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IN THE WATER COURT OF THE STATE OF MONTANA

CONFEDERATED SALISH AND KOOTENAI TRIBES-MONTANA-UNITED STATES COMPACT

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CASE NO. WC-0001-C-2021

MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW, Vivian Allen, *Pro Se* Objector, and submits this Motion and Memorandum in support of Motion for Summary Judgment. Objector Allen moves the Montana Water Court to reject the Water Compact of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana and the United States, (hereinafter Flathead Compact) based on several grounds. Each ground alone is sufficient to require rejection.

A. SUMMARY OF THE ARGUMENTS

The grounds that require rejection of the Flathead Compact are:

1. The priority date of July 16, 1855, for water rights granted in the Flathead Compact is unsupported by the language of the Treaty with the Flatheads, &c. July 16, 1855, aka, Treaty of Hell Gate, 1855, in that the treaty did not become effective until it

was ratified on April 18, 1859.

2. The reserved water rights, i.e., *Winters* doctrine rights, is only of that water which is necessary for the activities described in the Treaty of Hell Gate, 1855.

3. Only the uses that were in place as of the creation of the Treaty of Hell Gate, 1855, are reserved water rights with a priority date of April 18, 1859.

4. The confederated tribe, pursuant to the Treaty of Hell Gate, 1855, gave up all claims to water in the ceded lands, which includes all the off reservation water described in the Flathead Compact.

5. When Montana became a state on November 8, 1889, all waters of the state of Montana became controlled by the state of Montana for public use, and as such, the Confederated Tribe's *Winters* doctrine/reserved water rights are only the rights the Confederated Tribe had as of November 8, 1889.

6. When the federal government granted title to land to non-Indians on the Flathead Reservation, the *Winters* doctrine water rights passed with the land.

7. All pre-July 1,1973 water rights claimed by the confederated tribe in the Flathead Compact, including, but not limited to, reserved water rights, that were not properly claimed by July 1, 1996, are deemed by the Montana Supreme Court to be abandoned rights and consequently cannot have a priority date prior to July 1, 1973.

8. The Treaty of Hell Gate, 1855's prohibition on damaging property of citizens requires rejection of the Flathead Compact.

9. The Flathead Compact violates Montana law in the following ways:

a. The Flathead Compact does not provide for equitable division and apportionment.

b. The Flathead Compact provides no showing that the water rights granted therein do not negatively impact prior appropriators.

c. There is no requirement in the Flathead Compact that there be a showing of

actual use of the water rights granted therein.

10. The Flathead Compact violates *ex post facto* laws to the extent it impacts current water rights.

The Montana Water Court should reject the Flathead Compact. Thereafter, each separate claim for a water right contained therein should be adjudicated, applying the same standards that the Montana Water Court applies to all claims for water rights within the State of Montana. Furthermore, the priority date should never be earlier than the date that actual use began.

B. BACKGROUND INFORMATION

1. ARIZONA V. NAVAJO NATION

The United States Supreme Court in *Arizona v. Navajo Nation*, 599 U.S. ___ (2023), dealt with the question of whether the United States had an affirmative duty under the treaty of 1868 to take steps to secure water for the Navajos. In deciding that the United States does not have an affirmative duty to secure water for the Navajos, the Supreme Court examined "reserved water rights," i.e., water recognized pursuant to *Winters v. United States*, 207 U.S. 564, 576-577 (1908). In *Winters*, the Supreme Court determined that even though a treaty did not mention water rights, as is the case with the Treaty of Hell Gate, 1855, there are nonetheless water rights that were intended to be included therein.

The Supreme Court in *Arizona v. Navajo Nation* held that the language "reserved water rights" is "shorthand for the water rights implicitly reserved to accomplish the purpose of the reservation." *Arizona v. Navajo Nation*, (slip op at 2), citing both *Winters* and *Cappaert v. United States*, 426 U.S. 128, 138 (1976). In its analysis the Court stated, applying the *Winters* doctrine, that "Under the *Winters* doctrine, the Federal Government reserves water only 'to the extent needed to accomplish the purpose of the reservation.'" (emphasis added) *Id*. (slip op at 4), citing *Sturgeon v. Frost*, U.S. ____,

____ (2019) (slip op at 13) and *United States v. New Mexico*, 438 U.S. 696, 700-702 (1978).

In *Arizona v. Navajo Nation*, the Supreme Court looked to the language of the treaty to determine obligations under the treaty. The Court held that federal courts "must adhere to the text of the relevant law--here the treaty." The Court also stated, citing *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943), "Indian treaties cannot be rewritten or expanded beyond their clear terms." *Arizona v. Navajo Nation*, (slip op at 8-9). The Court further held that "it is not the Judiciary's role to rewrite and update this 155-year-old treaty." *Id*.

Finally, the Court noted, "it is not surprising that a treaty ratified in 1868 did not envision and provide for all the Navajos' current water needs 155 years later, in 2023." *Id*. (slip op at 10). The Court then noted that tribes seeking more water rights than covered by the *Winters* doctrine, "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." *Id*. (slip op at 12).

2. THE TREATY OF HELL GATE, 1855

Pursuant to the terms of the Treaty with the Flatheads, &c. July 16, 1855, aka, Treaty of Hell Gate, 1855, the 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 . . ." Article I, Exhibit B at p 1. The treaty goes on to describe a great swath of land which was ceded, relinquished and conveyed with all rights, title and interest that includes, *inter alia*, the Flathead Valley, and the Flathead River drainage area. See Exhibit A. (Attached to the Eighteenth Annual Report of the Bureau of American Ethnology, 1899.) The land designated as 373 is the land ceded by the confederated tribe.

From this ceded land, Article II, Exhibit B at pp 1-2, reserved lands were to be set apart "for the exclusive use and benefit of said confederated tribes as an Indian reservation." These reserved lands are known as the Flathead Reservation. The land designated as 374 is the Flathead Reservation. Exhibit A.

Article III, Exhibit B at p 2, gave to the confederated tribes "exclusive right of taking fish in all the streams running through or bordering said reservation . . ." It also gave the right to the Indians "of taking fish at all usual and accustomed places, in common with citizens of the Territory . . ." *Id*.

Article IV, Exhibit B at pp 2-3, describes what the United States will give to the tribes in exchange for the cession of land and all the associated rights thereto. The United States agreed to pay the confederated tribes of Indians $120,000 over a period of 20 years. In addition to this payment of $120,000, in Article V, Exhibit B at p 3, the United States, *inter alia*, agreed to build a school and provide for free education for Indian children. It also agreed to build and furnish a variety of shops, including blacksmith, carpenter, plough makers, etc. It also agreed to erect a sawmill and a hospital. The United States agreed that it would keep everything it build in repair and provide employees to carry out these provisions for a period of twenty years.

Article V, Exhibit B at p 3, also required that the United States pay each of the tribes subject to the treaty, $500 dollars per year for a period of 20 years to be paid as a salary to the chief of each tribe and to erect "a comfortable house, and properly furnish the same and to plough and fence for each of them ten acres of land."

Article VI, Exhibit B at p 3, provides that the President of the United States may assign lots, on the reservation land to tribal individuals and families subject to the same regulations as provided in the sixth article of the Treaty With The Omaha, 1854. Exhibit D at pp 2-3. In addition to laying out the requirements for tribal members to obtain and continue to own a patent on the land, Article 6 of the Treaty With The Omaha, 1854,

Exhibit D at p 3, states that the remainder of the land may be sold for their benefit. Article VII, Exhibit B at p 3, provides that the annuities paid to the confederated tribes of Indians shall not be taken to pay the debts of individuals.

Article VIII, Exhibit B at pp 3-4, states that the "aforesaid confederated tribes of Indians acknowledge their dependence upon the Government of the United States."

Article VIII goes on to state that the confederated tribes 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." Exhibit B at p 3. Article VIII further provides that "the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of annuities." *Id*.

Article IX, Exhibit B at p 4, deals with excluding alcohol from the reservation. Article X, Exhibit B at p 4, protects the confederated tribes of Indians from certain claims made by the Hudson Bay Company. Article XI, Exhibit B at p 4, states the possibility that the Bitter Root Valley may be a better alternate site for the reservation to be determined by the President of the United States. Article XII, Exhibit B at p 4, states that the 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 Stated." It was ratified by the Senate on March 8, 1859, and Proclaimed/Signed by President James Buchanan on April 18, 1859. Exhibit B at p 5.

C. GROUNDS FOR REJECTING THE FLATHEAD COMPACT

1. The priority date of July 6, 1855 for all the water rights granted in the Flathead Compact, is unsupported by the language of the Treaty of Hell Gate, 1855.

The Flathead Compact sets the priority date for all the water rights allowed by the Compact as July 16, 1855, as the date the Treaty with the Flatheads, &c. 1855, aka The Treaty of Hell Gate, 1855, was agreed to by Superintendent of Indian Affairs Isaac

I. Steven and the confederated tribes. However, by the terms of the agreement, the Treaty of Hell Gate, 1855, did not become obligatory upon the contracting parties until April 18, 1859, the date it was signed by President Buchanan. Article XII, Exhibit B at p 4, 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 signed by President Buchanan on April 18, 1859. *Id*. at p 5. Consequently, there should be no priority date on any water right whatsoever before April 18, 1859. Having the wrong priority date requires rejection of the Flathead Compact in its entirety.

2. The reserved water rights, i.e., *Winters* doctrine rights, is only of that water which is necessary for the activities described in the Treaty of Hell Gate, 1855.

Pursuant to *Arizona v. Navajo Nation*, because there was no mention of water rights in the Treaty of Hell Gate, 1855, the reserved water right, i.e., the *Winters* water rights that are deemed included in the treaty, is the water "needed to accomplish the purpose of the reservation." *Arizona*, 599 U.S. ____ (2023) (slip op at 2). The question then becomes: What was the purpose of the Flathead Reservation as set forth by the Treaty of Hell Gate, 1855? *Arizona v. Navajo Nation*, (slip op at 8-9) requires that we look to the language of the treaty to make this determination. Based on the language of the Treaty of Hell Gate, 1855, the purpose of the reservation was to confine the confederated tribes onto a tract of land, giving them the ability to have a subsistence lifestyle thereon, so that they would do no harm to the settlers in the area. See Exhibit B, Articles I, II, III, V, VI, and VII, at pp 1-4.

To determine the water needed to fulfill the purpose of the treaty, i.e., the water rights that would have a priority date of April 18, 1859, we must look to the language of the Treaty of Hell Gate, 1855. *Arizona v. Navajo Nation*, (slip op at 8-9). The Treaty of

Hell Gate, 1855, refers to: fishing in Article III, farming, fencing and building houses in Article IV; schools, hospital, tin and gun shop, carpenter shop, and wagon and plough maker's shops in Article V. Exhibit B at p 2-3. Consequently, the water rights the confederated tribe had, as conferred by the *Winters* doctrine, was enough water to provide for household use, whatever was needed to run the shops, as well as for fishing and farming for the Indian occupants on the Reservation as of April 18, 1859. Only those water rights have a priority date of April 18, 1859, the date of ratification of the Treaty of Hell Gate, 1855. The remainder of the water rights claimed in the Flathead Compact are not, pursuant to *Arizona*, *Winters* reserved water rights. Pursuant to Montana law, those water rights would have a priority date as of the date of actual use, once it is shown that such water right claimed will not adversely affect water rights of a prior appropriator. MCA 85-2-311 (1)b. In that the Flathead Compact does not distinguish between *Winters* reserved water rights and non-*Winters* reserved water rights, the Flathead Compact must be rejected.

3. Only the uses that were in place as of the creation of the Treaty of Hell Gate, 1855, are the uses that would have a priority date of April 18, 1859.

a. In *Winters* the uses of the land that were considered by the Supreme Court were uses that were in place as of May 1, 1888, the date the treaty was ratified, i.e., hunting, grazing and agriculture. *Winters v. United States*, 207 U.S. 564 (1908). See, also, *Arizona v. Navajo Nation*, slip op at 2, 4, 8-9, 10, and 12. By contrast, in the instant action, the uses being made of the water in the Flathead Compact are, *inter alia*, two hydroelectric dams, wetland preservation and even a claim to to 90,000 AFY (acre feet per year) of water to be stored in the Hungry Horse Reservoir, as well as any use whatsoever that a tribal member or the Tribe makes of the water and water used in modern irrigation practices. Of these, only irrigation of the land was even contemplated when the Flathead Reservation was created in 1859.

In interpreting the treaty, it is appropriate to consider what people knew/expected as of the time of the treaty. See, *Arizona v. Navajo Nation*, slip op at 8-9, holding that the courts must adhere to the relevant treaty, stating "Indian treaties cannot be rewritten or expanded beyond their clear terms." Consequently, the court must determine the uses to which water was being put as of the date of the treaty. Even in its 1908 opinion, the Supreme Court in *Winters* considered only what was the usual use of land as of that date, i.e., grazing, hunting and agriculture, definitely not hydroelectric dams and wetlands preservation and water to be stored in a Bureau of Reclamation dam constructed in 1953, 85 miles from the reservation, or modern irrigation practices. These uses are outside the purview of the *Winters* doctrine in that they were not contemplated in 1855, requiring rejection of the Flathead Compact which does not distinguish between *Winters* doctrine water rights and non-*Winters* doctrine water rights.

b. To hold that the penumbra of the 1855 treaty includes any and all uses whatsoever that the Confederated Tribe could ever contemplate, as is depicted in the Flathead Compact, would require the conclusion that the Indian Tribes in Montana have a claim to all the waters of the State of Montana with a priority date as of the date of their respective treaties. This would necessarily make Montana's becoming a State in 1889 a farce. Montana would essentially be a state, a state dependent on its waters, without any right to its waters. The only people of the state of Montana who would have enjoyment of the waters of the state would be the Reservation Indians. Being contrary to Montana's admission into the United States as a State on November 8, 1889, the Flathead Compact must be rejected.

4. The Confederated Tribe gave up all claims to water in the ceded lands, which includes all the off-reservation water described in the Flathead Compact.

When the confederated tribe of Indians ceded the land described in Article I of

the Treaty of Hell Gate, 1855, it ceded, relinquished and conveyed all right, title and, interest therein. See Article I, Exhibit B at p 1, which 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 . . . " See, Exhibit A. Area 373 is ceded lands which includes Area 374. Area 374 is the Flathead Reservation which is lands "reserved from the lands ceded, for the use and occupation of the said confederated tribe." Article II, Exhibit B at pp 1-2. When the confederated tribe of Indians ceded the lands, they ceded "all right, title and interest" to the water on those lands. To allow the confederated tribe to now claim the waters on those lands with a priority date as of the date of their ceding their interest in those waters, is a direct violation of the Treaty of Hell Gate, 1855. The Flathead Compact must be rejected.

5. When Montana became a state on November 8, 1889, all waters of the state of Montana became controlled by the state of Montana for public use, and as such, the Confederated Tribe's *Winters* doctrine/reserved water rights are only the rights the Confederated Tribe had as of November 8, 1889.

Montana became a state on November 8, 1889. In the 1889 Montana Constitution, § 15, the State of Montana claimed all water, "now appropriated, or that may hereafter be appropriated" in the state to be held for a public use. Exhibit C at 2. This was reiterated in the 1972 Montana Constitution, Article IX, Section 3. WATER RIGHTS. (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 appropriations for beneficial uses as provided by law. (Emphasis added.)

Consequently, the water rights that were granted to the confederated tribes pursuant to the *Winters* doctrine was only for the water usages that were in place as of November 8,1889. As of that date, all other waters of the great State of Montana were owned by the state to be held for a public use. Consequently, in order to

determine the reserved water rights the confederated tribe had pursuant to the *Winters* Doctrine, the water usage as of November 8, 1889 must be ascertained. That is the water rights the confederated tribe has with a priority date of April 18, 1859. Because the Flathead Compact did not make this determination, it must be rejected.

6. When the federal government granted title to land to non-Indians on the Flathead Reservation, the *Winters* doctrine water rights passed with the land.

The Constitution of the State of Montana, ORDINANCE NO. 1., 1889, Second, Exhibit C at pp 3-4, provides:

> [T]he people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all rights and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.

Ordinance No. 1., Second, did not in any way amend § 15 of the 1889 Constitution of the State of Montana that provides that all the waters of the state shall be held for a public use by the State of Montana. It merely dealt with title to the land. Consequently, the State of Montana controls/owns all waters in the state as of its date of admission as a state, November 8, 1889, including the waters on federal lands, including the waters on Indian Reservations.

Ordinance No. 1, Second, made it clear that the people of the state of Montana could not hold title to the lands on Indian Reservations within the state until or unless the United States had extinguished the Indian's or Indian Tribes' claim to the land. See also, Exhibit D at pp 2-3, Treaty of the Omahas, 1854, Article 6, to which the Treaty of Hell Gate, 1855 is subject, that also indicates that portions of the reservation may be sold. This is what happened with all the non-Indians who became owners of land on

the Flathead Reservation. See Openings and Sales of Indian Lands, Section (4) Flathead Indian Reservation, Mont., electronically filed, November 20, 2023, and 25 USC 404.

Consequently, another fatal flaw of the Flathead Compact, requiring it's rejection, is that it fails to address the *Winters* doctrine water rights, with the corresponding priority date of April 18, 1859, that passed with the land to those non-Indians who bought land on the Flathead Indian Reservation. See, *Schutter v. State of Montana Board of Land Commissioners*, ¶¶ 21-26, DA 23-0314, decided April 30. 2024, in which the Montana Supreme Court discusses how a water right becomes appurtenant to the land, and thereafter passes with the land.

7. All pre-July 1, 1973 water rights claimed by the Confederated Tribe in the Flathead Compact that were not properly claimed by July 1, 1996, are deemed by the Montana Supreme Court to be abandoned rights and consequently cannot have a priority date prior to July 1, 1973.

MCA 82-2-212 includes an order by the Montana Supreme Court. It provides that "every person" including "any Indian or Indian tribe" that claims "an existing right to the use of water arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the department no later than June 30, 1983." That date was extended to July 1, 1996, by MCA 85-2-221 (3). The Supreme Court order states in bold and all caps, "**FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ABANDONED**." To the extent the Flathead Compact contains therein claims for water rights with priority dates before July 1, 1973, that have not already been claimed pursuant to MCA 85-2-212, and MCA 85-2-221, such water rights are deemed conclusively abandoned. Those water rights, as a matter of law, cannot have a priority date prior to July 1, 1973.

Any and all water rights claimed in the Flathead Compact by the Confederated

Tribes that were not properly claimed pursuant to MCA 82-2-212 are deemed, as a matter of law, to be abandoned. That includes reserved water rights. MCA 82-2-212 does not make an exception for water rights claims of Indians or Indian tribes, but rather specifically includes them. In that a priority date of July 16, 1855 is claimed for all the water rights set forth in the Flathead Compact, the Water Court should require proof that these water rights were properly claimed pursuant to MCA 82-2-212. Those water rights not properly claimed are deemed abandoned as of July 1, 1973, and consequently, cannot, as a matter of Montana law, have a priority date prior to July 1, 1973. To hold otherwise would be a violation of MCA 82-2-212 as well as of Article II, Section 4 of the Montana Constitution, which prohibits discrimination based on culture or social origin. Because the Flathead Compact does not reveal proof that the water rights claimed therein were not abandoned, it must be rejected.

8. The Treaty of Hell Gate, 1855's prohibition on damaging property of citizens requires rejection of the Flathead Compact.

The Treaty of Hell Gate, 1855, Article VIII, Exhibit B at p 3, provides that the confederated tribes of Indians "promise to be friendly with all citizens" of the United State, "and pledge themselves to commit no depredations upon the property of such citizens." This language, *inter alia*, requires that the confederated tribes not interfere with the rights of all Montanans to equitable enjoyment of the waters of the state. This promise necessarily requires compliance with MCA 85-2-701 which dictates equitable apportionment of water rights within the state of Montana among the people of the state and the Indian tribes. This promise of The Treaty of Hell Gate, 1855, also requires a showing that all water rights claimed by the confederated tribe do not negatively affect the property of citizens of the United States, i.e., Montanans. Furthermore, pursuant to MCA 85-2-701 (1), it is the legislative intent of the Montana Legislature to provide 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." If the water rights set forth in the Flathead Compact, negatively affect property of citizens of Montana, including property values, then such water rights violate the Treaty of Hell Gate, 1855, Article 8. See, *Schutter v. State of Montana Board of Land Commissioners*, ¶ 35, DA 23-0314, decided April 30. 2024, in which the Montana Supreme Court acknowledged the value to water rights. To the extent that the Flathead Compact negatively affects the property or its value due to loss of water rights, or lowering of the water levels on lakes or rivers, *inter alia*, of those people who own property on the Flathead Reservation, on the banks of the Flathead River or on the shores of Flathead Lake, it should not be approved. In that the Flathead Compact does not even address this issue, it should be rejected.

9. The Flathead Compact violates Montana Law.

a. The Flathead Compact does not provide for equitable division and apportionment.

1. The legislative intent, when dealing with reserved water rights claims of the several Indian tribes claiming water rights within Montana, is for the compacts to provide for an "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). The Flathead Compact is totally one sided. It does not take into consideration the people of Montana or the interests of the State of Montana. This can only be accomplished by the Water Court following the same procedures in assessing the Flathead Compact as it does for all other Montanans seeking water rights.

2. Montana Constitution, Article IX Section 3, Water Rights,1972, provides that "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 use as provided by law." When such a huge water right is

granted to such a small portion of the population of the state of Montana, as is the case with the Flathead Compact, it is appropriate to determine whether such appropriation is fair for those Montanans who are not benefitting therefrom, or indeed who may suffer as a consequence of such a large appropriation. Such determination has not been made with regard to the Flathead Compact, mandating rejection thereof.

3. The State of Montana owns and controls all the water within the state. Constitution of the State of Montana, § 15. The Confederated Tribe of Indians, as with everyone else wanting to claim a water right in Montana, must comply with MCA 85-2-224 and MCA 85-2-101, which require equitable division and apportionment. See, also, MCA 85-2-701(1), which sets forth the legislative intent with regard to reserved water rights:

> (I)t is further intended that the state of Montana proceed under the provisions of this part in an effort to conclude compacts 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.

Furthermore, requiring the Confederated Tribe to go through the same procedures as all Montanans is mandated by the United States Supreme Court in *Arizona*, which held that tribes seeking more water rights than covered by the *Winters* doctrine, "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." *Arizona v. Navajo Nation*, slip op at 12. The Flathead Compact should be rejected and the claims of the confederated tribe should be adjudicated like all other water rights claims in Montana.

b. <u>The Flathead Compact provides no showing that the water rights granted therein do not negatively impact prior appropriators</u>.

1. MCA 85-2-311(1)b requires that before a water use permit will be issued, the applicant must produce evidence that shows that the water use requested will not

adversely affect "the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation." At a minimum, the Confederated Salish and Kootenai Tribes should be required to make such a showing with regard to the two hydroelectric dams, the wetlands, the water storage in the Hungry Horse Reservoir, the water right claims of the tribal members and the tribe and their modern irrigation practices.

2. The requirement to show that the water rights claimed in the Flathead Compact do not negatively impact the water rights of Montanans is implicit in the Treaty of Hell Gate, 1855, Article 8, Exhibit B at p 3. Article 8 requires that the confederated tribes commit no "depredations upon the property" of citizens of the United States. The Flathead Compact is consequently required by Article 8 to make a showing that it does not negatively impact the water rights of Montanans. Having not done so, requires rejection.

3. To not require the Confederated Salish and Kootenai Tribes to make a showing that the water rights that are the subject of the Flathead Compact do not negatively impact the people of Montana, would amount to discrimination based on race and culture, in that all other Montanans must make such a showing. MCA 85-2-311(1)b, Montana Constitution Article II, Section 4.

4. Montana Constitution, Article IX Section 3, Water Rights, ratified on March 22, 1972, provides that "all existing rights to the use of any water for any useful or beneficial purpose are hereby recognized and confirmed." Objector Allen's water rights, which have a DNRC-assigned enforceable priority date of December 31, 1972, but likely are equally enforceable prior to March 22, 1972 as proven by use, were thereby recognized and confirmed and consequently, cannot, as a matter of Montana Constitutional law, be impacted by the Flathead Compact. This is the case for all similarly situated holders of water rights in Montana who have made claim to those

rights pursuant to MCA 85-2-212. There being no guarantee in the Flathead Compact that the Compact will not negatively affect all pre-existing water rights, the Flathead Compact must be rejected.

c. <u>There is no requirement in the Flathead Compact that there be a showing of actual use of the water rights granted therein.</u>

1. Montana has always had a "first in time, first in right" rule for sorting out water right priorities. This requires an actual use in order to establish a water right. "To support a valid claim, an appropriation of water must be put to a beneficial use--it is the 'basis, the measure and the limit of all rights to the use of water'" *Schutter v. State of Montana Board of Land Commissioners*, ¶ 21, DA 23-0314, decided April 30. 2024, quoting *McDonald v. State*, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986) (citation omitted). Because the Flathead Compact does not distinguish *Winters* doctrine and non-*Winters* doctrine water rights, it does not even allude to the prerequisite of designation of the date that actual use began. Following Montana law would require that the priority date for the hydroelectric dams, the wetlands, the storage in the Hungry Horse Reservoir, the use of the water by tribal members or the tribe, and the modern irrigation practices, be as of the date that actual use began. Furthermore, Montana law also requires a new permit request when water needs increase. Because there is no designation therein of a priority date based on actual use for non-*Winters* doctrine water rights, the Flathead Compact must be rejected.

2. The Flathead Compact has a provision that allows the Confederated Tribes to lease/sell their water obtained pursuant to their water rights, to an undesignated third party. This provision flies in the face of Montana Water Law which grants water rights only to those parties who <u>actually</u> <u>use</u> the water. <u>See</u>, MCA 85-2-224. <u>See</u> <u>also</u>, *Schutter*, at ¶ 21. If the tribe leases out a water right, it necessarily is not using that water. Under Montana Water Law, if a claimant is not using that water right, then it has

no legal claim to that water right. Because it allows the leasing/selling of water, the Flathead Compact should be rejected.

3. Montana Constitution Article II, Section 4 provides that the "State may not discriminate based on race, color, sex, culture, social origin or condition, or political or religious ideas." Relating the priority date of the water right back to July 16, 1855, a date before actual use of the water, is a benefit given to no other Montanan. All other Montanans must show actual use in order to obtain a water right priority date. See MCA 85-2-224. To do otherwise amounts to a violation of the Montana Constitution's prohibition against discrimination based on race and culture. The Flathead Compact violates Section 4 by giving the Confederated Salish and Kootenai Tribes special treatment based on their race and culture, i.e., Tribal status.

10. The Flathead Compact violates *ex post facto* laws to the extent it impacts current water rights.

To the extent that the water rights granted by the Flathead Compact, including water rights for a hydroelectric dam, the wetlands, storage in Hungry Horse Dam, the uses of tribal members and the tribe, including leasing water, and modern irrigation practices, granted by the Flathead Compact, impact Objector Allen's water rights that have, for example an enforceable priority date of May 22, 1967, see 76LJ 30122779, the Flathead Compact violates Objector Allen's right, granted by both the Montana and the U.S. Constitution, to not have *ex post facto* laws enforced against her. See Montana Constitution, Article II, Section 31; U.S. Constitution, Article I, Section 9.3. This can only be remedied for all who are similarly situated, i.e., with priority dates after July 16, 1855, but before the approval of the Compact, by setting the priority date of the Flathead Compact granted water rights described above, as the date of final approval of the Compact or the date that actual use began.

D. CONCLUSION

For the above stated reasons, the Montana Water Court should reject the Flathead Compact. Thereafter, each separate claim for a water right contained therein should be adjudicated, applying the same standards that the Montana Water Court applies to all claims for water rights within the State of Montana. Furthermore, the priority date should never be earlier than the date that actual use began.

Dated this 9th day of July, 2024.

Objector Vivian Allen
/s/ Vivian Allen
Vivian Allen
Pro Se

CERTIFICATE OF SERVICE

I declare under penalty of perjury, and signature above certifies, that I emailed a true and accurate copy of the foregoing document and Exhibits A, B, C, and D, on 9 July, 2024, to the following email addresses:

Montana Water Court: *watercourt@mt.gov*

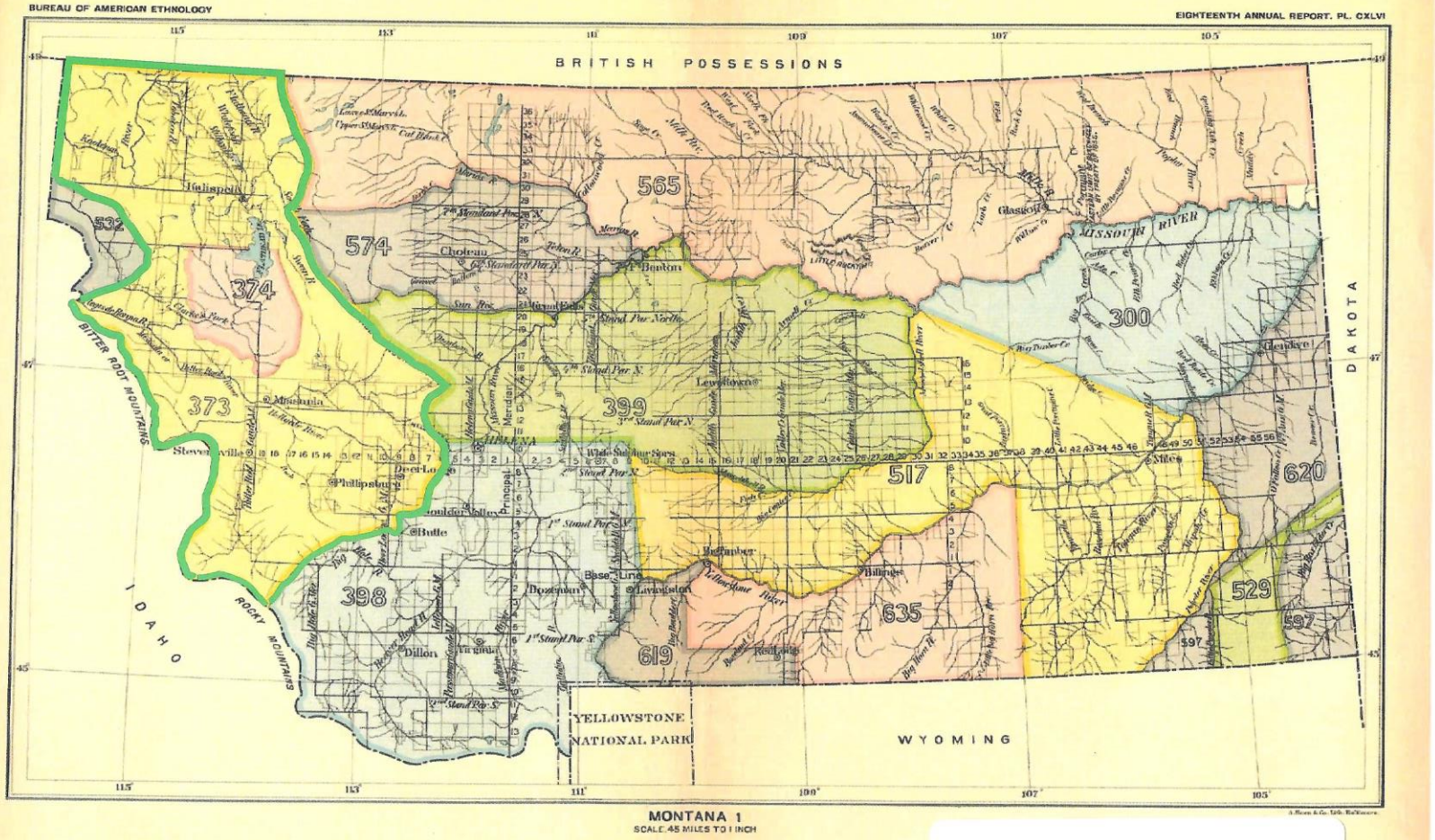
Daniel J Decker
Confederated Salish & Kootenai Tribes: *daniel.Decker@cskt.org*

David W. Harder
U.S. Department of Justice
Indian Resources Section
Denver: *david.harder@usdoj.gov*

Yosef Negose
U.S. Department of Justice
Indian Resources Section
Environment & Natural Resources Division: *yosef.negose@usdoj.gov*

Molly M. Kelly
Montana Department of Natural Resources and Conservation: *Jean.Saye@mt.gov*

Chad Vanisko
Montana Attorney General Agency
Legal Counsel Agency Legal Services Bureau: *chad.vanisko@mt.gov*



Judicially Determined CSKT Ceded Lands

Exhibit A

Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians. Concluded at Hell Gate in the Bitter Root Valley, July 16, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 18, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING: July 16, 1855.

WHEREAS a treaty was made and concluded at the treaty ground, at Hell Gate, in the Bitter Root Valley, on the sixteenth day of July, eighteen hundred and fifty-five, between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the hereinafter named chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes and duly authorized thereto, by them, which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at the treaty ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them. It being understood and agreed that the said confederated tribes do hereby constitute a nation, under the name of the Flathead nation, with Victor, the head chief of the Flathead tribe, as the head chief of the said nation, and that the several chiefs, headmen, and delegates, whose names are signed to this treaty, do hereby, in behalf of their respective tribes, recognise Victor as said head chief. Contracting parties.

ARTICLE I. The said confederated tribes 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, to wit: Cession of lands to the United States.

Commencing on the main ridge of the Rocky Mountains at the forty-ninth (49th) parallel of latitude, thence westwardly on that parallel to the divide between the Flat-bow or Kootenay River and Clarke's Fork; thence southerly and southeasterly along said divide to the one hundred and fifteenth degree of longitude, (115°,) thence in a southwesterly direction to the divide between the sources of the St. Regis Borgia and the Cœur d'Alene Rivers, thence southeasterly and southerly along the main ridge of the Bitter Root Mountains to the divide between the head waters of the Koos-koos-kee River and of the southwestern fork of the Bitter Root River, thence easterly along the divide separating the waters of the several tributaries of the Bitter Root River from the waters flowing into the Salmon and Snake Rivers to the main ridge of the Rocky Mountains, and thence northerly along said main ridge to the place of beginning. Boundaries.

ARTICLE II. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes Reservation.

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and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Boundaries.

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied if with the permission of the owner or claimant.

Whites not to reside thereon unless, &c.

Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. *And provided*, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

Indians to be allowed for improvements on lands ceded.

ARTICLE III. *And provided*, That if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them; as also the right in common with citizens of the United States to travel upon all public highways.

Roads may be made through reservation.

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Rights and privileges of Indians.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of one hundred and twenty thousand dollars in the following manner — that is to say: For the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for

Payments by the United States.

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the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto. How to be applied.

ARTICLE V. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books, and stationery, to be located at the agency, and to be free to the children of the said tribes, and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun shop; one carpenter's shop; one wagon and ploughmaker's shop; and to keep the same in repair, and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures, and to employ two millers. To erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide with the necessary furniture the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years. United States to establish schools. mechanic's shops. saw and grist mills. a hospital.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected and will be called upon to perform many services of a public character, occupying much of their time, the United States further agree to pay to each of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the said houses to be occupied by, such head chiefs so long as they may be elected to that position by their tribes, and no longer. to pay salary to head chiefs.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said tribes. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States. Certain expenses to be borne by the United States and not charged on annuities.

ARTICLE VI. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Lots may be assigned to individuals. Vol. x. p. 1044.

ARTICLE VII. The annuities of the aforesaid confederated tribes of Indians shall not be taken to pay the debts of individuals. Annuities not to pay individual debts of Indians.

ARTICLE VIII. The aforesaid confederated tribes of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens. And should Indians to preserve friendly relations.

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Indians to pay for depredations.

not to make war except, &c

to surrender offenders.

any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article, in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Annuities to be reserved from those who drink, &c., ardent spirits.

ARTICLE IX. The said confederated tribes desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said confederated tribes of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Guaranty of reservation against certain claims of Hudson Bay Company.

Vol. ix. p. 870.

ARTICLE X. The United States further agree to guaranty the exclusive use of the reservation provided for in this treaty, as against any claims which may be urged by the Hudson Bay Company under the provisions of the treaty between the United States and Great Britain of the fifteenth of June, eighteen hundred and forty-six, in consequence of the occupation of a trading post on the Pru-in River by the servants of that company.

Bitter Root Valley to be surveyed, and portions may be set apart for reservation.

meanwhile not to be opened for settlement.

ARTICLE XI. It is, moreover, provided that the Bitter Root Valley, above the Loo-lo fork, shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo fork, shall be opened to settlement until such examination is had and the decision of the President made known.

When treaty to take effect.

ARTICLE XII. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

Signatures, July 16, 1855.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs and principal men of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, [L. S.]
Governor and Superintendent Indian Affairs W. T.

VICTOR, *Head chief of the Flathead Nation,* his x mark. [L. S.]
ALEXANDER, *Chief of the Upper Pend d'Oreilles,* his x mark. [L. S.]
MICHELLE, *Chief of the Kootenays,* his x mark. [L. S.]
AMBROSE, his x mark. [L. S.]
PAH-SOH, his x mark. [L. S.]
BEAR TRACK, his x mark. [L. S.]
ADOLPHE, his x mark. [L. S.]
THUNDER, his x mark. [L. S.]
BIG CANOE, his x mark. [L. S.]
KOOTEL CHAH, his x mark. [L. S.]
PAUL, his x mark. [L. S.]

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ANDREW, his x mark. [L. S.]
MICHELLE, his x mark. [L. S.]
BATTISTE, his x mark. [L. S.]

Kootenays.

GUN FLINT, his x mark. [L. S.]
LITTLE MICHELLE, his x mark. [L. S.]
PAUL SEE, his x mark. [L. S.]
MOSES, his x mark. [L. S.]

JAMES DOTY, *Secretary.*
R. H. LANSDALE, *Indian Agent.*
W. H. TAPPAN, *Sub Indian Agent.*
HENRY R. CROSIER,
GUSTAVUS SOHON, *Flathead Interpreter.*
A. J. HOECKEN, *Sp. Mis.*
WILLIAM CRAIG.

Consent of Senate, March 8, 1859.

And, whereas, the said treaty having been submitted to the Senate of the United States for their constitutional action thereon, the Senate did, on the eighth day of March, eighteen hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and Chiefs, Headmen and Delegates of the confederate tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, who are constituted a nation under the name of the Flathead Nation, signed 16th day of July, 1855.

"Attest: "ASBURY DICKINS, *Secretary.*"

Proclamation, April 18, 1859.

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

Done at the city of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hundred and fifty-
[SEAL.] nine, and of the Independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

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CONSTITUTION

—OF THE—

STATE OF MONTANA

AS ADOPTED BY THE CONSTITUTIONAL CONVENTION AUGUST 17TH, 1889; RATIFIED BY THE PEOPLE, OCTOBER 1ST, 1889; STATE ADMITTED, NOVEMBER 8TH, 1889.

PREAMBLE.

We, the people of Montana, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a state government, do, in accordance with the provisions of the enabling act of congress, approved the twenty-second of February, A. D. 1889, ordain and establish this constitution.

CONSTRUCTION OF LEGISLATIVE ACTS.—An act of the legislature will not be adjudged to be in violation of the constitution, except where plainly repugnant thereto. The act will be presumed to be constitutional until the contrary is clearly and satisfactorily shown: People ex rel Robertson v. Van Gaskin et al. 5 Mont. 352.

INTERPRETATION OF CONSTITUTION.—The constitution of a state should be liberally construed to determine the primary purpose of any constitutional enactment: State ex rel Harrington v. Kenny, 10 Mont. 410.

The provisions of a constitution will be construed to operate prospectively only, unless a retrospective intention is clearly expressed: State ex rel Maddox v. Kenny, 11 Mont. 553.

Constitutional provisions as well as statutes are construed by the same canons of construction: Dunn v. City of Great Falls, 12 Mont. 58.

ACT VOID IN PART.—Where a part of a statute is unconstitutional that fact does not authorize the courts to decide the remainder void, unless the provisions are so connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other: Dunn v. City of Great Falls, 12 Mont. 58.

ARTICLE I.

BOUNDARIES.

§ 1. The boundaries of the state of Montana shall be as follows, to wit: Beginning at a point formed by the intersection of the twenty-seventh degree of longitude west from Washington with the forty-fifth degree of north latitude, thence due west on the forty-fifth degree of latitude to a point formed by its intersection with the thirty-fourth degree of longitude west from Washington, thence due south along

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Exhibit C

land to erect and maintain thereon a mill and mill dam upon and across any navigable stream, upon paying to the owners of lands which are thereby caused to be flowed such damages as may be assessed in a judicial proceeding, does not deprive such owners of their property without due process of law: Heard v. Amoskeag Man Co., 113 U. S. 9.

The inhibition found in all the constitutions against the taking of private property for public use without compensation does not protect against damaging it without taking it, and it is to remedy this manifest wrong and injustice that the words "or damaged" are inserted. The effect of this section is to declare that private property shall not be invaded for public use unless the owner receive compensation: Johnson v. Parkersburg, 16 W. Va. 402; 37 Am. Rep. 779; Pekin v. Brereton, 67 Ill. 477; 16 Am. Rep. 629; Pekin v. Winkle, 77 Ill. 56; Elgin v. Eaton, 83 Id. 535.

Where a city government changes the grade of a street after an abutting land owner has made his improvements in conformity to a grade previously established, and thus injured the property of such abutting owner, this provision is violated, and an action lies for damages: Johnson v. Parkersburg, 16 W. Va. 402; 37 Am. Rep. 779.

It is for the courts to determine whether or not the use for which property is sought to be taken is a public use: Coster v. Tide Water Co., 18 N. J. Eq. 54; Tyler v. Beacher 44 Vt. 648.

Land over which a highway is laid is not taken for public use until the highway is operated by proper authority: State ex rel James, 4 Wis. 408.

The constitution contemplates a proceeding in court in all cases of taking private property for public use without consent of the owner. All other methods are excluded. The owner has the right to a trial by jury for ascertaining the compensation to which he is entitled: Weber v. Santa Clara County, 59 Cal. 265.

A sum paid into court by a railroad company, on the award of damages made by commissioners as compensation for occupation by such railroad of land sought to be condemned for railroad purposes, is, though the owner has appealed from the award, a just compensation, within the meaning of constitutional article 3, section 14, providing that private property cannot be taken for public use without just compensation, and hence is sufficient to justify an order allowing the railroad company to take possession pending the appeal: State ex rel Volunteer mining Co. v. McHatton, 15 Mont.

§ 15. The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use and the right of way over the lands of others, for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. Private roads may be opened in the manner to be prescribed by law, but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount together with the expenses of the proceeding shall be paid by the person to be benefited.

ROADS TO MINING CLAIM—CONDEMNATION PROCEDURE.—The provisions of the constitution that the necessity for, and the damages occasioned by, the opening of private roads shall first be determined by a jury does not abrogate sections 1495 et seq. of the general laws, granting to the owners of mining claims a right of way across the claims of others, and providing for the assessment of damages by commissioners, but merely modifies the statute as to the method of determining the damages, leaving the jurisdiction and procedure in other respects unchanged: State ex rel Coleman et al. v. District Court Third District, 14 Mont. 476.

§ 16. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.

RIGHTS OF THE ACCUSED.—The accused is informed of the "nature and cause" of the accusation, when he receives the indictment or information

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PETER BREEN,
SIMMON R. BUFORD,
WILLIAM MASON BULLARD,
WALTER A. BURLEIGH,
ALEX. F. BURNS,
ANDREW J. BURNS,
EDWARD BURNS,
JAMES E. CALLAWAY,
EDWARD CARDWELL,
B. PLATT CARPENTER,
MILTON CAUBY,
WILLIAM A. CHESSMAN,
TIMOTHY E. COLLINS,
CHARLES E. CONRAD,
WALTER COOPER,
THOMAS F. COURTNEY,
ARTHUR S. CRAVEN,
W. W. DIXON,
D. M. DURFEE,
WILLIAM DYER,
GEORGE O. EATON,
WILLIAM T. FIELD,
J. E. GAYLORD,
PARIS GIBSON,
WARREN C. GILLETTE,
O. F. GODDARD,
FIELDING L. GRAVES,
R. E. HAMMOND,
CHARLES S. HARTMAN,
HENRI J. HASKELL,
LUKE D. HATCH,
LEWIS H. HERSHFIELD,
RICHARD O. HICKMAN,
S. S. HOBSON,
W. J. KENNEDY,
H. KNIPPENBERG,
HIRAM KNOWLES,
CONRAD KOHRS,
C. H. LOUD,
LLEWELLYN A. LUCE,
MARTIN MAGINNIS,
J. E. MARION,
CHARLES S. MARSHALL,
WM. MAYGER,
P. W. MCADOW,
C. R. MIDDLETON,
SAMUEL MITCHELL,
WILLIAM MUTH,
ALFRED MYERS,
WILLIAM PARBERRY,
W. R. RAMSDELL,
G. J. REEK,
JOHN C. ROBINSON,
L. ROTWITT,
J. E. RICKARDS,
FRANCIS E. SARGEANT,
LEOPOLD F. SCHMIDT,
GEORGE W. STAPLETON,
JOSEPH K. TOOLE,
J. R. TOOLE,
CHARLES S. WARREN,
WILLIAM H. WATSON,
CHAS. M. WEBSTER,
H. R. WHITEHILL,
GEORGE B. WINSTON,
AARON C. WITTER,
DAVID C. BROWN.

ORDINANCE NO. I.

FEDERAL RELATIONS.

BE IT ORDAINED: First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of the state of Montana shall ever be molested in person or property, on account of his or her mode of religious worship.

FORCE AND EFFECT.—An ordinance framed and adopted by the constitutional convention and appended to the constitution, and with it adopted by the people, has the same force and effect as a constitutional provision. State v. Kenny, 9 Mont. 223.

EFFECT UPON STATUTE.—The effect of an ordinance upon the statute is to change and modify its provisions so far as necessary to give the provisions of the ordinance full scope and effect: Id.

Second. That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any

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Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, that the lands belonging to citizens of the United States, residing without the said state of Montana, shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the said state of Montana on lands or property therein belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the said state of Montana from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, but said last named lands shall be exempt from taxation by said state of Montana so long and to such extent as such act of congress may prescribe.

Third. That the debts and liabilities of said territory of Montana shall be assumed and paid by said state of Montana.

Fourth. That provision shall be made for the establishment and maintenance of a uniform system of public schools, which shall be open to all the children of said state of Montana and free from sectarian control.

Fifth. That on behalf of the people of Montana, we in convention assembled, do adopt the constitution of the United States.

Sixth. That the ordinances in this article shall be irrevocable without the consent of the United States and the people of said state of Montana.

Seventh. The state hereby accepts the several grants of land from the United States to the state of Montana, mentioned in an act of congress, entitled "An act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana and Washington, to form constitutions and state governments, and to be admitted into the union on an equal footing with the original states, and to make donations of public lands to such states." Approved February 22d, 1889, upon the terms and conditions therein provided.

ORDINANCE II.

ELECTIONS.

Be it Ordained by the Convention assembled to form a Constitution for the State of Montana:

First. That an election shall be held throughout the territory of Montana on the first Tuesday of October, 1889, for the ratification or

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TREATY WITH THE OMAHA, 1854.

March 16, 1854.
10 Stats., 1043.
Ratified Apr. 17, 1854.
Proclaimed June 21, 1854.

Articles of agreement and convention made and concluded at the city of Washington this sixteenth day of March, one thousand eight hundred and fifty-four, by George W. Manypenny, as commissioner on the part of the United States, and the following-named chiefs of the Omaha tribe of Indians, viz: Shon-ga-ska, or Logan Fontenelle; E-sta-mah-za, or Joseph Le Flesche; Gra-tah-nah-je, or Standing Hawk; Gah-he-ga-gin-gah, or Little Chief; Ta-wah-gah-ha, or Village Maker; Wah-no-ke-ga, or Noise; Sa-da-nah-ze, or Yellow Smoke; they being thereto duly authorized by said tribe.

Cession of lands to the United States.

ARTICLE 1. The Omaha Indians cede to the United States all their lands west of the Missouri River, and south of a line drawn due west from a point in the centre of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of said line: *Provided, however*, That if the country north of said due west line, which is reserved by the Omahas for their future home, should not on exploration prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them. And for the purpose of determining at once and definitely, it is agreed that a delegation of said Indians, in company with their agent, shall, immediately after the ratification of this instrument, proceed to examine the country hereby reserved, and if it please the delegation, and the Indians in counsel express themselves satisfied, then it shall be deemed and taken for their future home; but if otherwise, on the fact being reported to the President, he is authorized to cause a new location, of suitable extent, to be made for the future home of said Indians, and which shall not be more in extent than three hundred thousand acres, and then and in that case, all of the country belonging to the said Indians north of said due west line, shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line.

Reserve for the Indians.

Removal of the Indians.

ARTICLE 2. The Omahas agree, that so soon after the United States shall make the necessary provision for fulfilling the stipulations of this instrument, as they can conveniently arrange their affairs, and not to exceed one year from its ratification, they will vacate the ceded country, and remove to the lands reserved herein by them, or to the other lands provided for in lieu thereof, in the preceding article, as the case may be.

Exhibit D

Relinquishment of former claims.

ARTICLE 3. The Omahas relinquish to the United States all claims, for money or other thing, under former treaties, and likewise all claim

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which they may have heretofore, at any time, set up, to any land on the east side of the Missouri River: *Provided*, The Omahas shall still be entitled to and receive from the Government, the unpaid balance of the twenty-five thousand dollars appropriated for their use, by the act of thirtieth of August, 1851.

Payment to the Indians.

ARTICLE 4. In consideration of and payment for the country herein ceded, and the relinquishments herein made, the United States agree to pay to the Omaha Indians the several sums of money following, to wit;

1st. Forty thousand dollars, per annum, for the term of three years, commencing on the first day of January, eighteen hundred and fifty-five.

2d. Thirty thousand dollars per annum, for the term of ten years, next succeeding the three years.

3d. Twenty thousand dollars per annum, for the term of fifteen years, next succeeding the ten years.

4th. Ten thousand dollars per annum, for the term of twelve years, next succeeding the fifteen years.

How made.

All which several sums of money shall be paid to the Omahas, or expended for their use and benefit, under the direction of the President of the United States, who may from time to time determine at his discretion, what proportion of the annual payments, in this article provided for, if any, shall be paid to them in money, and what proportion shall be applied to and expended, for their moral improvement and education; for such beneficial objects as in his judgment will be calculated to advance them in civilization: for buildings, opening farms, fencing, breaking land, providing stock, agricultural implements, seeds, &c.; for clothing, provisions, and merchandise; for iron, steel, arms, and ammunition: for mechanics, and tools; and for medical purposes.

Further payment.

ARTICLE 5. In order to enable the said Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and which they agree to do without further expense to the United States, and also to pay the expenses of the delegation who may be appointed to make the exploration provided for in article first, and to fence and break up two hundred acres of land at their new home, they shall receive from the United States, the further sum of forty-one thousand dollars, to be paid out and expended under the direction of the President, and in such manner as he shall approve.

Disposition of the lands reserved.

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed,

80 acres

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and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

Protection from hostile Indians.

ARTICLE 7. Should the Omahas determine to make their permanent home north of the due west line named in the first article, the United States agree to protect them from the Sioux and all other hostile tribes, as long as the President may deem such protection necessary; and if other lands be assigned them, the same protection is guaranteed.

Grist and sawmill.

ARTICLE 8. The United States agree to erect for the Omahas, at their new home, a grist and saw mill, and keep the same in repair, and provide a miller for ten years; also to erect a good blacksmith shop, supply the same with tools, and keep it in repair for ten years; and provide a good blacksmith for a like period; and to employ an experienced farmer for the term of ten years, to instruct the Indians in agriculture.

Blacksmith.

Annuities not to be taken for debts.

ARTICLE 9. The annuities of the Indians shall not be taken to pay the debts of individuals.

Conduct of the Indians.

ARTICLE 10. The Omahas acknowledge their dependence on the Government of the United States, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Omahas commit any depredations on any other Indians, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens.

Depredations.

Payment to Lewis Saunsosee.

ARTICLE 11. The Omahas acknowledge themselves indebted to Lewis Saunsosee, (a half-breed,) for services, the sum of one thousand dollars, which debt they have not been able to pay, and the United States agree to pay the same.

Provision against introduction of ardent spirits.

ARTICLE 12. The Omahas are desirous to exclude from their country the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Omaha who is guilty of bringing liquor into their country, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Grant to the missions of the Presbyterian Church.

ARTICLE 13. The board of foreign missions of the Presbyterian Church have on the lands of the Omahas a manual-labor boarding-school, for the education of the Omaha, Ottoe, and other Indian youth, which is now in successful operation, and as it will be some time before

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the necessary buildings can be erected on the reservation, and [it is] desirable that the school should not be suspended, it is agreed that the said board shall have four adjoining quarter sections of land, so as to include as near as may be all the improvements heretofore made by them; and the President is authorized to issue to the proper authority of said board, a patent in fee-simple for such quarter sections.

Construction of roads.

ARTICLE 14. The Omahas agree that all the necessary roads, highways, and railroads, which may be constructed as the country improves, and the lines of which may run through such tract as may be reserved for their permanent home, shall have a right of way through the reservation, a just compensation being paid therefor in money.

ARTICLE 15. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said George W. Manypenny, commissioner as aforesaid, and the undersigned chiefs, of the Omaha tribe of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

George W. Manypenny, Commissioner. [L. S.]
Shon-ga-ska, or Logan Fontenelle, his x mark. [L. S.]
E-sta-mah-za, or Joseph Le Flesche, his x mark. [L. S.]
Gra-tah-mah-je, or Standing Hawk, his x mark. [L. S.]
Gah-he-ga-gin-gah, or Little Chief, his x mark. [L. S.]
Tah-wah-gah-ha, or Village Maker, his x mark. [L. S.]
Wah-no-ke-ga, or Noise, his x mark. [L. S.]
So-da-nah-ze, or Yellow Smoke, his x mark. [L. S.]

Executed in the presence of us:
James M. Gatewood, Indian agent.
James Goszler.
Charles Calvert.
James D. Kerr.
Henry Beard.
Alfred Chapman.
Lewis Saunsoci, interpreter.

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