, into two water rights to prevent disproportionate call for water up one drainage.
- The minimum protectable flow rates for the water right, which occurs during lower flow periods of the year, represents an 800 cfs reduction from the current water right's protectable flow level of 2,000 cfs.
- Call is limited to irrigation surface water rights and groundwater sourced irrigation rights in excess of 100 GPM. This leaves domestic, commercial, municipal, industrial, stock, recreation, and other purposed water rights 100% protected from call. This purpose specific call protection minimizes

potential disruption to existing water rights that use water during the winter months when water supply is most limited as compared to enforceable values. (See Figures 4, 5, and 6)

- The ability to enforce these water rights is suspended for a period of 10 years from the Montana legislature's ratification of the Compact, which allows water users to establish a drought management program and requires Tribes and the DFWP to engage in planning with stakeholders in these basins.
- Call is based on a five-day deficit period that resets when two-in-five days are no longer below the callable level. This allows irrigators the opportunity to manage drought conditions so as to avoid call through irrigation scheduling.

In addition to the above considerations, monthly and irrigation season periods were analyzed for the 1985 to 2013 period of record and the percentages of days susceptible to call under both Compacted and non-Compacted conditions are presented (Table 4). The deficits were determined by subtracting actual streamflows from the enforceable levels of the respective instream flow water rights during periods in which streamflow falls below enforceable values. Both of the proposed *enforceable hydrographs* for the Blackfoot and Clark Fork Rivers are compared to the full value of the historic Milltown Dam water rights (2,000 cfs). The average, median, and maximum values of the call deficits are presented to characterize enforceable conditions.

Table 4

Call Susceptibility Comparison Between Proposed Enforceable Hydrographs and Historic 2,000 cfs Flow Rate of Former Milltown Dam Water Right

	Proposed Enforceable Hydrograph			2,000 (cfs)	
	Clark Fork @ Turah*	Blackfoot @ Bonner**	Combined Total	Historic Dam Site***	Difference
April % of Days Susceptible to Call	2%	6%		9%	
May % of Days Susceptible to Call	2%	0%		0%	
June % of Days Susceptible to Call	4%	3%		3%	
July % of Days Susceptible to Call	10%	12%		40%	
August % of Days Susceptible to Call	30%	49%		86%	
Sept % of Days Susceptible to Call	27%	70%		94%	
Irrigation % of Days Susceptible to Call	13%	24%		40%	
Avg Daily Call Deficit (cfs)	-119	-163	-282	-693	-411
Median Daily Call Deficit (cfs)	-108	-157	-265	-720	-456
Max Daily Call Deficit (cfs)	-347	-376	-723	-1,442	-719

* USGS gage 12334550; 1985-2013 period of record; ** USGS gage 12340000; 1985-2013 period of record; *** USGS gage 12340500; 1985-2013 period of record

In the absence of a settlement the Tribes have stated that they will file numerous and large instream fisheries water rights throughout the Clark Fork Basin and those water rights, if decreed by the Montana Water Court, will have a time immemorial priority date. If the Tribes' claims are adjudicated, it is impossible to predict the scope and extent of Tribal instream flow water rights that might be decreed by the Water Court and be upheld on appeal. Any instream flow water rights recognized for the Tribes by the Water Court will be senior to all existing water rights of all purposes and not limited to the number in Table 2, or the associated geography.

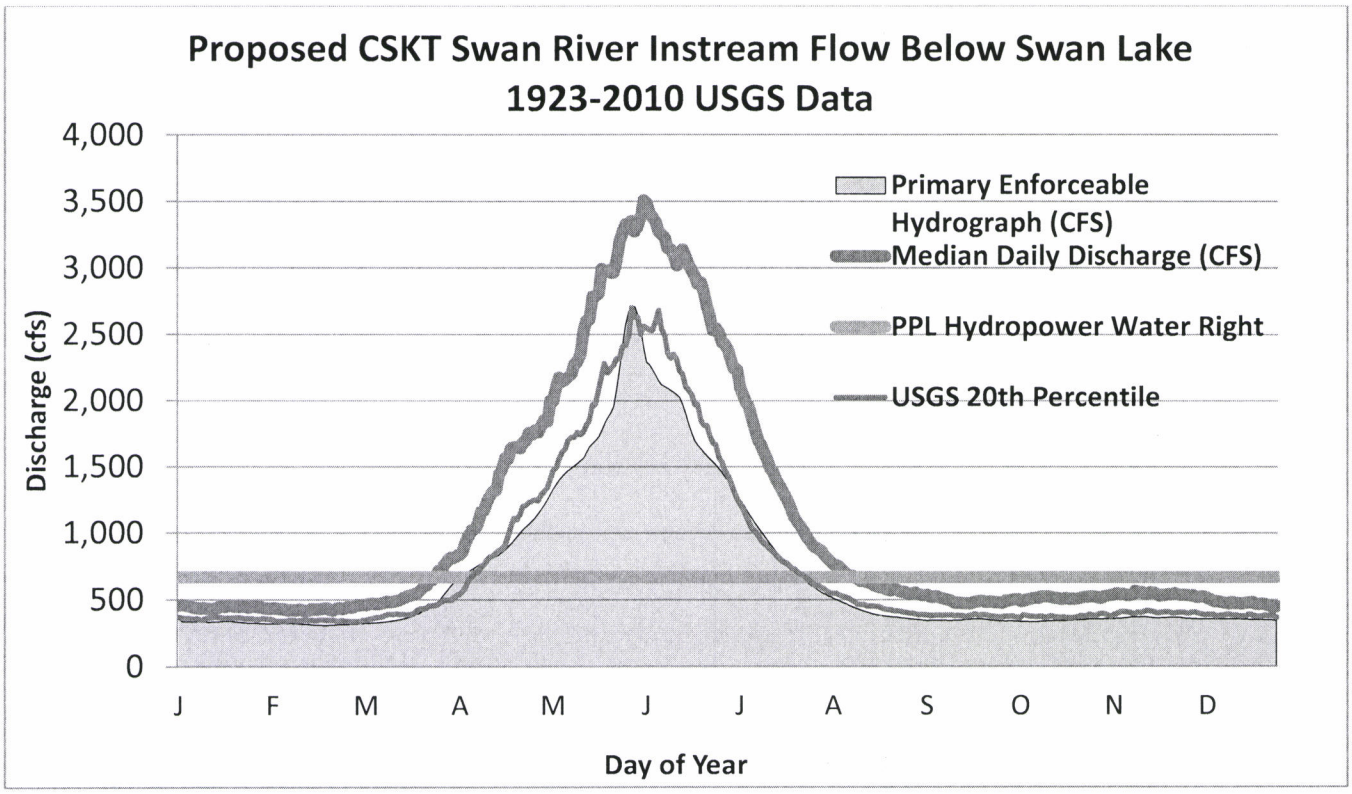
Swan River Instream Flow:

The water right located on the Swan River, as set forth in Appendix 26 to the Compact, is to be enforced using the USGS gage located below Swan Lake. This water right takes the form of a time immemorial priority date *enforceable hydrograph* that approximates 20th *percentile* flow values. The water right may only be enforced against water users whose purpose is irrigation and whose source is either surface water or groundwater in excess of 100 GPM, leaving all other purposed water rights protected from call entirely.

The proposed Swan River Instream flow water right is lower in enforceable flow rate than the large Swan River hydroelectric power water right currently owned by Pacific Power and Light (not related to the Compact). Both are graphed for comparison (Figure 7). As is demonstrated in the graph, irrigation water rights could be susceptible to call during dry periods from either water right, but the proposed Compact right does not affect legal availability as it is well below the median of the monthly mean, which is the current DNRC standard for legal availability of new water right appropriations. There are 68 irrigation water rights located above the USGS gage below Swan Lake that could be subject to call by the proposed Swan River instream flow. However, much of the irrigation in the Swan River basin occurs below the gage, and would be excluded from a call based on this instream flow. Of the total of 547 acres of irrigation identified in the State Water Plan, 63% of these acres are lower in the basin and would not be subject a call from the proposed Swan River instream flow that is enforced using the USGS gage below Swan Lake.

In contrast, absent a settlement, all Swan River Basin water rights, not just these irrigation purposed water rights, would be subject to call from any water rights recognized by the Montana Water Court through adjudication.

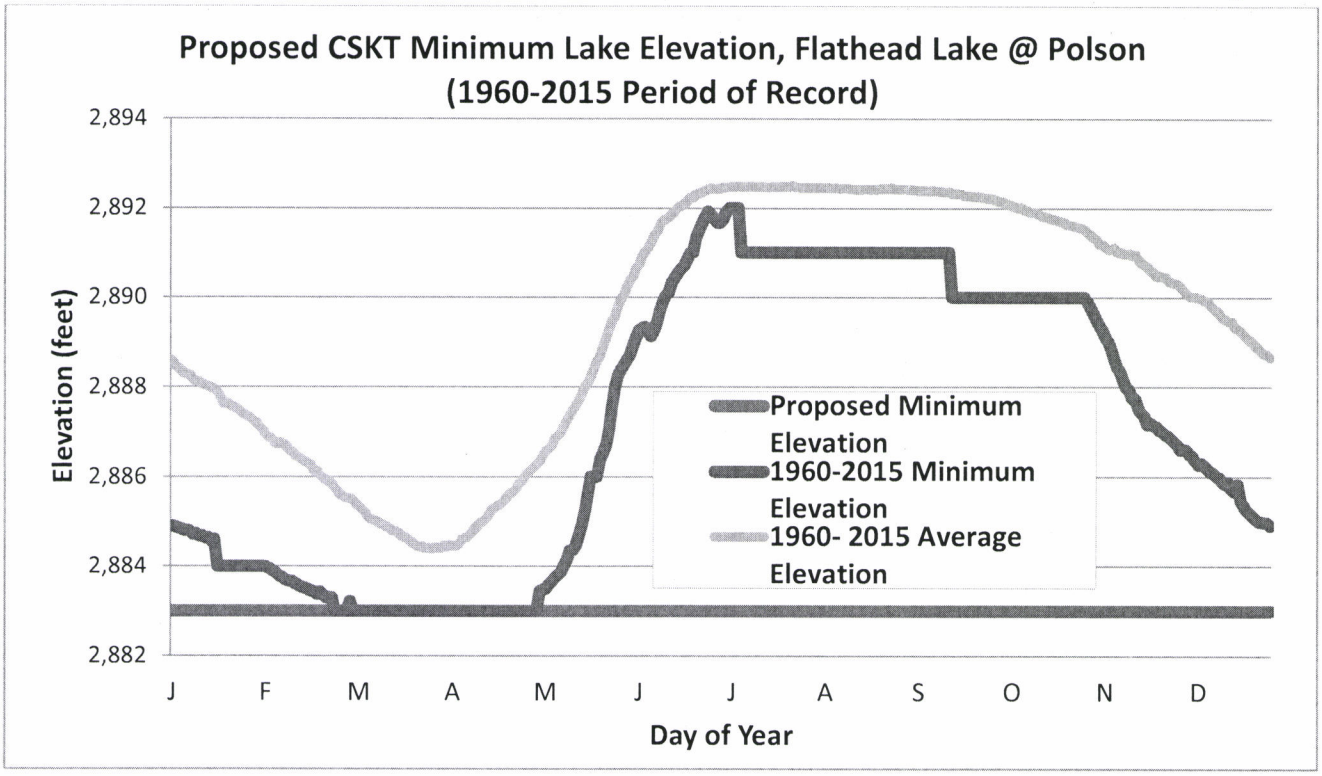
Figure 7



Flathead Lake Minimum Lake Elevation Water Right:

Appendix 18 of the Compact recognizes a water right for all naturally occurring surface water in Flathead Lake up to the shoreline elevation of 2883 feet. This water right is designed to protect the natural lake level of Flathead Lake as impounded by the bedrock outcropping located in the Polson area and may not be used consumptively. This amount of water lies beneath the storage water impounded by Kerr Dam (as much as 10 feet above the minimum elevation). This water right does not affect water impounded by the dam or water sourced from that impounded water, which includes all existing water uses out of Flathead Lake. Historic Flathead Lake minimum daily elevation records from 1960 to 2015 have approximated at times, but not dropped below the proposed enforceable value of 2,883 feet in elevation (Figure 8); accordingly, no existing state-based water rights will be affected by this water right.

Figure 8



Flathead River Instream Flows below Flathead Lake:

Appendix 12 to the Compact recognizes two "other" instream flows on the Flathead River within the Reservation, defined by Article III.C.1.d.iii of the Compact (WR numbers 76LJ 30052827 and 76L 30052864). These water rights have monthly flow values set as a starting point, but enforcement is deferred until such time as the public process set forth in the Law of Administration Section 2-2-116 has been completed. That process requires the development of an enforceable schedule that allows for the exercise of *all* existing water rights. Accordingly, no existing state-based water rights, as decreed by the Montana Water Court, would be affected by these rights. Additionally, the water supplied for these water rights is largely affected and regulated by Hungry Horse Reservoir and Flathead Lake storage and is much less dependent on water supplies from junior irrigation purposed water rights.

Flathead System Compact Water:

The Flathead System Compact Water Right (FSCW) (#76LJ 30063812) as set forth in Article III.C.1.c. and abstracted in Appendix 9 of the Compact can be sourced from the mainstem of the Flathead River, Flathead Lake and the South Fork of the Flathead River, either on or off the Reservation. The right includes an option to use the Clark Fork River as a natural carrier so long as the use is consistent with state law, allowing for direct diversions from the mainstem of the Clark Fork River downstream of the confluence of the Flathead and Clark Fork Rivers. This direct flow water right includes the use of up to 90,000 acre-feet from Hungry Horse Reservoir, which is part of (not in addition to) the water right. There are several important elements of this water right:

- Priority date: July 16, 1855
- Volume: 229,383 acre-feet (diverted); 128,158 acre-feet (consumed)
- Period of Use: Jan 01 to Dec 31
- Diversion Means: Any
- Purpose: Any
- Place of Use: Any within the Flathead and Clark Fork River Basins within Montana

The Diversion Means and Purposes are flexible for this water right, to allow for the broadest possible range of potential future and existing uses to be supplied by this water right:

1. State Water Mitigation Bank: Pursuant to Article IV.B.7, 11,000 acre-feet of this water right must be made available for the purposes of mitigating new or existing domestic, commercial, municipal and industrial water uses for a lease fee of $40/acre-foot/year adjusted for inflation. This water will be administered by the DNRC and may be used to address existing limitations on legal water availability in some areas of the Clark Fork Basin as a result of the Department's decision: *In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 By Thompson River Lumber Company*.
2. Flathead Indian Irrigation Project Water Use Right Supplemental Water: The Tribes are obligated to make water available for short-term lease from the FSCW right for purposes supplementing River Diversion Allowances during periods of Shared Shortages as set forth in Article IV.C through F of the Compact for a lease fee of $8/acre-foot/year adjusted for inflation plus a $25 administrative fee per lease.
3. Uses by the Tribes: FSCW provides water for the Tribes for existing and future tribal water needs, a critical part of the settlement of the Tribes' claims to reserved water rights.
4. Future Water Lease Options: FSCW provides the Tribes an opportunity to lease this water on or off the Reservation users within Montana.
5. Keeping Water in Montana: Like all of the rights quantified by the Compact, FSCW may not be leased, used, or sold out of State. Through this limitation, the Compact protects this block of water from competing downstream out-of-state water claims and preserves it to sustain present needs and future development in Montana.
6. Federal compliance: In marked contrast to the State's prior unsuccessful efforts to obtain private contracts for water from Hungry Horse reservoir, the FSCW right eliminates the need to complete Cost-reallocation efforts and expensive NEPA evaluations before obtaining the right to lease Hungry Horse

water and instead would allow Hungry Horse water to be used on the Effective Date of the Compact and ensures its compliance with environmental regulations.

7. ESA and Columbia Treaty Compliance: FSCW has been vetted by the Bureau of Reclamation and Federal Government as an amount of water that can be obligated in Montana without disrupting endangered species flow augmentation requirements or flood storage obligations for Hungry Horse Reservoir.
8. Maintains off-Reservation Jurisdiction: The use of the FSCW off the Reservation must comply with State law (e.g. for quantification or issuance of water rights, water quality, species management, environmental review, facilities siting, etc.).
9. Tracking FSCW use: FSCW uses and leases will be accounted for in the DNRC water rights database.
10. Call Protection: This water right may not subject any existing water users to call (see FSCW constraints below).

Constraints on Use of Flathead System Compact Water: Defined flow conditions are required to be present along the south fork and mainstem of the Flathead River before the FSCW water right may be used. There are also conditions regarding the filling and release of water impounded by both Hungry Horse Reservoir and Flathead Lake. These conditions are set forth in the water right abstract and detailed in two technical documents included as appendices to the Compact. Appendix 7 is the Bureau of Reclamation's *Flathead Basin Tribal Depletion Study* (2012)[4] and Appendix 8 is the State of Montana's *Hungry Horse Reservoir, Montana: Biological Impact Evaluation and Operational Constraints for a Proposed 90,000-acre-foot withdrawal* (2011)[5]. The water right abstract is set forth as Appendix 9 to the Compact and includes key provisions to ensure legally required protections of biological conditions.

The requirements contained in the abstract to maintain stipulated instream flow and reservoir ramping rates provide assurances that the use of FSCW will comport with the FERC licensing regulations for Kerr Dam, the Biological Opinion requirements of Hungry Horse Reservoir, the downstream Columbia River Endangered Species Act requirements, Flathead Lake Filling targets, flood storage requirements, and the Biological Constraints of Hungry Horse Reservoir. Accordingly, the Tribes are required to coordinate with the Hungry Horse Operator so as to ensure that Hungry Horse releases match depletions associated with the FSCW use during lower flow periods of the year. In contrast to a typical water right that would look to make call on junior uses during times of limited supply, the FSCW use is predicated on the mandate that the 90,000 acre-feet of storage be released in a manner *so that call conditions will not occur*, with the strict stipulation that should such call conditions occur, FSCW use would need to be curtailed until such time as call conditions are no longer present. *In other words, the water right mandates that it mitigate its own depletive use with Hungry Horse Reservoir storage water, thereby protecting other existing water uses (regardless of purpose) from depletions associated with FSCW use.*

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[4] *Flathead Basin Tribal Depletion Study, US Bureau of Reclamation, September 2012,* http://dnrc.mt.gov/rwrcc/Compacts/CSKT/2013/Appendix7BureauOfReclamationModelingReport.pdf

[5] *Hungry Horse Reservoir, Montana: Biological Impact Evaluation and Operational Constraints for a Proposed 90,000-acre-foot withdrawl, State of Montana, September 2011,* http://dnrc.mt.gov/rwrcc/Compacts/CSKT/2013/Appendix8StateBiologicalConstraintsMemo.pdf

North Fork Placid Creek Instream Flow:

The water right located on the North Fork of Placid Creek is a continuous 10cfs instream fisheries flow. This water right affects only one of the diversions, which is just upstream and routs water cross-basin to the Flathead Indian Irrigation Project. In the past, the Project has honored this instream flow at the request of downstream landowners on Placid Creek. In the future, the Placid Creek instream flow will be treated like a Minimum Enforceable Flow, similar to those located on the Reservation, with respect to the one Project diversion it affects. As the water right cannot be enforced downstream past any private properties it has no effect on any non-Project state-based water users.

Existing MT FWP water rights and contracts to be co-owned by the Tribes:

There are a total of 83 existing MT FWP water rights and 2 water delivery contracts to be co-owned by the Tribes. None of the existing elements, excepting ownership, shall be changed by the Compact. Nothing in the Compact circumvents the adjudication process and those water rights that have not yet been adjudicated (Appendix 29) shall continue through the standard Montana Adjudication and shall not be decreed as part of the Compact.

Appendix 28 of the Compact lists 36 water rights that will be decreed as part of the compact. They include the following stream reaches: (2) Middle Fork of the Flathead River, (2) South Fork of the Flathead River, (2) Rock Creek of the Clark Fork, and (10) Lakes in the Blackfoot Drainage.

Appendix 29 of the Compact lists 47 water rights will not be decreed as part of the compact. They include the following stream reaches: (3) Bitterroot River, (2) Flathead River, (2) North Fork of the Flathead River, and (2) Blackfoot River.

The Tribes and MT FWP will each retain the unilateral right to exercise each water right, but may not do so a manner that exceeds the legal parameters of those existing water rights. Neither the Tribes nor MT FWP has any affirmative duty to take any particular action (make a call) in regard to the exercise of any of these rights.

For the contracts for water deliveries from Painted Rocks Reservoir and Como Lake in the Bitterroot River Basin, MT FWP shall continue to be the main point of contact for purposes of implementing these contracts. The nature and operational constraints of these contracts will not be changed by the Compact in any way other than to make the Tribes co-owners of these contract rights.

The Compact does not change any of the elements of these water rights or contracts in any manner that would change the existing potential for these water rights and contracts to affect existing water users or to diminish the available water supply for new development.