

The CSKT Water Compact:

Providing legal protection for streamflows in a changing climate

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Background

Climate in the Northern Rockies is changing significantly. Some climate modelers predict the average daily air temperature could be 3 C. warmer by the year 2100.

Modelers still can't predict with any certainty what this means for precipitation. We could get more or less. But this is certain: We will have warmer winters, meaning less snow and lower snowpacks and more winter flooding. This will result in lower peak flows during runoff, and lower streamflows in summer and probably winter.

Tools we can employ to buffer the effects of these changes on aquatic ecosystems include:

- Implementing conservation measures for irrigation, including more science-based irrigation scheduling, improving conveyances, modernizing diversion structures, switching to sprinklers where appropriate; employing more conjunctive use, etc.
- Implementing more basin-wide voluntary drought plans
- Changing consumptive water rights to instream flow rights, either through sales or leasing or voluntary agreements.
- Managing water storage facilities more efficiently for preserving flows downstream.

We are, however, hamstrung by water law. Montana's water law is based on the prior appropriation doctrine -- first in time, first in right. This doctrine is enshrined in law and acknowledged in our state Constitution. It provides only limited flexibility for adjusting to a climate shift and changes in priorities for water. Today agriculture consumes more than 90 percent of the consumed water in Montana. That doesn't necessarily reflect the highest need for neither water, nor does it necessarily reflect changing priorities in the future when water is scarcer.

Montana TU has thus recognized we need to maximize institutional legal tools that can keep water in-stream for aquatic systems into the future. One such tool is establishment and implementation of federal reserved water rights.

Federal reserved water rights are those that accompanied the establishment of federal reserves, such as national forests, BLM lands, national parks and refuges, and Indian reservations. These water rights have been implied and their purpose is to dedicate water to meet the purposes of the reservation. The U.S. Supreme Court first recognized federal reserved water rights in 1908 in the celebrated case *Winters v. United States*.

Until recent years in Montana they have never been quantified, and their priority, amount and place of use not assigned. Most states have resorted to litigation to quantify these rights within their state water right systems. Montana, however, decided to take a different route, establishing a commission in 1979 to negotiate reserved water rights.

In the 1980s, the Montana Supreme Court ruled that the Montana Water Use Act was adequate to on its face to adjudicate federal reserved water rights, and the federal McCarron Amendment of 1952 essentially okayed concurrent jurisdiction to the states of federal reserved water rights. And thus, federal reserved water rights get adjudicated along with other water rights in state water court. Adjudication provides legal certainty to water right claimants in the form of decrees that prioritize water rights by first in time, first in right, detailing the beneficial uses they apply to, in specific amounts for specific places of use.

Since then, the Compact Commission has successfully negotiated settlement of 17 Compacts – 11 with the feds for federally owned rights, and 6 with tribal entities. The Montana Legislature ratifies the final agreement, or compact. The secretaries of their respective agencies must also approve compacts between federal agencies and the states. Congress and then tribal councils must approve tribal compacts, after ratification by the state Legislature.

The last Compact to be settled was the Compact with the Confederated Salish and Kootenai Tribes. The Montana Legislature ratified it in April. The most meaningful Compact so far for preserving flows for aquatic systems was the Compact between the State and U.S. Forest Service ratified by the Legislature in 2007. It allows the FS to file for state-based instream flow water reservations, or rights, in headwater streams to benefit fisheries.

The CSKT Compact

The CSKT Compact had been in the works for at least 15 years, with real negotiations occurring for at least 10. It differs from other tribal compacts because the State and tribes agreed to wrap in off-reservation aboriginal claims of the tribes. These claims are based on language in treaties signed by so-called Stevens treaty tribes -- this case the Treaty of Hellgate in 1855. Stevens treaties guaranteed tribal members the right to fish in all the usual and accustomed places on and off the reservation. Federal courts in other states have ruled that having a right to fish also

means that water must be available to support a fishery. This has been controversial, but it is settled law.

And thus, the CSKT Compact settled:

- The federal reserved water rights that came with establishment of the Flathead Indian Reservation, including rights associated with a federal water project. The priority date for these rights could rightfully be claimed to have a priority of 1855, the time of the treaty signing. This would make these rights the most senior on the reservation.
- Aboriginal instream flow rights off the reservation, which covered potentially all waters west of the Continental Divide, as well as the upper Missouri River basin above the Judith River and the upper Yellowstone basin down to Billings. These water rights would have a priority of time immemorial.

There has been a third party to the negotiations, which is the federal government, which holds certain resources of the tribes in trust, and which oversees the operation of the Flathead Indian Irrigation Project on the reservation. Many of the water users on this project are non-tribal members. And this is where most of the legitimate opposition to the Compact came from.

What the Compact does

First, it is most distinguishable for three reasons:

- The water rights the tribes get in the Compact are only for instream flows to support fish.
- The tribes conceded much and could have negotiated for much more.
- The accord went to great lengths to ensure protection for existing water uses on and off the reservation.

What the tribes conceded:

- Claims on all water rights east of the Continental Divide
- All existing non-irrigation water rights on and off the reservation will be unaffected, as will all groundwater uses for agriculture under 100 gallons per minute.
- All existing water right holders can still object in Montana Water Court to the water rights the tribes get in the compact
- All water rights the tribes get off the reservation with the exception of a limited instream flow right in the upper Clark Fork basin are either equal to, co-owned or co-managed with existing instream flow rights of Fish, Wildlife and Parks, or, subordinate to existing license or operating conditions of federal and private hydro dams on the Kootenai and Clark Fork Rivers.

- The upper Clark Fork Right is not enforceable until 10 years after the ratification of the Compact. It is a portion of the former hydro right now held by the State of Montana.
- Grants immediate legitimacy to all groundwater wells drilled since the late 1990s, when the court ruled they were not legal because there was no Compact between the tribes and state.
- Up to 90,000 acre-feet of federal water from Hungry Horse Reservoir will be available for mitigation or development within Montana, with 11,000 acre-feet available for lease by the State
- off reservation in the Clark Fork system.

What the tribes and fish get:

- Co-ownership or sole ownership of some instream flow rights for fish off-reservation, with the most meaningful being the Clark Fork right.
- Ownership of the water rights for the Flathead Indian Irrigation Project, though the water users still get guaranteed water deliveries representing their historical use. Ownership of these rights was one of the primary issues the Compact solved.
- Co-management of the water right system on the reservation with a unitary management agreement and a water management board comprised equally of tribal and nontribal members.
- Instream flows in key tributaries on the reservation for native fishes, such as bull trout and cutthroat trout. Some of these are flows above water projects and are immediately enforceable. The specific instream flow targets on stream with the irrigation project and around the reservation where other water rights exist will be met when investments have been made in local irrigation infrastructure to free up water to leave in stream through conservation.
- \$56 million in state funds will eventually be made available to the tribes, with the bulk going to irrigation infrastructure improvements, and the rest to stream restoration.

Finally, some important points:

- The Compact will start to be implemented, but Congress must still ratify it and approve federal funding for implementation; After that, the tribal council must finalize it.
- Only \$3 million of state money has been appropriated.
- The tribes will still, as they must by law, file their expansive on and off reservation water claims in Montana Water Court. This is their fall back should Congress nix the Compact.
- Approval of this accord means the tribes give up forever all claims to new water rights in Montana.