



State-Tribal Relations Committee

60th Montana Legislature

SENATE MEMBERS

FRANK SMITH--Chair
DONALD STEINBEISSER--Vice Chair
RICK LAIBLE
JOE TROPILA

HOUSE MEMBERS

GORDON HENDRICK
JOEY JAYNE
KEN PETERSON
JONATHAN WINDY BOY

COMMITTEE STAFF

PAT MURDO, Lead Staff
JEREMY GERSOVITZ, Staff Attorney
DAWN FIELD, Secretary

August 15, 2008

MEMO

TO: State-Tribal Relations Committee Members
From: Pat Murdo, Legislative Staff
Re: Reserved Water Rights Compact Commission Issues

At the June 23 meeting of the State-Tribal Relations Committee, Rep. Jonathan Windy Boy proposed a committee bill to extend the Reserved Water Rights Compact Commission. After discussion in which legislators raised several questions, Rep. Windy Boy withdrew the proposal so that more information could be provided related to the Reserved Water Rights Compact Commission. The following information seeks to answer questions raised at that meeting.

The Beginning: The Reserved Water Rights Compact Commission was formed in 1979 under 2-15-212, MCA. Enacting legislation provided in 85-2-217, MCA,¹ for a suspension of adjudication of federal and Indian reserved water rights while agreements or compacts for those rights were being negotiated with the Reserved Water Rights Compact Commission. Amendments over time continued the suspension of adjudication from 1982 to 1985 to 1987 to 1993 to 1999 to 2005 then to 2009.

In 1987 the legislature passed 85-2-218, MCA, requiring water judges and the Department of Natural Resources and Conservation (DNRC) to give priorities to basins or subbasins designated by the legislature each biennium. The statute provides criteria for designations.

Current Sunset: Currently the suspension expires June 30, 2009. The applicable language of 85-2-702(3), MCA, for the sunset and next steps is:

However, if approval of the state legislature and the tribe has not been accomplished by July 1, 2009, all Indian claims for reserved water rights that have not been resolved by a compact must be filed with the department within 6 months. These new filings must be used in the formulation of the preliminary decree and must be given treatment similar to that given to all other filings.

Compacts Achieved: The attached Timeline shows water compacts achieved to date:
With Tribes: 1985 (Fort Peck), 1991 (Northern Cheyenne), 1997 (Rocky Boy's), 1999 (Crow), and 2001 (Fort Belknap).

Of these, the Northern Cheyenne and Rocky Boy's compacts have completed the process of getting approval from the legislature, then Congress, then the tribe, and finally from the Montana Water Court. The Fort Peck Compact has also been approved by the legislature, the U.S. Department of the Interior, the Tribes, and the Montana Water Court. The Crow and Fort Belknap have finished the first step. See below, under Federal Issues, for their current status.

With Federal Agencies: 1993 (National Park Service for Yellowstone, Glacier National Parks and the Big Hole National Battlefield), 1995 (National Park Service for Little Bighorn area), 1997 (Bureau of Land Management for Upper Missouri and Bear Trap Canyon and Fish and Wildlife Service for Black Coulee & Benton Lake), 1999 (Fish and Wildlife Service for Red Rocks Lake area), 2007 (U.S. Department of Agriculture - 4 agreements for Fort Keogh Lab, Sheep Experiment Station, Bowdoin National Wildlife Refuge, and the Forest Service.)

Pending Issues: A compact with the Blackfeet Tribe is expected to be introduced as legislation in the 2009 Legislature. Still in negotiations is a compact with the Confederated Salish and Kootenai Tribes (CSKT) on the Flathead Reservation. A process for settling the reserved water rights of allotments (in Montana) related to the Turtle Mountain Chippewa Tribe (of North Dakota) has yet to be determined due to complications.

Relevant Litigation: The Timeline lists relevant litigation, with summaries of court cases attached in a Memo from State-Tribal Relations Staff Attorney Jeremy Gersovitz. Three decisions since 1996 have emphasized that DNRC cannot issue new water use permits on the Flathead Reservation until either there is a water compact for the Flathead Reservation or the Water Court determines the extent of treaty-authorized (aboriginal) rights of the Confederated Salish and Kootenai Tribes for current and future uses.

Relevant Dates: Most water claims are decided under the "first in time, first in right" doctrine. As a result of the U.S. Supreme Court decision in *U.S. v. Winters* (1908), tribes are entitled to a priority date of the date of the establishment of their reservations. The Hellgate Treaty of 1855 established the Flathead Indian Reservation. Reservation lands were opened up to allotment in 1904 and to homesteading in 1910.

Complicating Factors: For the Flathead Reservation, more than other reservations in Montana, these are some of the complicating factors:

- 1) The Flathead Reservation has an extremely checker-boarded ownership pattern. Land owners include: the Confederated Salish and Kootenai Tribes; individual Indians who are either tribal members or not; non-Indians; federal agencies; the state; and incorporated towns. Many stakeholders have claimed or are interested in claiming water rights in this fast-developing part of Montana.
- 2) The Flathead River feeds into the Columbia Basin, which is a

complicated river system, implicating the interest of multiple states and tribes, as well as myriad other stakeholders interested in sufficient water supplies for irrigation, environmental uses, power generation, and other uses.

3) There is an effort to make sure there is enough water for everyone who has a claim. Studies are or will be looking at seepage from irrigation canals, transpiration, and water augmentation.

4) Tribal elders dislike the thought of dividing up a resource that they feel is sacred.

Montana Bill Drafts: DNRC has proposed legislation, LC277, to handle details associated with the termination of the Reserved Water Rights Compact Commission, including moving staff from the Commission to the DNRC to form a Compact Implementation Bureau.

Sen. Carol Juneau has requested LC57 to extend the sunset of the Reserved Water Rights Compact Commission. Her proposal is for an extension until 2013, along with an extension of 60 months (rather than the current 6 months) to file claims if no settlement is reached.

Federal Issues: Nationwide, tribes are attempting to negotiate water settlements, which generally involve a tribe agreeing to accept certain water amounts, often along with monetary compensation from federal and sometimes state sources, in exchange for relinquishing any other water rights bestowed by treaty. (The U.S. Supreme Court *Winters* decision said that Indian claims to water included the right to water for current and future use through treaties and the establishment of reservations).

At least 20 tribal agreements were codified in federal law as of 2006, attorney Jeanne S. Whiteing of Boulder, Colorado, told the 6th annual Montana Water Law Conference in 2006. She also suggested in her remarks that, given the high cost of settlements, litigation might be seen more in the future.

"Having spent the money on litigation preparation, litigation costs no longer represent a savings to the United States, and it appears that the federal government may just as soon litigate as settle in the absence of compelling reasons otherwise." (Jeanne S. Whiteing, "Tribal Reserved Water Rights: Montana's Approach as Compared to Elsewhere," 6th Annual Montana Water Law Conference, Oct. 19-20, 2006, Helena MT)

Compacts with the Fort Peck, the Fort Belknap, and the Crow are codified in Montana law but not yet in federal law.² A bill to ratify the Crow water rights settlement was introduced in Congress July 29, 2008. Fort Belknap and the Blackfeet are developing federal ratification legislation as well. Because of complicated downstream-state issues, federal ratifying legislation is not expected for Fort Peck's compact, but the U.S. Department of the Interior has approved that settlement and the tribes are implementing water rights conferred by that settlement.

The federal settlement legislation for the Rocky Boy's compact appropriated \$48 million in trust for the Tribe. A separate \$120 million of federal expenditures was authorized in 2002 for the design and construction of the Rocky Boy-North Central Regional Drinking Water System. The federal settlement legislation for the Northern Cheyenne compact included \$21.5 million appropriated in trust for the Tribe and \$43 million for rehabilitation of a high-hazard dam.

Financial Concerns: The CSKT is concerned that, if a compact is not in place or the sunset date not extended, the financial costs of litigation could run into millions of dollars annually for many years, depleting the Tribes' financial resources and diverting money from other uses. The CSKT also has suggested that those who have filed 4,000 claims on the Flathead Reservation, excluding the claims by CSKT or people CSKT represents, will potentially face additional litigation costs as they move through the Water Court process. Rhonda Swaney, an attorney for CSKT, estimates that CSKT may file more than 10,000 claims for water rights both on and off the Flathead Reservation if there is no compact.

What Happens If . . . : If compacts are not approved by the legislature for the Flathead or Blackfeet Reservations prior to the suspension date of July 1, 2009, or if the sunset date is not extended, the tribes will have 6 months to file all of their water rights claims with the Water Court as well as possibly those of individual members of the tribes. As with claims anywhere else in the state, individual claims will go before the Water Court where anyone has the chance to object.

Endnotes

1. **85-2-217. Suspension of adjudication.** *While negotiations for the conclusion of a compact under part 7 [regarding Indian tribes and federal agencies] are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of those tribes and federal agencies that are negotiating are suspended. The obligation to file water rights claims for those federal non-Indian and Indian reserved rights is also suspended. This suspension is effective until July 1, 2009, as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, 2009, the suspension must terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies are subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their federal non-Indian and Indian reserved water rights are subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section.*

2. The codification for reserved water rights compacts is in Title 85, chapter 20. The Fort Peck Compact is in part 2. The Northern Cheyenne Compact is in part 3. The Rocky Boy's Chippewa Cree Tribe Compact is in part 6. The Crow Tribe Compact is in part 9. The Fort Belknap Compact is in part 10. Preliminary compact provisions for the Blackfeet Tribe are in part 15.