

MONTANA WATER COURT, CLARK FORK DIVISION  
JOCKO RIVER HYDROLOGIC SUB-BASIN (BASIN 76L) AND  
FLATHEAD RIVER TO AND INCLUDING FLATHEAD LAKE (BASIN 76LJ)

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**ORDER EXTENDING STAY**

The Water Court issued an order extending a stay of the adjudication of Basins 76L and 76LJ on September 26, 2016. The CSKT Tribes have asked for an extension of the stay. Their request was supported by the United States, the State of Montana, and various other parties. No party opposes an extension.

“A court determines whether to grant a stay by balancing competing interests and considering whether the public welfare or convenience will be benefitted by a stay.” *State v. Mont. First Judicial Dist. Court*, 361 Mont. 536, ¶ 10, 264 P.3d 518 (2011) (citing *Henry v. Seventeenth Judicial Dist. Court*, 198 Mont. 8, 13, 645 P.2d 1350, 1353 (1982)).

The Montana Supreme Court noted the following criteria applicable to stays:

1. A court has inherent power to stay proceedings in control of its docket – after balancing the competing interests.
2. The party seeking a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay will work damage to someone else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.
3. Especially in cases of extraordinary public moment, the individual may be required to submit to moderate delay if the public welfare or convenience will thereby be promoted.

*Henry*, 198 Mont. at 13-14, 645 P.2d at 1353 (internal citations omitted).

The CSKT Tribes asked that the stay be extended until passage of legislation by the United States Congress and approval of the CSKT Compact by the Montana Water Court. Neither the Tribes nor any other party was able to say when those events would occur, or how long the stay would need to be extended. Although it appears the Tribes, the Department of Interior, the Department of Justice, and the Montana Congressional Delegation are engaged in talks about the scope and content of legislation, no party has shown that legislation has advanced through either house of Congress since the last time an extension was requested.

The parties assert that further legislative progress is unlikely until after mid-term elections this fall. No party was willing to speculate on when Congress might next take up legislation approving the CSKT Compact.

Basins 76L and 76LJ are the only two basins in Montana for which the Water Court has not issued decrees. The Court has issued over eighty other decrees, many of which include claims for both tribal and federal reserved water rights.

The Montana Legislature funded the adjudication process with an expectation it would go forward efficiently. That expectation is expressed in § 85-2-270(2), MCA, which states it is “realistic and feasible for the water court to issue a preliminary or temporary preliminary decree by June 30, 2020, for all basins in Montana.”

In their most recent request for an extension, the Tribes assert that § 85-2-270(2), MCA is a non-binding benchmark, which amounts to an expression of hope rather than a command that decrees be issued by a set date. They assert the Legislature’s hoped-for date may be unrealistic, and contend that, because the reference to June 30, 2020 is non-binding, the Water Court is not obligated to issue decrees by that date.

While § 85-2-270(2), MCA does not expressly state that decrees in all Montana basins be issued by a specified deadline, it does establish an expectation that public resources expended on the adjudication produce a tangible result. That result, as defined in the statute, is completion of “the initial decree phase” of the adjudication. § 85-2-270(1)(a), MCA. This expectation is understandable considering the time and money spent on the adjudication so far.

The Legislature's approval of the CSKT Compact signaled that it values settlement of the Tribes' claims for water. The Tribes contend that issuance of decrees in Basins 76L and 76LJ will jeopardize the chances of getting legislation through the United States Congress, and thereby imperil the Compact. If true, this forecast establishes a tension between the Legislature's desire for issuance of decrees in all Montana basins, and its preference for resolution of tribal claims through settlement.

The law applicable to stays requires that courts balance competing interests, and where required, apply governing statutes.

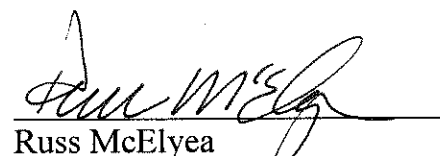
Because no one opposed the stay, there is no need to balance competing interests between parties. The lack of opposition, and support from the State of Montana and other amicus parties, indicates public benefits if the stay is extended.

That said, the Legislature's specific reference to a June 30, 2020 date for issuance of all decrees, and the public interest in seeing the adjudication move forward must also be considered. The Tribes have asserted a stay should be extended indefinitely, without saying when it might be lifted. Even if all the arguments made by the Tribes in favor of an extension are true, an open-ended request with no time limit and no forecast for completion is unreasonable, and violates at least the spirit of § 85-2-270(2), MCA.

Extending the stay until January 10, 2020 will give the parties more than a year after mid-term elections to move legislation through Congress. It will also give the parties and the Montana Legislature an opportunity during the 2019 legislative session to modify § 85-2-270(2), MCA.

Based on the foregoing, it is ORDERED that the stay of the adjudication in Basins 76L and 76LJ issued by this Court on September 26, 2016 is extended until **January 10, 2020**.

DATED this *5<sup>th</sup>* day of *June*, 2018.

  
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