

PROPOSED FLATHEAD INDIAN IRRIGATION PROJECT
WATER USE AGREEMENT SUMMARY

The Flathead Indian Irrigation Project (FIIP) Water Use Agreement addresses the exercise and administration of both the FIIP water rights (but *not* private rights held by irrigators personally) and the Confederated Salish and Kootenai Tribes' (Tribes) instream flow rights for streams supplying the FIIP. This agreement is being negotiated among the Tribes, the Flathead Joint Board of Control (FJBC) and the United States. The Compact Commission is not a party to these negotiations, but the Water Use Agreement is intended to be attached to the Compact as an appendix, and the Compact makes the Water Use Agreement's conditions binding on the Tribes' exercise of its instream flow and FIIP water rights.

Under Montana law, all water rights in the state are going through a general adjudication. The United States, the FJBC, and the Tribes have competing claims to the water delivered and controlled by the FIIP. Consequently, in the absence of a settlement, the water use associated with the FIIP will be contested through the Montana General Stream Adjudication process to determine whose water rights claims are valid, the priority date of all valid claims, and all the other aspects of such claims. This prospect creates much uncertainty and risk for all parties and indefinitely prolongs the adjudication.

Based on rulings by the U.S. Supreme Court and other Federal Courts, the adjudication process may determine that the instream water rights of the CSKT have a time immemorial priority date and the CSKT consumptive water rights a priority date of 1855. The priority dates for CSKTs' instream flows would be senior to any other water rights on the FIIP and the CSKTs' consumptive use rights' priority date would at least be equal to and in many cases senior to non-tribal irrigation rights.

The Water Use Agreement eliminates this conflict by making the FIIP right part of the Tribal Water Right, meaning all FIIP water users benefit from the Tribes' 1855 priority date. In addition, the Water Use Agreement contains specific protections for the irrigation right from the full exercise of the Tribes' senior instream flow rights, as explained in the points below. The Water Use Agreement does not transfer ownership of any private water rights to the Tribes. All water rights claims filed individually in the Adjudication will be as finally decreed by the Montana Water Court and those decreed rights are entitled to benefit from the protections for existing water rights built into the Compact.

Litigation: The FJBC's legal authority to enter into the Water Use Agreement has been challenged in state district court. On February 15, 2013, Judge C.B. McNeil enjoined the FJBC for entering into the Water Use Agreement. The FJBC has appealed that ruling to the Montana Supreme Court. The Montana Supreme Court granted the FJBC's motion to expedite the appeal. Briefing is currently in progress and will be completed by April 1, 2013. A ruling is expected shortly thereafter. The Montana Supreme Court has stayed Judge McNeil's ruling and all further proceedings in the case pending its resolution of the appeal.

- The proposed agreement protects FIIP irrigators by providing water through two main methods: the **Farm Turnout Allowance (FTA)**, and a **Measured Water Use Allowance (MWUA)**:
 - The **FTA** is a volume of water that is available to all FIIP lands – up to a maximum of 1.4 acre-feet per acre. The annual FTA will be set each year based on hydrologic conditions (wet, normal, dry).
 - Separate FTAs will be established for the Jocko, Mission and Camas divisions to reflect local conditions.
 - FTAs are phased in as management improvements and rehabilitation and betterment projects funded by the settlement occur. Status quo allocations remain in place until that time.

- The **MWUA** allows individual irrigators to use water over and above the FTA if they can show through an efficiency audit overseen by the FIIP Operator that the additional water can be efficiently used.

In addition to the FTA and MWUA, the Water Use Agreement protects irrigation uses by allowing for pumping of up to 65,000 acre-feet of water through existing FIIP pumps. This is considerably in excess of the amount historically pumped. An irrigator would be able to purchase additional water through pumping from the Flathead Pumps or from the Tribes' Flathead System Compact Water.

Irrigators who are served by the FIIP and who have Secretarial Water Rights (which are still junior to the Tribes' instream flow rights) will continue to be served by the Project. These irrigators will benefit from the Water Use Agreement on the same basis as other FIIP users – including access to the FTA and MWUA and other related provisions.

The Compact creates a process for irrigators located within the FIIP influence area who have individually-owned water right claims or permits under state law to be protected by entering into voluntary agreements that allow them to use irrigation water up to their historic use or the FTA, whichever is less, without being 'called' by the Tribes' senior instream flow rights.

Deferrals for on-farm quotas and extra-duty water: The Water Use Agreement contemplates rehabilitation and betterment (R&B) of FIIP infrastructure, as well as operational improvements to make the balance work between irrigation uses and instream flows. There is a deferral period before any of the changes contemplated in the Water Use Agreement (including the FTAs) would go into effect. During this deferral period current FIIP water delivery practices remain in place. Changes made as a result of management improvements will be deferred for up to five years after funding is appropriated. Changes as a result of R&B projects will be deferred for up to seven years after funding is appropriated. Federal funding for the operational improvements and R&B projects require passage of Federal legislation, leaving the status quo in place for several additional years.

Protecting Property Rights: As the Water Use Agreement concerns only the FIIP right and the Tribes' instream flow rights, nothing in the agreement affects any private claim filed by a water user in the Adjudication. Those claims will be as they are finally decreed by the Water Court. In addition, nothing in the proposed agreement:

- authorizes any access to private property by any party to the agreement;
- reduces or enhances the legally enforceable right of individual irrigators under the Project to receive irrigation water. A FIIP water user's right to receive irrigation water delivered by the Project Operator is appurtenant to the land and runs with the land and is fully transferable under applicable law
- alters, diminishes, or enhances applicable operating procedures concerning a FIIP irrigator's ability to transfer or marshal, within a FIIP irrigation system operator's administrative area, irrigation water allocated to that irrigator. However, consistent with current law, no water marketing directly between or among FIIP irrigators is allowed.

Improving FIIP Operations and Facilities: Funding for the improvements would come from the United States and the State of Montana as a result of this settlement. The improvements would be designed to bring the greatest possible benefit to CSKT natural resources, FIIP management, the FIIP land base, and the Reservation economy. Without a settlement, funding for these projects would not be available. The State intends to spend \$42 million directly for the benefit of the FIIP as part of its overall \$55 million contribution to the settlement.