



# **Tribal Water in the Pacific Northwest:** **Water Allocations, Treaty Rights, New Case Law**

**Flathead Basin Adjudication – How We Got to  
this Point and Where We Go From Here**

By Peter G. Scott



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# General Stream Adjudication

- Montana Water Use Act, Title 85, Ch. 2, Mont. Code Ann. (effective date July 1, 1973).
  - Established permit process for water rights.
  - Established water right repository.
- SB 76 in 1979 initiated the state-wide general stream adjudication for “existing” water rights.
- Supreme Court ordered deadline for filing of all water right claims that was extended to April 30, 1982.
- Water Act adequate on its face, left open as applied challenges. *State ex rel Greely v. Confederated Salish Kootenai Tribes*, 219 Mont. 76, 712 P.2d 754 (1985).





# Adjudication Process (1 of 5)

- Adjudication proceeds by basin; there are 85 basins in Montana.
- Claims are examined by Department of Natural Resources & Conservation (DNRC).
- Abstracts for each claim identify claimed elements and any **issue remarks**.
- Index is searchable for all claims based on various parameters (i.e., priority, source, owner, pod, etc.)



# Adjudication Process (2 of 5)

- Findings and Conclusions are prepared for each basin.
- Temporary preliminary decree.
  - For claims based on state law.
  - Federal reserved claims (if any) may be added later in the “preliminary decree” step.
- **Notice** of the temporary preliminary decree is sent to all claimants.
  - At least one public meeting is scheduled.
  - Triggers 180 day **objection period**.





# Adjudication Process (3 of 5)

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- Most objections directed by issue remarks.
- After objection period, Notice of Objection is sent to each claimant.
  - Sixty days for counter-objection.
- Notice of Availability of Objection List
  - Sixty days for Notice of Intent to Appear (**NOIA**)
- Master issues Consolidation Orders



# Adjudication Process (4 of 5)

- Master
  - starts with **status conference**
  - Reviews and approves settlement agreements,
- Master issues scheduling order.
  - Conducts hearing (field investigation).
- Master's Report w/ findings and conclusions.
  - 10 business days for objection to the Water Court.



# Adjudication Process (5 of 5)

- Water Court decision is **interlocutory**.
- Upon Resolution of objections temporary preliminary decree becomes enforceable in district court under Title 85, Ch. 5, MCA.
- Preliminary Decree issues if:
  - No reserved rights to be determined (11 basins).
  - Reserved water right compact approved.
  - Agreement not reached on reserved rights.
- Objections to preliminary decree are resolved by the Water Court which then issues a final decree, subject to appeal in the Supreme Court.

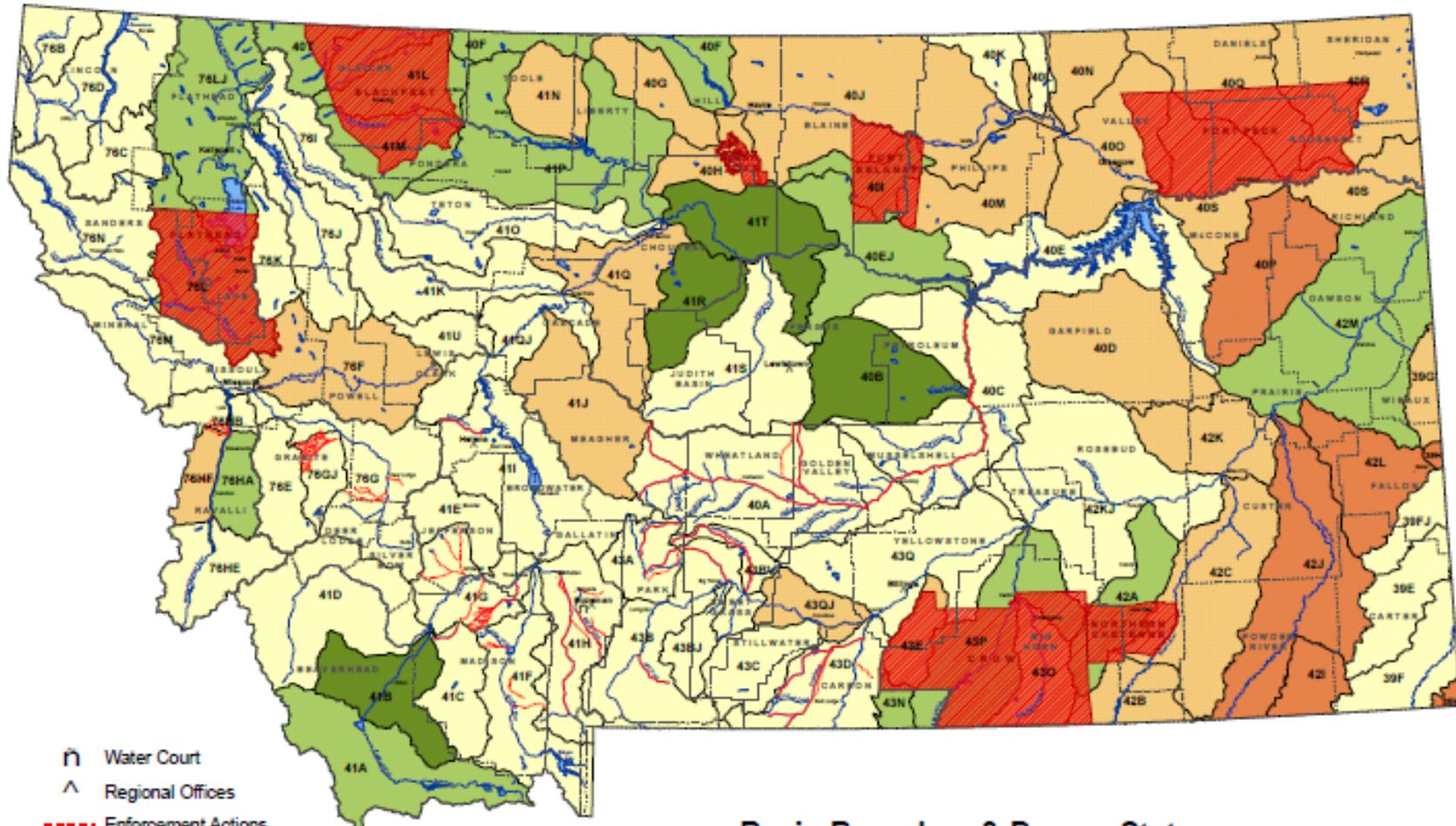


# Compact Process

- Compacts for federal reserved water rights are negotiated on behalf of Tribes, Federal Agencies and the State.
- Compacts must be approved by state legislature the US Congress and then ratified by the respective tribes
- Completed compacts are then inserted into a Preliminary Decree for objections and final approval by the state courts.

# Basin Location and Adjudication Status

3/9/11



- Water Court
- Regional Offices
- Enforcement Actions
- COUNTIES
- RESERVATIONS

## Basin Boundary & Decree Status

- Temporary Decree
- Preliminary Decree
- Final Decree
- Currently Examining
- Summary Report Issued

# Reserved Water Rights Compact Commission

- Nine appointed members – four by Governor; two by President of Senate; two by Speaker of House; one by Attorney General.
- Negotiated settlement with tribes and federal government is the commission's highest priority, § 85-2-701, MCA.
- Compact process requires ratification by State, Congress and Tribes.



# Tribal Team

- Tribal Council members
- Tribal Attorney
- Elder Representatives (Salish and Kootenai)
- Agency staff (Nat. Res., Culture, Lands).



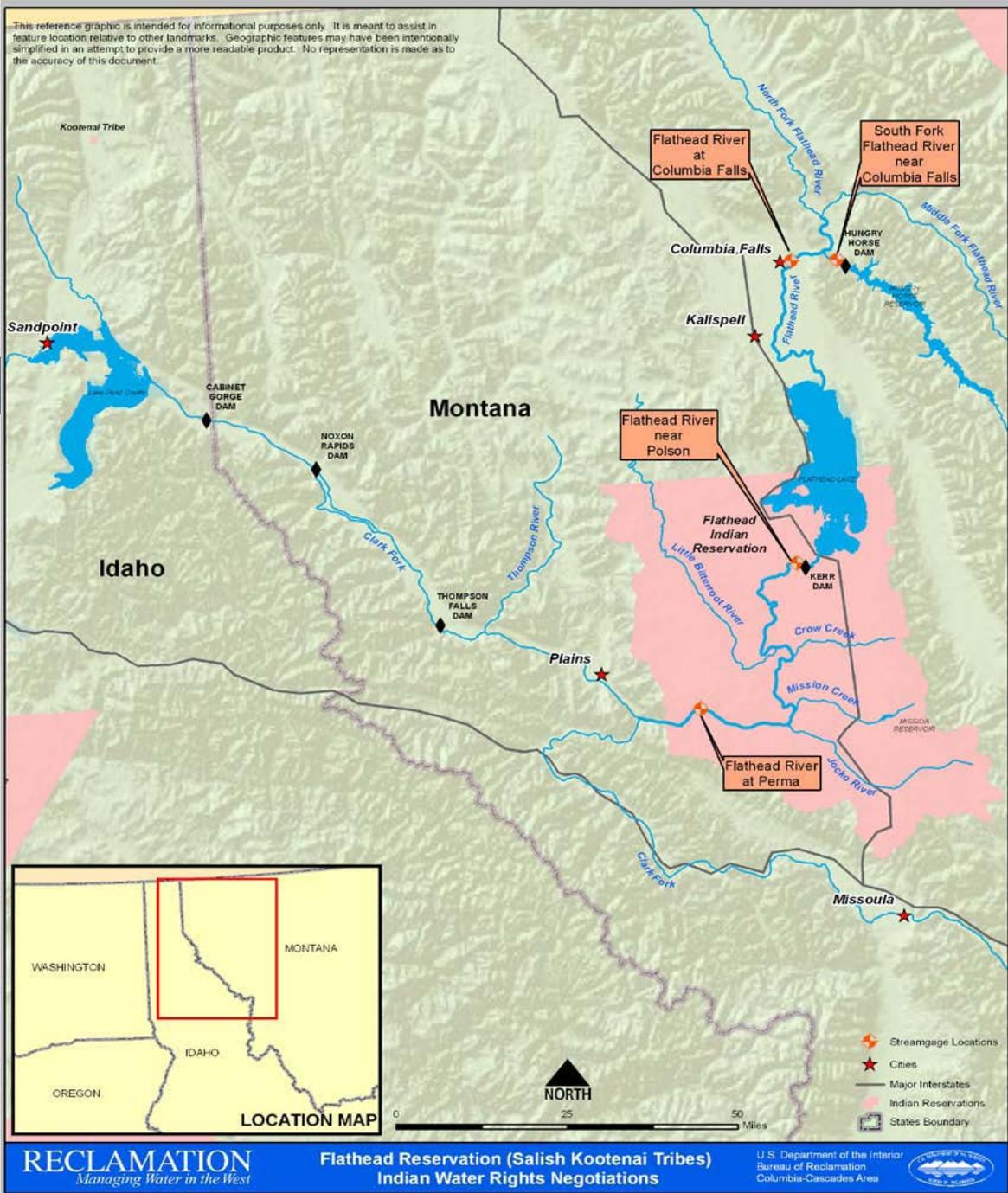
# Federal Team

- Bureau of Reclamation
- Bureau of Indian Affairs
- US Fish and Wildlife Service
- US Dept. of Justice
- US Dept. of Interior, Office of Solicitor



# CSKT

- Hellgate Treaty (1855)
- Flathead Irr Project (1904)
- McCarran Amend. (1952)
- US v. Abell (1979);



# Initial Efforts

- Negotiations with CSKT commenced by commission, § 85-2-702, MCA.
  - Compact must be approved by July 1, 2013, if not, tribes have 24 months to file water right claims in state court.
- CSKT Water Rights Proposal of 2001
  - Proposed all water on reservation owned by US in trust for tribes with recognition of non tribal uses and a single administrative system.
  - State rejected the proposal.
- Negotiation for Interim Agreement was discontinued after more than 2 years.



# Unitary Management

- Proposed in 2007
  - Unitary Management Board.
  - Adjust priority for irrigation project rights to 1855.
  - Coordinate **future use** with conservation and supplemental withdrawals.
  - Protect **existing uses**.
  - Stevens Treaty: off-reservation aboriginal rights for hunting and fishing in accustomed places.



# Draft Compact

- Working Draft Compact proposed July 28, 2010.
- Key components
  - Quantification
  - Jurisdiction and Management by unitary management board of five members – two by Tribes; two by Governor; one jointly selected and one non-voting by Secretary of Interior.
  - Adjust priority of FIID to 1855.



# Flathead Indian Irrigation Project

- Owned by Bureau of Indian Affairs.
- Operates from multiple sources for irrigation of about 135,000 acres, with 1,300 miles of ditch and over 10,000 structures.
- Repaid in 2004 and beginning in 2010 is managed by Cooperative Management Entity (CME) under approved plan of operations.
- Competing water right claims filed by Flathead Joint Board of Control and Tribes.



# Reserved Rights

- Replacement Water is subject of negotiation to offset protection for existing non-tribal uses.
- Proposal for 90,000 acre-feet from Hungry Horse reservoir.
- Down basin modeling shows negligible impact on Columbia River power system
- Biological modeling by MT Fish Wildlife and Parks shows some habitat impacts in consecutive dry years – defined at 15 percentile.



# Summarize

- Reserved Water Rights Commission sunsets after 2013 legislative session.
- Working to put compact out for public comment in Summer 2012 in time for approval by 2013 legislature.
- Will require claimants to stipulate on existing uses and resolution of reserved rights both on and off the reservation.



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