

From: Harris, Joel [mailto:HarrisJ@mt.gov]
Sent: Wednesday, September 14, 2022 2:40 PM
To: Jack Venrick
Subject: RE: [EXTERNAL] Western Montana Water Rights

Jack,

Here are a few more thoughts on the points raised by the posts from the link you sent. I meant to give you a call before sending this, but I seem to have lost your number in my notes, so please give me a call if you'd like to discuss some of this more in depth or get more context.

- I wanted to clarify some info from the initial post by Jan Rogers about the Water Court notice sent out to approximately 70,000 water right holders in Western Montana. It's not entirely clear what Jan Rogers means by "when asked where the other 100,000+ letters were, they had no idea." I'm guessing that Jan is thinking that around 160,000 people live in the notice area and therefore all should have been noticed. Water Court decree notices, however, are sent to water right owners. The notice was sent to all water right owners west of the divide, aside from a small group of around 1,400 whose rights were in a "Suspended" status and who were initially overlooked. These 1400 suspended rights were groundwater well filings received by the DNRC from the reservation after the MT Supreme Court had ruled in August of 1996 (and in a couple of subsequent cases) that the DNRC no longer had authority to issue permits, certificates, or changes on the reservation. The compact and ordinance lay out a process for these suspended rights to be approved by the new Flathead Water Board after verifying that the filings met the requirements under state law at the time of their filing. We realized we had overlooked these and sent out notice to these folks in July.
- Scrolling down to the "Save Your Water Rights!" post, I have already briefly covered the claim that folks will lose their water rights if the CSKT Water Compact is finally decreed by the MT Water Court. I would point to the protection from call language in the compact I cited in my previous email as one important point. A point that the State negotiators were immovable on during negotiations and that the Tribes would come to fully support is that all verified state-based water uses on the reservation are recognized by the compact, and the vast majority of them are protected from call. Many tribal members, after all, have state law-based water rights themselves and overwhelmingly supported ensuring that those uses of theirs and their non-tribal neighbors are protected by the settlement.
- The post says that the Compact results in the Flathead Irrigation Project rights being "transferred to the Tribe." The project is an irrigation project on an Indian reservation, so just as the water right of the Project on the Blackfeet Reservation is in the name of "USA (Dept of Interior Bureau of Indian Affairs) in Trust for the Blackfeet Tribe," so too is the project right on the Flathead Indian Reservation which is under "USA Dept of Interior Bureau of Indian Affairs) in Trust for the Confederated Salish and Kootenai Tribes." There's no transfer happening here. The BIA will continue to operate the irrigation project. The Flathead Water Board has no authority over that water once it is diverted from the source. Additionally, the Flathead Water Board is itself independent from the Tribes. It consists of two members appointed by the state, two appointed by the Tribes, and a fifth selected by the original four.
- Another paragraph says people "Will lose the protection of state law and not have control over the use of their water!" The compact could be said to be an agreement that brings federal reserved water rights (i.e., rights based in federal law) into compatibility with state law-based water rights. The federal reserved rights clearly pre-date the state-law based rights. So if the Tribes had decided to go the litigation route in order to claim the full extent of their reserved

right under the law, they would likely have ended up with a much broader set of rights in western Montana—all with 1855 and “Time Immemorial” priority dates that would have had precedence under the prior appropriation doctrine over state-law based rights. Instead, the compact provides for call protection for most state-law based rights and for a “Shared Shortage” management approach to water on the reservation for periods of drought or low water when there isn’t enough water to satisfy both the project right and the tribal instream flow rights to their full extent. In essence, the compact provides for a sharing approach in times of shortage. There is even a right to approximately 90,000 acre feet per year out of Hungry Horse Reservoir that is conditioned to act as buffer water in times of shortage to ensure that all parties are getting as close as possible to the amount they’ve always gotten. Without the compact, none of these protections would exist.

- As for the sentence “Your wells can be metered and you can be required to pay a third party for water used from your well!” it’s difficult to tell what the blogger is talking about. There is a measurement requirement for Development Domestic Well allowances (See section 2-2-117(6) of the Ordinance)—these are wells with higher than typical volumes supplying water to numerous homes simultaneously. There is a requirement to measure a cumulative annual volume in order to prove that the use is in compliance with the volume limitation. But this Development Domestic Well allowance is a brand new application type for new developments. No existing wells are going to have a measurement requirement applied or a fee required.
- Finally, a note on the discussion of the land exchange. Please see this page on the DNRC website for more info on [the exchange](#). I would point out that it is simply that—an exchange of land. The blogger goes on immediately after mention of this exchange to discuss “taking property without compensation,” implying that there is a taking and not an exchange. This strikes me as misleading. The land exchange is a bargained for opportunity for the Tribes to reclaim some of the state trust land on the reservation in exchange for the state trust land system gaining an equal amount of land from Federal public lands outside the Reservation. This was an opportunity for both the Tribes and state to benefit—the Tribes because it would allow them to regain land adjacent to existing trust land on the reservation and the state because it could potentially receive land that is less dispersed, more accessible, more easily manageable, and with potentially better revenue generating potential.

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Compact Implementation Program

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From: Jack Venrick <jacksranch@freedomforallseasons.org>

Sent: Tuesday, September 6, 2022 9:29 AM

To: Harris, Joel <HarrisJ@mt.gov>

Subject: [EXTERNAL] Western Montana Water Rights

Joel –

Good to hear back from you was worried.

Because of the December 6, 2022 deadline for filing objections there is a call from the two groups below for objections to be filed ASAP.

I wanted to get your statement in writing because those of us who are deeply concerned about the agenda of the tribes, State and Fed need to hear what you are saying. Whether they believe it or not is up to them. I want to pass this on to my property rights group and the two water rights sites:

<http://SaveYourWaterRights.org> [saveyourwaterrights.org]

or westernwaterrights.wordpress.com [westernmtwaterrights.wordpress.com]

And Yes to your last statement below re. “a more full answer from us on some of the points made in the article.” If you could do this in an email or Word doc. Then I will wait and share it with the others.

- Or you could directly reply on the Western Montana Water Rights blog - <https://westernmtwaterrights.wordpress.com/> [westernmtwaterrights.wordpress.com].

I will standby to hear from you.

Jack Venrick
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