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Omnibus includes historic water rights settlement

Kylie Mohr, E&E News reporter • Published: Wednesday, December 23, 2020



The legislation would return the National Bison Range in Montana to tribal control. FWS/Flickr

A Montana tribe is having a "once in a lifetime moment" after a water compact with the federal government passed Monday night, tucked inside the massive spending and pandemic aid package.

The Confederated Salish and Kootenai Tribes of Montana (CSKT) compact, amounting to \$1.9 billion, is the largest tribal water rights settlement in history by total federal cost.

The year-end package also advanced other tribal water rights settlements, including for the Pueblos of Nambé, Pojoaque, Tesuque and San Ildefonso; the Navajo Nation; and the Kickapoo Tribe of Kansas.

CSKT Chair Shelly Fyant said in a press release, "This is one of the most significant days in the history of our people and one that will have a profound and positive impact on the future of the Flathead Reservation for the next century."

In a call with reporters yesterday, Fyant also used the words "momentous," "elated" and "relief" to describe the tribe's emotions surrounding the conclusion of intense negotiations.

Fyant said the agreement to divvy up water will allow the tribe to "rehabilitate and modernize the Flathead Indian Irrigation Project and restore damages to fish and wildlife habitat caused by the project, while simultaneously protecting farmers and ranchers who depend on irrigation for their livelihoods."

The project's scope includes 15 dams and reservoirs and 1,300 miles of canals. She added that implementation of the settlement "will create thousands of good-paying jobs and help boost our regional economy."

The "Montana Water Rights Protection Act," [S. 3019](#), also includes language that returns the National Bison Range, where bison conservation efforts occur, back to tribal control ([E&E Daily](#), Dec. 12, 2019).

Sen. Steve Daines (R-Mont.), who introduced the bill in 2019, and co-sponsor Sen. Jon Tester (D-Mont.) worked with Rep. Greg Gianforte (R-Mont.) to get the bill into the massive end-of-year funding law and through both chambers.

"Water is among our most valuable resources, and ratifying this Compact honors our trust responsibilities, creates jobs, and invests in infrastructure while providing certainty to water users everywhere," Tester, who first introduced the bill in 2016, said in an email yesterday. "I'm thankful we were able to work together to get this critical legislation across the finish line."

The Montana congressional designation called the bill's passage a major win, not only for the tribes but also for taxpayers, ranchers and farmers.

"Without our bill, thousands of Montanans would be forced into very expensive litigation and our ag economy would've taken a \$1 billion hit," Daines said.

Decade of negotiations

The compact is the result of more than a decade of negotiations in Montana seeking to resolve the tribe's claims to reserved water rights on and off the Flathead Reservation — a process fraught with historical distrust and racial tensions.

Conservatives in the region, many living on land taken from the tribe in the allotment era, consistently opposed what they saw as infringement on states' rights.

"It's surreal," said Melissa Hornbein, former staff attorney for the Montana Reserved Water Rights Compact Commission. "Even though we knew there was going to be an effort to get it tagged onto the stimulus bill, I really didn't think it was going to happen."

Hornbein noted the bill makes \$900 million available immediately for pressing project infrastructure, "which is almost unheard of in these water rights settlements."

States have a legal obligation to recognize Native American treaties and reserved water rights. Instream flow rights are "time immemorial," and other use rights have a priority date of when the tribe's reservation was created.

This means CSKT rights predate those of other junior users, like the state, creating the potential for conflict in times of low flows.

Together with the federal government filing on its behalf as a trustee, the tribe claimed almost 10,000 water rights throughout its aboriginal territory in the majority of Montana's river basins.

The final compact significantly narrowed the geographic scope of its claims to the state's northwest corner on and near its reservation.

A prior version of the compact failed to pass the state's Legislature in 2013. Gov. Steve Bullock (D) requested the reopening of negotiations in 2014, and the state and tribe took back up contentious provisions.

'Very long and difficult effort'

Most of the dispute centered on irrigation use and instream flows on the Flathead Reservation. But the Montana Legislature managed to approve it in 2015, and the state is contributing an additional \$55 million of its own money to the settlement.

Settling water use conflict in a compact, rather than a claim-by-claim adjudication and any appellate litigation that might follow, appealed to all parties involved.

"This will conclude a very long and difficult effort to quantify the water rights of the Selis, Qlipse and Ksanka people," Fyant said.

"This means we can avoid decades of acrimonious litigation on streams across much of Montana and protect many streams with sufficient amounts of water to ensure fish can survive and Montana's residents can recreate and fish as they have for generations."

The water compact now heads to President Trump's desk to be signed into law along with hundreds of other items in the omnibus bill. It's unclear whether Trump will sign it ([see related story](#)).

The water rights will be finalized pending tribal approval and the issuance of final decrees by the Montana Water Court.

"This is such great news going into the holiday season and the new year," Fyant said. "I'm sure that the elders who negotiated this settlement over the years are doing a victory dance in heaven right now."

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EDITOR'S NOTE: Wednesday, December 23, 2020 — 12:54 PM

Greenwire will not be published during the holiday break. It returns Monday, Dec. 28.

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