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WC-0001-C-2021

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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
CONFEDERATED SALISH AND KOOTENAI TRIBES-MONTANA-UNITED STATES
COMPACT

CASE NO. WC-0001-C-2021

**OPPOSITION TO
MOTION FOR APPROVAL OF THE FLATHEAD RESERVATION-STATE OF
MONTANA-UNITED STATES COMPACT AND FOR SUMMARY JUDGMENT
DISMISSING ALL REMAINING OBJECTIONS**

Comes now, Mickale Carter, Pro Se Objector, and submits this Opposition to the Compact Parties' Motion for Approval of the Flathead Reservation-State of Montana-United States Compact and for Summary Judgment Dismissing all Remaining Objections. Objector Carter hereby adopts by reference the arguments set forth in her Memorandum in Support of Motion for Summary Judgment filed with the Water Court on June 17, 2024. The Compact Parties ask the Court to presume that the Flathead Compact is valid and argue further that there are no valid objections. However, the Flathead Compact violates both the law and public policy. Furthermore it is neither fair nor equitable. The Court should acknowledge the validity of the

objections, and thereby deny the motion for approval of the Flathead Compact and declare the Flathead Compact void.

I. SUMMARY OF THE ARGUMENTS

Winters reserved water rights are the water rights implicitly reserved when the Flathead Reservation was created. Winters v. United States, 207 U.S. 564, 576-577 (1908). Reserved water rights is a shorthand for water rights implicitly reserved to accomplish the purpose of the reservation. Arizona v. Navajo Nation, 599 U.S. _____, slip op at 2 (2023). When the United States establishes a tribal reservation, the reservation generally includes "the right to use needed water on the reservation." (Emphasis added) Arizona, slip op at 6, citing, United States v. Shoshone Tribe, 304 U.S. 111, 116-118 (1938). The priority date of the Winters reserved water rights is the date the reservation was created. Montana ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 Mont. 76, 92, 712 P.2d 754 (1985).

Not only does the Flathead Compact not use the date of the creation of the Flathead Reservation as the priority date for the claimed Winters reserved water rights, the Compact Parties neither address the purpose for which the Flathead Reservation was created, nor do they make an assessment as to the nature of the water rights needed to accomplish that purpose. The Compact Parties also fail to justify their claim to off reservation water rights. Each of these failures is sufficient basis for the Court to void the Flathead Compact.

The Flathead Compact does not comply with the requirements of MCA 85-2-212, which requires that all persons, including Indian tribes and the United States acting as a trustee for an Indian tribe, file a claim for all pre July 1, 1973 water rights, including reserved water rights, by June 30, 1983. This date was extended by MCA 85-2-221 to July 1, 1996. The consequence of

failure to comply with this mandate is that the pre July 1, 1973 water right is deemed by the Montana Supreme Court, pursuant to MCA 85-2-212, to be abandoned. The Flathead Compact was not filed prior to July 1, 1996. Consequently, as a matter of law, all pre July 1, 1973 reserved water rights must be deemed abandoned and the Court necessarily must declare the Flathead Compact void.

The Compact Parties did not comply with the requirements of MCA 85-2-702 (3). The Flathead Compact was not approved by the state legislature by July 1, 2013. As a consequence, the reserved water rights claimed by the CSKT must be filed with the department. Furthermore, pursuant to MCA 85-2-221 (3) (f), those claims are subordinate to all water rights for which a timely, valid claim has been filed. The Court must declare the Flathead Compact void.

The Compact Parties ask the Court to make inconsistent presumptions. They ask the Court to presume that the setting aside of land for the Flathead Reservation included all the water on such lands. They also ask the Court to presume that when they "ceded, relinquished and conveyed all their right, title and interest," Hellgate Treaty, Article I, in the lands not included in the reservation, that they did not give up therewith their rights to all waters on the ceded land. These presumptions are inconsistent. Pursuant to Rule 301 (c) of the Montana Rules of Evidence, the Court should either disregard both or apply the presumption with weightier considerations of public policy. Either choice requires that the Court declare the Flathead Compact void.

The Flathead Compact violates Article VIII of the Hellgate Treaty which is a pledge by the confederated tribes of Indians to "commit no depredations upon the property of such citizens (U.S. Citizens)." The Flathead Compact harms the property of non Indian U.S. Citizens in

several ways. The Flathead Compact does not protect all valid existing water uses. When non Indians purchased land from Indians, the Winters water right, along with its "as of the date of creation of the reservation" priority date, being appurtenant to the land, passed to the non Indian purchaser. Colville Confederated Tribes v. Walton, 647 F.2d 42, 49-51 (9th Cir. 1981).

Nonetheless, the Flathead Compact does not provide for the recognition or protection of these Walton water rights. Similarly, the Flathead Compact provides no protection for non Indian irrigators who use surface water or more that 1000 gallons per minute of groundwater. Also, the Flathead Compact provides no protection for junior water rights which are subject to call. These are all depredation upon the property of non Indian U. S. Citizens, and as such, are violations of Article VIII of the Hellgate Treaty. This warrants the Court voiding the Flathead Compact.

The Flathead Compact is contrary to Montana Public Policy. Montana owns all the "surface, underground, flood and atmospheric waters within the boundaries of the state for the use of its people." Montana Constitution, Article IX Section 3(3). The reserved water rights commission was created in 1979 by MCA 2-15-212, to fashion compacts that provide "equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state." MCA 85-2-701 (1). It is the policy of the state to make use of the water to the "maximum benefit of its people." MCA 85-2-101 (3).

The Flathead Compact provides for the water interests of the 15,560 Confederated Salish & Kootenai Tribes (CSKT) members with 7000 living on or near the Flathead Reservation. Only 22% of the people who live on the Flathead Reservation are tribal members. Yet, pursuant to the Flathead Compact, these 22% would control virtually all the water on the reservation, leaving the 78% non Indian Montana citizens at their mercy. This is not fair or equitable. It is similarly not

fair or equitable to those 437,927 Montanans who live on the ceded lands, to have less than 1% of the population of the state of Montana control nearly all of the surface waters on the ceded lands. It is not to the maximum benefit of the people of Montana. This violation of Montana public policy requires that the Court void the Flathead Compact.

II. ARGUMENTS

1. The Flathead Compact Uses the Wrong Priority Date for the Winters Rights.

The Compact Parties acknowledge, at page 10 of their Memorandum in Support of the Motion for Approval of the Flathead Reservation-State of Montana-United States Compact and for Summary Judgment Dismissing all Remaining Objections (hereinafter Memorandum), that the case law indicates that the priority date for Winters reserved water rights is the date the reservation was created. Citing, Montana ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 Mont. 76, 51, 49-712 P.2d 754 (1974). Nonetheless, the date claimed in the Flathead Compact, is not the date of creation of the reservation, but rather the date the preliminary treaty was signed, i.e., July 16, 1855. In footnote 18 of their Memorandum, at pp 10-11, the Compacting Parties justify this error by stating that there are other compacts with the Winters reserved rights priority date designated as the date that the preliminary treaty was signed. There is no analysis as to whether those treaties have a relation back clause or as to whether that date was ever challenged.

Nonetheless, it is clear from the language of the Hellgate Treaty, that the Flathead Indian Reservation was not created until the treaty was ratified. Article XII of the treaty states: "This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and the Senate of the United States." It was ratified by the Senate on March 8, 1859,

and by the President James Buchanan on April 18, 1859. Consequently, the Flathead Reservation was created on April 18, 1859. As a matter of law, April 18, 1859, is the priority date of the Tribe's Winters reserved water rights.

This Court is obligated to "interpret the law (here, the treaty) according to its text and history." Arizona v. Navajo Nation, 599 U.S. ___, slip op at 10 (2023). The Hellgate Treaty clearly states that it becomes obligatory upon the parties as soon as it is ratified. There is no relation back language. Indeed, the Hellgate Treaty makes several references therein to the date of ratification, including the date the payments were to start for the ceded land, Article IV, the promise to build schools, etc., within a year of ratification, Article V, and payment for the public service of the head chiefs of \$500 a year, to begin after ratification, Article V.

As noted by the Compact Parties, at page 18 of their Memorandum, "This Court may only approve the Contract or declare it void." Because the Flathead Compact has the wrong priority date for Winters reserved water rights, this Court is obligated to declare the Flathead Compact void.

2. The Compact Parties Fail to Quantify Winters Reserved Water Rights.

a. The Compact Parties fail to establish the purpose for which the Flathead Reservation was formed. The United States Supreme Court in Arizona, at slip op at 2, states that "reserved water rights" is "a shorthand for the water rights implicitly reserved to accomplish the purpose of the reservation." Citing, Cappaert v. United States, 426 U.S. 128, 138 (1976) and Winters v. United States, 207 U.S. 564, 576-577 (1908). Consequently, as a condition precedent to determination of the extent of the Winters reserved water rights, the purpose of the reservation must be ascertained. However, nowhere in the 72 pages of the Compact Parties' Memorandum is

there even a mention of the purpose for which the Flathead Reservation was created. This is a fatal flaw. Without the determination of the purpose of the Flathead Reservation, as a matter of law, the Court cannot quantify the Winters reserved rights and consequently, must declare the Flathead Compact void.

To determine the purpose of the Flathead Reservation, the Court must look to the language of the Hellgate Treaty. The Hellgate Treaty indicates that the main purpose of the Flathead Reservation was to confine the Indians to the reservation and keep them from killing U.S. citizens or harming their property. The secondary purpose of the Flathead Reservation was to assimilate the Indians.

The Indians had been hostile to the Montana settlers. Treaties were entered into to confine the Indians to reservations and to insure the safety of settlers and their property. In the Hellgate Treaty the Indians give up their claim to all lands they had hunted and gathered upon, Hellgate Treaty, Article I, except those lands designated as the Flathead Reservation, Article II. Article VIII requires that the confederated tribe of Indians "promise to be friendly with all citizens thereof (the United States) and pledge themselves to commit no depredations upon the property of such citizens."

Up until the ratification of the Hellgate Treaty, the Salish, Pend d' Oreille, and Kootenai had enjoyed a nomadic hunter-gatherer lifestyle. The Hellgate Treaty, not only confined them to the boundaries of the Flathead Reservation, it also made provisions to transform them into settlers, similar to the non-Indian settlers. To accomplish this, the Hellgate Treaty, in Article V, made provisions for an "agricultural and industrial school" which included building a school and providing teachers, furniture and books. Article V also provided for the building of a blacksmith

shop, a carpenter's shop, a wagon and a ploughmaker's shop and a sawmill. Article V also provided for the hiring of "two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for instruction of the Indians in trades, and to assist them in the same." Article V also provided for the construction of a hospital along with the hiring of a physician, and providing necessary medicine and furniture.

The treaty indicates that the provision of the Article V construction and services would not continue indefinitely. The schools, hospital and maintenance of the building, and providing of staff, however would only be for a period of twenty years after ratification. The payment for the head chiefs, for their public service work, of \$500 per year after ratification, Article V, similarly would be in effect for only 20 years. Similarly, the payments of \$120,000 for the ceded land, Article IV, would be made over a period of 20 years. The first year after ratification; \$36,000, next four years; \$6000, next five years; \$5000, next five years; \$4000, and finally, last five years \$3000. The amounts gradually decreased, which indicates the intent that the Indians would become assimilated and thereby self sufficient and consequently would need less and less government assistance. This indicates that the intention of the treaty was that within twenty years the Indians would be self sufficient farmers or tradesmen and would no longer need any assistance from the United States government.

Article VI of the Hellgate Treaty, provides for individual Indians or Indian families to become owners of land on the same terms as provided in the sixth article of the Treaty with the Omahas. Article 6 of the Treaty with the Omahas provides for assigning lots, and thereafter title, to Indians willing to locate thereon as a permanent home, a single Indian, 80 acres; a family of two, 160 acres; a family of three to five; 320 acres, a family of six to 10; 640 acres; and families

over 10; 160 acres for each additional 5 members. The residue of the reserved land, after the Indians were assigned permanent homes, "may be sold for their benefit." Treaty with the Omaha, 1854, Article 6. Hence the non-Indian ownership of land on the Flathead Reservation.

The General Allotment Act of 1887 was designed, inter alia, to effectuate Article VI of the Hellgate Treaty. "The purpose of this act was the assimilation of of them (Indians) in non-Indian culture and society." Colville Confederated Tribes v. Walton, 647 F.2d 42, 49 (9th Circuit 1981). It's primary sponsor, Senator Dawes, explained that "the quicker (the Indian) is mingled with the whites in every particular the better it will be." Report of the Secretary of Interior, *Proceeding of Mohonk Lake Conference*, H.R. Exec. Doc. No. 75, 49th Cong., 2d Sess. 992 (1887). Id.

b. The Compact Parties fail to determine the water needed to accomplish the purpose of the Flathead Reservation, i.e. Winters reserved water rights. Based upon the language of the Hellgate Treaty, one of the purposes of the treaty was to protect the settlers and their property from harm by the Indians. The other was to turn the Indians into farmers, gunsmiths, blacksmiths, tanners, carpenters, and wagon and plough makers, i.e., assimilate them. The Court must determine the water needed for these purposes, i.e., waters for irrigation and water needed to run the various businesses.

As a matter of law, here, the text of the Hellgate Treaty, the purposes for which the Flathead Reservation was created do not require all the on reservation water listed on page 14 of the Memorandum including, inter alia, "water rights for wetlands, high mountain lakes, Flathead Lake, or the Boulder and Hellroaring hydroelectric projects." Similarly, the waters needed for irrigation on the reservation, or for gunsmith, blacksmith, tinner, carpenter and wagon and

plough making businesses i.e., the reasons for which the Flathead Reservation was created, do not require the claimed off reservation water rights listed on pages 14-15 of the Memorandum, inter alia, 1. water rights to waters of "Flathead Lake, the Flathead River, the South Fork of the Flathead River and water stored in the Hungry Horse Reservoir" which the CSKT "may lease . . . for use on or off the Reservation;" 2. in stream flow and water for "recreation purposes in the Bitterroot Basin, Blackfoot Basin, and Rock Creek Basin;" and 3. "water right formerly associated with the Milltown Dam."

As a prerequisite for a priority date as of the date of creation of the reservation, the Court must require the Compact Parties show that the claimed water rights are for water necessary to accomplish the purpose for which the reservation was created. Arizona v. Navajo Nation, 599 U.S. ___, slip op at p 2 (2023). All claimed water rights that do not come within the purview of the purpose of the Flathead Reservation pursuant to the Hellgate Treaty, must be given a priority date as of the date that use began, like all other non Winters reserved rights in Montana. See MCA 85-2-224, MCA 85-20221(3), MCA 85-2-702 (3), and MCA 85-2-228 (2).

The Compact Parties just assume, without any analysis, that all the water rights they claim are Winters reserved rights. This assumption that all claimed water rights are necessarily Winters reserved water rights, is contrary to the case law which specifically includes only water required "to accomplish the purpose of the reservation" as Winters reserved water rights. Arizona v. Navajo Nation, 599 U.S. ___, slip op at 2 (2023). Not having distinguished Winters reserved water rights from non Winters reserved water rights is a fatal flaw requiring the Court to declare the Flathead Compact void.

c. The Compact Parties fail to provide sufficient legal basis for their claim of off reservation water rights. The United States Supreme Court in Arizona v. Navajo Nation, 599 U.S. ____, slip op at 4 (2023), states: "The Federal Government's reservation of land for an Indian tribe implicitly reserves the right to use needed water from various sources--such as ground water, rivers, streams, lakes, and springs--that arise on, border, cross, underlie, or are encompassed within the reservation. " The Supreme Court reiterated that the Winters reserved water would come from on reservation sources when it stated: "the Tribe has the right to use needed water **on the reservation.**" (Emphasis added). Id., slip op at 6.

In 1979 the Montana Legislature added Part 7, to Chapter 2, Surface and Ground Water, of Title 85, Water Use. Part 7, is captioned, "Indian and Federal Water Right -- Water Rights Within Indian Reservations." "Water Rights Within Indian Reservations" indicates the legislative intent that the water rights claimed by by Indians would be for water "within Indian Reservations."

Even though the Supreme Court and the Montana Legislature, made it clear that the reserved water rights are rights to **on reservation** water sources, the Flathead Compact, nonetheless, includes a substantial claim of rights to **off reservation** water, including, inter alia, water from the Flathead River, the South Fork of the Flathead River, and water stored in Hungry Horse Reservoir that the CSKT may also lease this water for use on or off the Reservation, Memorandum at p 14, and in stream flow and recreation purposes in the Bitterroot Basin, Blackfoot Basin, and Rock Creek Basin, and water rights formerly associated with the Milltown Dam. Memorandum at p 15.

The Compact Parties fail to address the clear meaning of the language of the Hellgate Treaty, Article 1, that states: "The said confederated tribe of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows." The treaty goes on to describe that portion of Montana which is west of the Continental Divide. "All their right, title, and interest" in the ceded land would necessarily include their "right, title and interest" in the waters of those ceded lands. Nonetheless, the Compact Parties's claim of **off reservation** water, is waters located in those ceded land to which they had given up all right, title and interest. The waters on the ceded lands cannot, as a matter of law, i.e., the Hellgate Treaty, be included in the Winters reserved water rights.

The Compact Parties' claim to **off reservation** water is based solely upon the reference to fishing in the Hellgate Treaty, Article III which grants: "the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory." Memorandum at p 50. The Compact Parties rely on cases involving the Yakima Nation which is well known for its tradition of trading Salmon harvests from annual runs in the Columbia River, in which the courts acknowledged Yakima Nation's rights to water sufficient for the salmon to spawn and otherwise to protect the salmon runs. See Memorandum at pp 51-52.

The Compact Parties then aver that the Yakima Nation cases are "sound precedent" for the Court to interpret "the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory" in Article III of the Hellgate Treaty, to grant "the CSKT water rights to off-reservation in stream flow." Memorandum at p 53. There is no limit put on this claimed right of in stream flow. Their claimed water right is not limited, as was the case with the

Yakima Nation cases, in which the courts held that there should be enough water released from the dams to protect the salmon fishery. In the case at bar, the Compact Parties, not only do not identify what fish that are being taken from the off reservation streams, so that the water necessary to protect the identified fish can be assessed, they do not identify the "usual and accustomed places, in common with the citizens of the Territory." Indeed, there is only a bald claim to a right to all in stream flows of waters that run through the ceded lands. Memorandum at p 53.

The Compact Parties then further stretched this argument beyond all recognition. They argue that because Courts have allowed for the protection of salmon runs for the Yakima Nation who traditionally fished for salmon, that this somehow forms the basis for their claim to all off reservation water rights. See Memorandum at pp 50 & 53. They do not mention that most, if not all, of their off reservation water claims have absolutely nothing to do with the unidentified off reservation fishing sites. They give no basis whatsoever for a right to claim, for example, water from Flathead Lake, the Flathead River, the South Fork of the Flathead River, and water stored in the Hungry Horse Reservoir that may be used by the CSKT or leased for on or off reservation use. Memorandum at 14. Similarly, there is no explanation as to how they can justify a claim of co-ownership with Montana Fish, Wildlife, and Parks of in-stream flow and waters for recreation purposes in the Bitterroot Basin, Blackfoot Basin and Rock Creek Basin, or the water rights associated with the Milltown Dam. Memorandum at 15.

There being no basis in the law for the claims of off reservation water rights, the Court should declare the Flathead Compact void.

3. The Compact Parties Failed to Comply with MCA 85-2-212 and MCA 85-2-702.

a. MCA 85-2-212. Nowhere in their Memorandum, do the Compact Parties address the impact of MCA 85-2-212 on their claim in the Flathead Compact of Winters reserved water rights. MCA 85-2-212 is a Montana Supreme Court order which mandates that **all** water right holders with a priority date that is before July 1, 1973, **must** file a claim of such water right, before June 30, 1983. This deadline was extended to July 1, 1996, by MCA 85-2-221 (3). Reiterated in MCA 85-2-221 (1). Pursuant to the Montana Supreme Court Order, failure to file such claim **shall** result in a conclusive presumption that the claim had been abandoned. MCA 85-2-212. Reiterated in MCA 85-2-226 referencing MCA 85-2-221(1)..

These statutes were enacted after the ratification, on June 6, 1972, of Montana's Constitution which includes Article IX, Section 3 (3) which states: "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Article IX, Section 3 (4) of the Montana Constitution states: "The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records."

MCA 85-2-212 specifically states that the requirement to file a water right claim, as well as the consequences for not doing so, apply to "federal agency of the United States of America on its own behalf or as a trustee for any Indian or Indian tribe, asserting a claim to an existing right to the use of water prior to July 1, 1973." Montana set up a compact commission in 1979 to assist the tribes in claiming their water rights. MCA 2-15-212.

As a matter of Montana law, the CSKT was required to file its pre July 1, 1973 Winters reserved water right claim before July 1, 1996. Failure to do so would result in a conclusive

presumption that the claim had been abandoned. Nonetheless, the Compact Parties make no mention whatsoever as to their compliance with the requirements of MCA 85-2-212. Had they complied with MCA 85-2-212, they surely would have indicated as such. The Court can safely conclude that there was no compliance. As a matter of Montana law, the Court must declare that the CDKT's claim of pre July 1, 1973 Winters rights is conclusively abandoned.

The rights that the CSKT can claim, in that its Winters reserved rights are abandoned, are appropriation rights based on actual use. See MCA 85-2-228 (2) which states that federal reserved water rights with a priority date of July 1, 1973, or later are "subject to the claim filing requirements of the state water adjudication system provided for in Title 85, chapter 2, parts 2 and 7." See also, Arizona v. Navajo Nation, 599 U.S. ____, slip op at 12 (2023), in which the Supreme Court stated, with regard to the Navajo Nation's claim of water rights which the Court had held were not included in their Winters reserved rights: "In addition, the Navajos may be able to assert the interests they claim in water rights litigation, including by seeking to intervene in cases that affect their claimed interests, and courts will then assess the Navajos' claims and motions as appropriate."

Because the Flathead Compact was not filed with the Water Court by July 1, 1996 , as required by MCA 85-2-212, as a matter of Montana law, the water rights contained therein can have no priority date prior to July 1, 1973. The Court must declare the Flathead Compact void.

b. MCA 85-2-702.

Title 85, Chapter 2, Part 7 deals specifically with "Indian and Federal Water Rights -- Water Rights Within Indian Reservations." MCA 85-2-702 deals with reserved water rights compact negotiations with the Indian tribes or their authorized representatives. MCA 85-2-702

(3) provides that if the compact has not been approved by the state legislature and the tribe by July 1, 2013, "all Indian claims of reserved water rights that have not been resolved by compact **must be filed with the department within 24 months,**"(emphasis added) i.e., by July 1, 2015. Furthermore, these new filings "must be given treatment similar to that given to all other filings." MCA 85-2-702 (3).

MCA 85-2-221 deals with the filing of claims for existing water rights including the filing of late claims. Pursuant to MCA 85-2-221 (f) (i), unless a claim of existing water rights is filed by April 30, 1982, and received by the department on or before May 7, 1982, the right represented in the claim is "subordinate to" "rights represented in all valid, timely filed claims."

As indicated in the Memorandum at p 26, the Compact Parties have been working on the compact beginning as early as 1979. Nonetheless, they did not meet the July 1, 2013 completion requirement of MCA 85-2-702 (3). MCA 85-2-702 (3) then mandates that "all Indian claims for reserved water rights" that have not met this deadline, "must be filed with the department within 24 months." This mandate was not complied with by the Compact Parties. The statute does not state the consequence of such noncompliance. It does indicate, however, that the filings of claims of reserved water rights after July 1, 2013, will be treated like all other filings, including that the reserved water rights claimed by the Compact Parties would be subordinate to the rights of all valid, timely filed claims. MCA 85-2-221 (f) (i).

The water rights claimed by CSKT, pursuant to MCA 85-2-702 and MCA 85-2-221, are subordinate to all water rights that were timely filed. Consequently, the Flathead Compact cannot have a priority date that is prior to any timely filed water right. The Court must declare the Flathead Compact void.

4. The Compact Parties Make Inconsistent Presumptions.

The Compact Parties ask the Court to presume that when the Flathead Reservation was set aside by the Hellgate Treaty that the land included essentially **all** the waters on the Flathead Reservation. The Compact Parties also ask the Court to presume that when the Confederated Salish and Kootenai Tribe "ceded, relinquished and conveyed " "all their right, title, and interest" in the land surrounding the Flathead Reservation, Article I of the Hellgate Treaty, that they did not thereby give up their rights to water on those lands. Indeed, in the Flathead Compact, they are making claims to substantial amounts of water on the ceded lands. These presumptions are inconsistent.

Rule 301 (2)(c), Inconsistent Presumptions, of the Montana Rules of Evidence, states:

If presumptions are inconsistent the court shall apply the presumption that is founded upon weightier considerations of public. If considerations of public policy are of equal weight the court shall disregard both presumptions.

The Compact Parties argue that the presumption that rights to essentially **all** waters on the Flathead Reservation were reserved for the CSKT pursuant to the Winters doctrine. The Winters doctrine, however, only reserves the water necessary to carry out the purpose of the reservation, not **all** the water on the reservation, especially, where, as here, the United States allowed non-Indian homesteaders to settle on the Flathead Reservation. Indeed, presently 78% of the population on the Flathead Reservation is non-Indian.

The Compact Parties provide no support whatsoever for their request for the presumption that although they "ceded, relinquished and conveyed" "all their rights, title and interest" to off-reservation land, they nonetheless kept/reserved whatever waters they decided they wanted some 165 years later. They want their cake and to eat it too.

Whichever course the Court takes, i.e., the Court, as required by Rule 301 2(c), may disregard either or both of these inconsistent presumptions, the Court is compelled to void the Flathead Compact.

5. The Flathead Compact Violates Article VIII of the Hellgate Treaty.

The Hellgate Treaty provides in Article VIII, that the confederated tribes of Indians "promise to be friendly with all citizens thereof (United States), and pledge themselves to commit no depredations upon the property of such citizens." The Flathead Compact commits depredation upon, inter alia, the property of the non-Indian property owners on the Flathead Reservation. The Compact Parties admit to several depredations upon the property of non Indians in their Memorandum.

Walton rights are the water rights of non-Indians who purchased lands from Indians who had been granted a deed to land on the Flathead Reservation pursuant to Article VI of the Hellgate Treaty. Those purchasers have a right to use Winters reserved water rights with a priority date, the date of creation of the Reservation. This is known as Walton rights. Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (9th Cir. 1981). See, also, Memorandum at p 47. The Compact Parties admit that the Flathead Compact does not address or otherwise protect the water rights of those non Indian landowners on the Flathead Reservation who possess Walton rights. Memorandum at p 48. This is a depredation upon the property of a citizen in violation of Article VIII of the Hellgate Treaty and sufficient cause to void the Flathead Compact.

At page 53 of the Memorandum, the Compact Parties state that "the Compact includes provisions that will protect **many** valid existing uses of water." Emphasis added. Thusly, the Compact Parties admit that there will be **some** valid existing uses of water that will not be

protected by the Flathead Compact. If there is even **one** valid existing use of water that is not protected by the Flathead Compact, that is a violation of Article VIII of the Treaty of Hellgate. That is sufficient cause to void the Flathead Compact.

The attitude of the Compact Parties is exemplified by their statement: "The fact that some irrigators using surface water or more than 1000 gallons per minute of groundwater are not so protected does not render the Compact, or the Decree implementing it unfair." Memorandum at p 53. Clearly, they believe that "fairness" is in the eye of the beneficiary. If it is good for CSKT, then it is fair. It doesn't matter if it is detrimental to non Indians. Irrespective of the "fairness" argument, this statement amounts to an admission that the Flathead Compact commits a depredation upon the water rights, and thereby the property, of these non Indians. This is sufficient cause to void the Flathead Compact.

Similarly, the Compact Parties cavalierly state in their Memorandum at p 55, "the possibility that some junior water rights may be subject to a CSKT call is not an unconstitutional taking of those junior rights." Notwithstanding whether this amounts to a taking, the water right of a non Indian being subject to call is a depredation of the property of non Indians which is prohibited by the Treaty of Hellgate, Article VIII, and requires that the Court void the Flathead Compact.

According to the Office of the Governor, Indian Affairs website, The Flathead Reservation is home to 30,849 people. There are 7000 tribal members who live on or near the reservation. Thus, about 22% of the population on the Flathead Reservation is Indian. 78% is non-Indian. The Flathead Compact gives the power to control all the water on the reservation to 22% of the population, leaving the remaining 78% of the population at the mercy of the CSKT.

The Court should attend closely to the objections of those among the 78% non Indian population as to the ways in which the Flathead Compact will negatively affect their property on the Flathead Reservation. The Court will thereby have plenty of evidence that the Flathead Compact will commit depredation upon the property of non Indian Montanans, in violation of Article VIII of the Hellgate Treaty, and void the Flathead Compact.

6. The Flathead Compact is Contrary to Montana Public Policy.

The legislative intent when Montana created the reserved water rights compact commission in 1979 was to create compacts that provided for "the **equitable** division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state." (Emphasis added.) MCA 85-2-701 (2). This is consistent with the Montana Legislature's Declaration of Policy and Purpose in enforcing Article IX of the Montana Constitution. MCA 85-2-101 (1) states: "Pursuant to Article IX of the Montana Constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by this chapter."

Montana Constitution, Article IX includes Section 1 Water Rights, (3), which provides: "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." MCA 85-2-101 (3) declares as a policy and purpose, to make use of the waters of the state "to the maximum benefit of its people."

According to the office of the Governor, Indian Affairs website, there are 15,560 members of the CSKT. 7,000 of them live on or near the Flathead Reservation. The 2024

population of the state of Montana is 1,132,812. The population of the nine counties which were part of the ceded lands, i.e., Flathead, Lake, Lincoln, Missoula, Sanders, Lewis & Clark, Powell, Granite, and Ravalli, is 437,927. The 7,000 tribal members who live on or near the Flathead Reservation is .6% of the population of the state of Montana. It is 1.6% of the population of the nine ceded counties.

The public policy of Montana requires "equitable" division of the water rights between "the state and its people and the several Indian tribes claiming reserved water rights." MCA 85-2-701 (1). Equitable, according to the Merriam-Webster, on line dictionary, means: "dealing fairly and equally with all concerned." The waters granted to the CSKT in the Flathead Compact is not a fair and equal division of the water. Pursuant to the Flathead Compact, 1.6% of the population of the nine ceded counties are granted nearly all the surface water in those nine counties. This would leave little to no surface water rights for the other 98.4% of the people who actually live in those nine counties. That is not a fair and equal division of the waters of the State of Montana. Furthermore, this huge granting of surface water rights to less than one percent of the population of the state of Montana does not provide for "maximum benefit" to the people of the state of Montana as required by MCA 85-2-101 (3). The Court should declare the Flathead Compact void.

III. CONCLUSION

Based upon the arguments above and those set forth in Objector Carter's Memorandum in Support of Motion for Summary Judgment, the Court should declare the Flathead Compact void.

Dated this 3rd day of September, 2024.

OBJECTOR MICKALE CARTER

/s/ Mickale Carter
MICKALE CARTER
Bar number 2594
pro se

CERTIFICATE OF SERVICE

I declare under penalty of perjury, that I emailed a true and accurate copy of the foregoing document, on September 3, 2024, to the following email addresses:

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/s/ Mickale Carter September 3, 2024