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AND GRACE SLACK

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

CASE NO. WC-0001-C-2021

<u>BRIEF IN SUPPORT OF MOTION FOR ENTRY OF SUMMARY JUDGMENT ON LEGAL ISSUES</u>

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INTRODUCTION

Pursuant to the Court's October 18, 2023 Case Management Order No. 3, Objectors William Sego and Bill & Irene LLC (collectively, "Sego" or "Objector") and Grace Slack ("Slack" or "Objector" and together with Sego, the "Objectors"), submit this brief in support of their motion for summary judgment addressing issues of law on the validity of the State of Montana – Confederated Salish and Kootenai Tribes – United States Water Rights Compact ("Compact"), codified at Mont. Code Ann. § 85-20-1901.

Objectors Sego and Slack own water rights within the State of Montana. Specifically, they both own certain identified water rights claims, Secretarial water rights, *Walton* water rights, and rights to receive Flathead Irrigation Project water deliveries. William Sego Affidavit at page 2, ¶ 10, attached hereto as Exhibit A; Grace Slack Affidavit at page 2, ¶ 4, attached hereto as Exhibit B. The implementation and enforcement of the Compact will substantially harm both Sego and Slack and result in material injury to their legally recognized water rights. The new system of water rights established by the Compact will reduce the nature, scope, and relative priority of their rights, and has already reduced irrigation deliveries on their respective properties. Sego Aff. at pages 3-4, ¶¶ 12-19; Slack Aff. at pages 2-4, ¶¶ 6–13.

As discussed in detail below, Objectors seek an order from the Court regarding certain legal conclusions about the Compact's scope, applicability, and limitations. Objectors move this Court to enter an order declaring that:

1. The "Tribal Water Right" under the Compact stems from, and therefore must be consistent with, the federal *Winters* and *Winans* case law.

2. The Tribal Water Right, as well as any other water right provided for by the Compact to the Confederated Salish and Kootenai Tribe ("CSKT") or its members, must be quantified.

3. To the extent that any portion of the Tribal Water right stems from the *Winters* doctrine, that right must be limited to (i) the amount of water that is necessary to accomplish the purposes for which the Flathead Indian Reservation, Montana ("Reservation") was created by the United States Congress and (ii) water that is on or appurtenant to the Reservation.

4. To the extent that any portion of the Tribal Water Right stems from the *Winans* case law and Article III of the Treaty of Hellgate, that right must be limited (i) in amount to the water necessary to support the CSKT's hunting and fishing rights as currently exercised; (ii) nonconsumptive use; and (iii) geographically to streams running through or bordering the Reservation or at all usual and accustomed places that the CSKT is able to document and where it engages in fishing.

5. The Objectors, and all other persons and entities that hold water rights regulated by the Compact, are entitled to due process protections under the Montana and Federal Constitutions.

6. These due process protections require, at a minimum, notice and a meaningful opportunity to be heard before the Flathead Reservation Water Management Board ("Board") or any other governmental entity that might impact those water rights.

7. The Compact violates the Montana Constitution by purporting to strip the Montana state courts of their exclusive jurisdiction to adjudicate civil claims.

8. The Compact's creation of exclusive jurisdiction for the Board over any controversy over the right to the use of water between the Parties to the Compact ("Compact

Parties") or between or among holders of other water rights and water uses on the Reservation violates Article III, Section 1 of the Montana Constitution.

9. The Compact's Unitary Administration and Management Ordinance ("UAMO") creates a special and local law applicable only to the Reservation and violates Article V, Section 12 of the Montana Constitution.[1]

STANDARD OF REVIEW

The initial inquiry for the validity of a water compact under Montana law is whether "(a) the compact is 'fundamentally fair, adequate and reasonable' and (b) the compact conforms to applicable laws." *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770, at *18 (quoting *In re Adjudication of Existing & Reserved Rights of Chippewa Cree Tribe*, 2002 Mont. Water LEXIS 1, at *7). If the Water Court is satisfied that both initial elements are met, and no objections are received, the compact review ends there. *Id*. However, if non-parties to a compact file objections, then the Water Court will make a further evaluation of whether the compact "'was the product of good faith, arms-length negotiations.'" *Id.* at *18–19 (quoting *In re Crow Water Compact*, 2015 MT 353, ¶ 18, 382 Mont. 46, 364 P.2d 584).

If the good-faith, arms-length negotiation threshold is met, "the burden of proof shifts to the non-party objectors to overcome the presumption of compact validity by proving (a) the compact is unreasonable and (b) their 'interests are materially injured by operation of the Compact.'" *Id.* (quoting *In re Crow*, ¶¶ 19–20). For a compact to be unreasonable under Montana law, a non-party objector may, for instance, show that the compact failed to follow "an approach to quantify and allocate water rights that departs from existing law." *Blackfeet* at *33.

[1] Objectors reserve the right to provide a response brief to any of the briefs submitted by any of the other parties in this matter.

"Material injury" has not been explicitly defined by the Water Court in terms of the burden-shifting framework for compact review.

ARGUMENT

As detailed below, the Compact does not, as a legal matter, meet the Montana standards for reasonableness or validity. The Compact is inconsistent with federal law, violates Objectors' due process and related constitutional rights, and violates specific restrictions and prohibitions in the Montana constitution concerning the separation of powers, the non-delegation of legislative and judicial authority to other branches of government or outside of the state government, and the enactment of special or local legislation where a general law cannot be shown to be inapplicable. Accordingly, the Compact should be deemed invalid and the declaratory relief sought by Objectors granted.

I. The Compact is inconsistent with federal water law.

The Compact improperly expands the CSKT's water rights beyond what federal law allows, purporting to give the CSKT rights that are unquantified, unlimited, and senior to all other users, even those like the Objectors who each have certain water rights that are derived from the same water sources and legal authority as the Tribal Water Right.

A. *Background on the Tribal Water Right.*

The Compact provides the CSKT with the "Tribal Water Right," which are the collective "water rights of the Confederated Salish and Kootenai Tribes, including any Tribal member or Allottee," as further described by the Compact. MONT. CODE ANN. § 85-20-1901, art. II, § 67. The basis for this right is expressly grounded in federal law. *Id.* (defining "Tribal Water Right" as certain water rights, "the basis of which are federal law"); *id.* art. III (referring to "water rights whose basis is Federal law that are defined and referred to as the Tribal Water Right").

This asserted federal right stems from two sources. *First*, the CSKT "claim[s] aboriginal water rights and, pursuant to [the Hellgate Treaty of 1855], reserved water rights to fulfill the purposes of the Treaty and the Reservation." MONT. CODE ANN. § 85-20-1901, art. I. Here, the Compact is referring to so-called "*Winters* rights." In *Winters v. United States*, 207 U.S. 564 (1908), the U.S. Supreme Court held that when the federal government executes a treaty establishing an Indian reservation—as it did here with the Treaty of Hellgate—the treaty also "contain[s] an implied reservation of water." *United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983). The amount of the water reserved under the *Winters* doctrine is only that which is necessary for "the purposes for which the reservation was created." *Winters*, 207 U.S. at 5; *see also Adair*, 723 F.2d at 1406 n.11 ("[R]eserved rights are established by reference to the purpose of the reservation rather than any actual beneficial use of water.").

Second, the Compact might also be relying on certain fishing rights granted by the Treaty of Hellgate.[2] Pursuant to that treaty, "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" 12 Stat. 875, art. III. These rights, commonly known as "*Winans* rights," were first recognized by the Supreme Court in *United States v. Winans*, 198 U.S. 371, 378 (1905) (interpreting a nearly identical term from the Treaty of the Yakima of 1855). While the language of the treaty itself does not formally include any water rights, federal courts have acknowledged that certain

[2] The Compact does not say whether the Tribal Water Right is based on this provision of the treaty. But the Compact does state that "[t]he Parties expressly reserve all rights not granted, recognized or relinquished in this Compact, including but not limited to the right to the continued exercise by members of the Tribes of Tribal off-Reservation rights to hunt, fish, trap and gather food and other materials, as reserved in Article III of the Hellgate Treaty." MONT. CODE ANN. § 85-20-1901, art. V, § C(2).

water rights "accompany [a tribe's] treaty hunting and fishing rights." *Adair*, 723 F.2d at 1418. The purpose is to "prevent other appropriators from depleting the streams waters below a protected level." *Id.* at 1411. Critically, however, "[t]hese rights are essentially nonconsumptive in nature." *Id.* at 1418. Thus, "[t]he holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses (absent independent consumptive rights)." *Id.* at 1411; *see also, e.g.*, MONT. CODE ANN. § 85-20-1901, art. III, § D(1)(c) ("This right shall not be changed to any other or additional purpose, *changed to consumptive use*, or transferred to different ownership.") (emphasis added).

B. *The Tribal Water Right must be consistent with federal law.*

For two reasons, the Tribal Water Right must be consistent with federal law. *First*, the Compact says so. As noted above, the Tribal Water Right is expressly grounded in—and therefore constrained by—federal law. MONT. CODE ANN. § 85-20-1901, art. II, § 67; *id.* art. III.

Second, Montana's courts have long recognized that water compacts must abide by federal law. Indeed, the framework the Court employs to assess the Compact's validity considers that question on two separate occasions: (i) at the "initial showing," where the court asks whether "the compact conforms to applicable laws," and (ii) at the second step, where the court asks whether the compact follows "an approach to quantify and allocate water rights that departs from existing law." *Blackfeet* at *18, 33 (citing *In re Adjudication of Existing & Reserved Rights of Chippewa Cree Tribe*, 2002 Mont. Water LEXIS 1, at *7). As these authorities confirm, the Court has a "'solemn obligation to follow federal law.'" *Blackfeet* at *16 (quoting *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983)).

C. *The Tribal Water Right is not consistent with federal law.*

i. **The Tribal Water Right is not quantified.**

Many of the water rights that the Compact purports to provide for the CSKT are unquantified. For example, the Compact gives the CSKT, as part of its Tribal Water Right, certain instream flow water rights across several different sources—including the Kootenai, Swan, and Clark Fork rivers—"for the maintenance and enhancement of fish habitat to benefit the instream fishery." MONT. CODE ANN. § 85-20-1901, art. III, §§ D(1), D(2), D(3), D(7), D(8). But the Compact does not disclose the volume of fish that the CSKT currently takes to establish how its right to fish is "currently exercised," *Adair*, 723 F.2d at 1414, nor does it quantify the requisite "volume of water needed to preserve" that level of fishing, *United States v. Anderson*, 591 F. Supp. 1, 5 (E.D. Wash. 1982), *affirmed in part and reversed in part*, 736 F.2d 1358 (9th Cir. 1984).

Likewise, the Compact awards the CSKT the unquantified amount of "all naturally occurring surface water in Flathead Lake up to the shoreline elevation of 2,883 feet," which includes "all named and unnamed tributaries that drain directly into Flathead Lake." MONT. CODE ANN. § 85-20-1901, art. III, § C(1)(h) & Appendix 18 at 1–2; *see also id.* art. III, § C(1)(f), (g) (awarding "all naturally occurring water" necessary to maintain "the Wetlands identified in the abstracts of water right attached hereto as Appendix 16" and "the High Mountain Lake identified in the abstracts of water right attached hereto as Appendix 17"). And finally, abstracts for Flathead Lake storage (76L 94409) and hydropower (76L 94408), combined with the Preliminary Decree's Flathead Compact System Water, are improperly vague regarding the well-developed historical operation and management of Kerr (SQK) Dam and Flathead Lake levels. In short, it is impossible to know the amount of water the CSKT is entitled to under the Compact.

Notably, Montana has entered into a number of other compacts, and those earlier compacts *did* quantify the amount of water allocated to the tribes. *See, e.g.*, MONT. CODE ANN. § 85-20-901, art. III, § A(1)(a); *id.* art. III, § F(1)(a)(1)–(2); MONT. CODE ANN. § 85-20-601, art. III, § A(1)(a)(1)–(2); *id.* art. III, § A(2)(a)(1)–(2); *id.* art. III, § A(3)(a)(1)–(2); MONT. CODE ANN. § 85-20-301, art. II, § A(2)(a)–(b); *id.* art. II, § A(3)(a); *id.* art. II, § A(7)(a).

This failure to quantify the CSKT's water right is inconsistent with federal law. With respect to the CSKT's *Winters* rights, federal law requires quantification. That is because "the scope of the implied right is circumscribed by the necessity that calls for its creation. The doctrine 'reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.'" *Adair*, 723 F.2d at 1049. Consistent with this reasoning, the U.S. Supreme Court has rejected attempts to quantify *Winters* rights by using a methodology that relied on "the Indians' 'reasonably foreseeable needs'" because the actual amount could "only be guessed." *Arizona v. California*, 373 U.S. 546, 600–01 (1963); *see also id.* at 601 (concluding "that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."). Likewise, the *Winans* rights reserved by the Treaty of Hellgate must also be quantified—and the amount may even be reduced if it is proven that "tribal needs may be satisfied by a lesser amount." *See Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 685 (1979). Thus, under binding federal precedent, the Compact cannot simply "[r]ecogn[ize] . . . Congress' power to reserve water for land which is itself set apart from the public domain" without "answer[ing] the question of the *amount* of water which has been reserved or the purposes for which the water may be used." *United States v. New Mexico*, 438 U.S. 696, 699 (1978) (emphasis added); *see also Fishing Vessel*, 443 U.S. at 684 (court

"unequivocally rejected" a tribe's "claim to an untrammeled right to take as many of the steelhead running through its reservation as it chose").

As this Court has previously recognized, "[a] compact may be unreasonable if it follows an approach to quantify and allocate water rights that departs from existing law," or when in conflict with "settled principles of reserved waters rights jurisprudence." *Blackfeet* *26, *33. *Cf. In re Crow*, ¶ 28 ("Given these protections in the Compact *and the calculation of the water right* based on the development of mineral deposits[,] we cannot conclude that the Water Court was clearly erroneous in adopting *the Compact allocation of water* for the Ceded Strip.") (emphasis added). Given that this Compact failed to quantify water rights, that is exactly what the Compact did here.

ii. The Tribal Water Right is impermissibly broad.

In a similar vein, the Tribal Water Right is impermissibly broad. As explained above, the CSKT's *Winters* rights extend only to the water that is necessary to fulfill the purposes for which the Reservation was created. *Adair*, 723 F.2d at 1419. Similarly, the CSKT's *Winans* rights only provide for a "right of taking fish in all the streams *running through or bordering* said reservation [and] also the right of taking fish *at all usual and accustomed places*." 12 Stat. 974, art. III (emphases added). But in direct conflict with these principles, the Compact grants time-immemorial rights not just for the "maintenance" of currently exercised fishing practices, but also for the "***enhancement*** of fish habitat to benefit the instream fishery." MONT. CODE ANN. § 85-20-1901, art. III, §§ D(1), D(2), D(3), D(7), D(8) (emphasis added). The Compact, in other words, goes beyond providing the CSKT with sufficient water that "serves so much as but no more than is necessary to provide the [CSKT] with a livelihood—that is to say, a moderate living." *Fishing Vessel*, 443 U.S. at 686; *Adair*, 723 F.2d at 1415 ("[i]mplicit in this 'moderate

living' standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of natural resources that they enjoyed at the time they entered into the treaty"). That is, the amount of water protected under such a treaty-reserved right is "the amount of water necessary to support [the CSKT's] hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members." *Hawkins v. Haaland*, 991 F.3d 216, 221 (D.C. Cir. 2021) (quoting *Adair*, 723 F.2d at 1414-15). But the Compact impermissibly expands the treaty-reserved right and allows the CSKT—at the expense of the Objectors and others—to lay claim to whatever water it might decide it needs to "enhance[]" its fisheries in whatever amount it desires.

iii. The Tribal Water Right extends too far geographically.

Finally, the Tribal Water Right extends too far geographically. *Winters* rights are physically tied to reservations. *United States v. Adair*, 478 F. Supp. 336, 345 (D. Or. 1979) ("When, by treaty, the Government withdraws land from the public domain and reserves it for a federal purpose, the Government impliedly reserves *appurtenant* unappropriated water to the extent needed to fulfill the purposes of the reservation.") (emphasis added). Likewise, the Treaty of Hellgate's *Winans* rights provide for non-consumptive fishing rights only in "streams running through or bordering" the reservation and at "all usual and accustomed places." 12 Stat. 975, art. III. Neither of these rights can apply to the CSKT subsistence range south and east of the Continental divide in Montana. The CSKT has not, and cannot, demonstrate "usual and accustomed" fishing in those areas.

In sum, the "Tribal Water Right" under the Compact is an unquantified, unlimited right to water, both on and off the Reservation, that is senior to all other users. It cannot be justified under the *Winters* or *Winans* cases, and it is therefore inconsistent with federal law.

D. *The Court should enter an order consistent with this analysis.*

Based on the analysis above, the Court should enter an order confirming that:

1. The Tribal Water Right stems from, and therefore must be consistent with *Winters*, *Winans*, and subsequent federal case law applying those *Winters* and *Winans* principles.

2. Any water right that the Compact provides to the CSKT must be quantified.

3. To the extent the Tribal Water right stems from the *Winters* case, it must be limited to (i) the amount that is necessary to accomplish the purposes for which the Reservation was created and (ii) water that is on or appurtenant to the Reservation.

4. To the extent the Tribal Water Right stems from the *Winans* case and Article III of the Treaty of Hellgate, that right must be limited to (i) the amount of water necessary to support the CSKT's hunting and fishing rights as currently exercised; (ii) nonconsumptive use; and (iii) streams running through or bordering the Reservation or at the usual and accustomed places the CSKT demonstrates that it currently exercises its treaty reserved fishing rights.

II. The Compact violates the Objectors' due process and related constitutional rights.

The Compact violates the Objectors' state and federal constitutional rights in two ways: it (i) infringes on their property interests without providing notice and an opportunity to be heard, and (ii) improperly strips Montana's state courts of their jurisdiction.

A. *The Compact violates due process.*

Both the State and Federal Constitutions enshrine the right to due process in their respective bills of rights. Under the U.S. Constitution, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law," U.S. CONST. amend. V, and "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend XIV. Similarly, the Montana Constitution provides, "No person shall be deprived

of life, liberty, or property without due process of law." MONT. CONST. art. II, § 17. Additionally, the water rights at issue here—those of the Objectors as well as those claimed by the CSKT—are a property interest that triggers due process protections. *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1305 (9th Cir. 1981), *affirmed in part and reversed in part on other grounds by Nevada v. United States*, 463 U.S. 110 (1983) (acknowledging property interest in a water right); *In re Sunlight Ranch Co.*, 2022 Mont. Water LEXIS 930, at *13 (Nov. 15, 2022) ("[N]otions of due process call for notice and the opportunity for a hearing before the Court ultimately does impose a sanction that terminates a property interest in a water right.").

The "hallmarks of procedural due process" are "notice and a meaningful opportunity to be heard." *Austin v. Univ. of Or.*, 925 F.3d 1133, 1139 (9th Cir. 2019) (quoting *Ludwig v. Astrue*, 681 F.3d 1047, 1053 (9th Cir. 2012)). That is true under Montana law as well. *E.g.*, *Larson v. Buck*, 2017 MT 84N, ¶ 8 ("The essential elements of due process are notice and the opportunity to be heard."). But, in violation of these bedrock principles, the adoption and implementation of the Compact has substantially diminished the Objectors' water rights—without notice or a hearing. For example, in 2022, Flathead Project water deliveries to the Sego Land began late (in June, rather than May historically) and were cut off early (in mid-August, rather than mid-September historically). The Flathead River and its tributaries were largely in flood stage in May, but the Flathead Board decided to allocate water for downstream uses instead of supplying irrigators like the Objectors. Additional shortages and delays in water deliveries continued into 2023. Thus, the Objectors have been deprived of a constitutionally protected property right without the bare minimum protections that due process requires.

B. ***The Compact improperly strips the Montana courts of jurisdiction*****.**

The Compact unconstitutionally strips the Montana courts of jurisdiction to hear disputes over water rights that are regulated by the Compact.

i. <u>Background on the Board</u>.

The Compact establishes the Board. MONT. CODE ANN. § 85-20-1901, art. IV, § I(1). The Board consists of five voting members: two are selected by Montana's Governor, two are appointed by the Tribal Council, and one is selected by the other four members. *Id.* art. IV, § (2)(a).

As for its powers, the Board has "the jurisdiction to enforce the terms of this Compact as provided by Article IV.I.1." MONT. CODE ANN. § 85-20-1901, art. IV, § I(4)(c). In addition, it has "*exclusive* jurisdiction to resolve . . . any controversy over the right to the use of water as between the Parties or between or among holders of Appropriation Rights and Existing Uses on the Reservation except as explicitly provided otherwise in Article IV.G.5." *Id.* art. IV, § I(1) (emphasis added). The Compact defines the term "Existing Use" to mean "a use of water under color of Tribal, State or Federal law in existence as of the Effective Date, including uses in existence on that date that are eligible for either of the registration processes set forth in the Law of Administration." *Id*. art. II, § 29. The effect of the Board's exclusive jurisdiction under the Compact and the definition of "Existing Use" means that the Board's exclusive jurisdiction includes the water rights of non-Tribal Montanans like the Objectors who use water pursuant to their water rights "under color of . . . State or Federal law" as of the time of the effective date of the Compact.

An aggrieved party may seek judicial review of a Board decision, but that right is limited. The Compact provides that a party "may appeal any final decision by the Board to a Court of Competent Jurisdiction within thirty days of such decision." *Id.* art. IV, § I(6). A "Court of

Competent Jurisdiction," in turn, is defined as "a State or Tribal court that otherwise has jurisdiction over the matter so long as the parties to the dispute to be submitted to that court consent to its exercise of jurisdiction, but if no such court exists, a Federal court." *Id.* art. II, § 26. As a result—and critically for purposes of this motion—if the CSKT declines to submit to the jurisdiction of Montana's courts, there is no path to review by the state judiciary.

ii. <u>The Compact's jurisdiction stripping is unconstitutional</u>.

The Compact's attempt to strip the Montana courts of jurisdiction violates the state constitution.

The Montana Constitution provides that "[t]he judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law." MONT. CONST. art. VII, § 1. With respect to the Supreme Court, the constitution confirms that it "has appellate jurisdiction" and "general supervisory control over all other courts," and that "Supreme court process shall extend to all parts of the state." *Id.* art. VII, § 2. The constitution is equally unequivocal with respect to the state trial courts' jurisdiction: "The district court has jurisdiction in . . . all civil matters and cases at law and in equity." *Id.* art VII, § 4(1). Consistent with these provisions, it is a "fundamental violation of a person's rights to due process, individual dignity, and liberty . . . should a 'judge' with no vested judicial authority . . . adjudicate rights regarding property or the law." *Brown v. Gianforte*, 2021 MT 149, ¶ 18, 404 Mont. 269, 280, 488 P.3d 548, 554 (2021).

In contravention of these well-settled principles, the Compact purports to strip the Montana state courts of jurisdiction over civil disputes involving the use of water regulated by the Compact. The Board's jurisdiction over such disputes is "exclusive," and even an appeal of a Board decision will not be heard by a Montana court unless all parties so consent. MONT. CODE

ANN. § 85-20-1901, art. IV, §§ I(1); *id.* art. II, § 26. Moreover, the purpose of the Board is to implement and enforce *the Compact*, and not Montana law. MONT. CODE ANN. § 85-20-1901, art. IV, § 4(c) (Board is empowered "to enforce the terms of this Compact" and "[a]ll controversies cognizable under this subsection shall be heard and resolved pursuant to the Compact and the Law of Administration"). Thus, whenever there is a conflict between the Montana Constitution and the Compact, the Board will give precedence to the Compact.

This argument is supported by the Montana Supreme Court's reasoning in *In re Crow Water Compact*, 2015 MT 353. There, the Court upheld the Water Court's decision to confirm the Crow Water Compact, but in doing so, it noted that "the Objectors are mistaken in their argument that the Compact removes enforcement of state-based rights from state agencies and courts." *Id.* ¶ 31. The Court explained that the Crow Water Compact—unlike the Compact at issue here—"plainly states that the Tribal water right is administered by the Tribe" and that "'the Tribe *shall not administer any water right recognized under state law*.'" *Id.* (emphasis in original). Thus, the Court held, "[t]he Compact protects state-based rights" because "the Objectors may enforce their rights *under state law with state agencies and in state court*." *Id.* (emphasis added). But here, the Objectors have no right to enforce their rights under state law with state agencies and in state court: their only recourse is through the Board.

Finally, these arguments find further support in the structure of the federal judiciary under the US Constitution. At the federal level, the US Supreme Court has long recognized that the Constitution imposes limits on Congress's power to strip jurisdiction away from the federal courts. Beginning with its seminal decision in *United States v. Klein*, the Court has held that Congress may not, by limiting jurisdiction, dictate a rule that undermines the judiciary's independence. 80 U.S. 128, 146 (1872); *see also* Tara Leigh Grove, *The Structural Safeguards*

of Federal Jurisdiction, 124 HARV. L. REV. 869, 888–916 (2011) (discussing the history of jurisdiction stripping).

It is true that, while *Klein* imposes some limitations, Congress has fairly broad discretion over whether and when to limit the federal courts' jurisdiction. *See, e.g.*, *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) ("Congress has the power (within limits) to tell the courts what classes of cases they may decide."). But that does not undermine the arguments here. Congress' discretion stems from two clauses in the Federal Constitution: Article 3, Section 2, which states that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*." U.S. CONST., art. III, § 2 (emphasis added). And Article 3, Section 1, which provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and *in such inferior Courts as the Congress may from time to time ordain and establish*." *Id.* art. III, § 1 (emphasis added).

The takeaway is that *even with* this express grant of power, the U.S. Constitution still places limits on Congress's authority to engage in jurisdiction stripping. The Montana Constitution, in contrast, doesn't contain any analogous provisions that would permit jurisdiction stripping from the state courts. To the contrary, it states, unequivocally and without limitation, that "[t]he district court has jurisdiction in . . . *all civil matters* and cases *at law and in equity*." MONT. CONST. art. III, § 4(1) (emphasis added). Likewise, it vests the State's judicial power in "one supreme court, district courts, justice courts, and such other courts as may be provided by law." *Id.* art. II, § 16. Consistent with these provisions, the Montana Supreme Court has noted that "the judicial power cannot be taken away by legislative action." *State ex rel. Bennett v. Bonner*, 123 Mont. 414, 429, 214 P.2d 747, 755 (Mont. 1950) (citation omitted). Because

Montana unconditionally gives its state courts jurisdiction over all civil matters, the Compact's jurisdiction-stripping provisions are unconstitutional.

C. *The Court should enter an order consistent with this analysis.*

Based on the analysis above, the Court should enter an order confirming that:

1. The Objectors, and all other persons and entities that hold water rights regulated by the Compact, are entitled to due process protections under the Montana and Federal Constitutions.

2. These due process protections require, at a minimum, notice and a meaningful opportunity to be heard before the Board or any other governmental entity that might impact those water rights.

3. The Compact violates the Montana Constitution by purporting to strip the Montana state courts of their jurisdiction to adjudicate civil claims.

III. The Compact Violates Article IX, Section 3 and Article III, Section 1 of the Montana Constitution.

A. *The Compact takes away the state legislature's power to administer, control, and regulate water rights.*

The Montana Constitution Article IX, Section 3(4), states that "[t]he legislature shall provide for the administration, control, and regulation of water rights[.]" The Montana Supreme Court has likewise long held that "[t]he state legislature cannot enact a valid law which goes counter to any of the mandatory and prohibitory provisions of the state constitution," observing "[t]he rule is well settled that the judicial power cannot be taken away by legislative action." *State ex rel. Bennett v. Bonner*, 123 Mont. 414, 429, 214 P.2d 747, 755 (Mont. 1950) (citation omitted). Article III, Section 1 of the Montana Constitution similarly states that "[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any

power properly belonging to either of the others, except as in this constitution expressly directed or permitted."

By enacting the Compact into law, the Montana Legislature improperly delegated the state's legislative and judicial control over Montanan's water rights. The Compact and the UAMO establish the Board, which has "the jurisdiction to enforce the terms of this Compact as provided by Article IV.I.1" as well as "exclusive jurisdiction to resolve . . . any controversy over the right to the use of water as between the Parties," including the water rights of non-Tribal Montanans, as explained above. MONT. CODE ANN. § 85-20-1901, art. IV, §§ I(1), I(4)(c); *supra* at 13.

Having delegated its authority to provide for the administration, control, and regulation of water rights in Montana to a separate, non-state governmental entity—the Water Management Board—the Montana Legislature and the Montana Department of Natural Resources no longer administer, control, or regulate the water rights belonging to Montana citizens who live on the Reservation under the Compact, violating Article IX, Section 3 of the Montana Constitution. This aspect of the Compact therefore "violate[s] . . . applicable law." *Blackfeet* at *24.

The Montana Supreme Court on several occasions has held that a statute or legislative act violated Article III, Section 1 as an unconstitutional delegation of the legislative or judicial power that was reserved to another branch of government. For instance, in *In Re Petition to Transfer Territory from High School District No. 6*, 303 Mont. 204, 15 P.3d 447 (2000), the state Supreme Court held that the school territory transfer statute was an unconstitutional delegation of legislative power as an overbroad grant of discretion to a county superintendent of schools. Among other things, the statute failed to limit a county superintendent to the role of fact finder or applying specific criteria identified by the legislature. 15 P.3d at 450-51. The legislative grant,

even though it set forth some criteria, did not sufficiently limit any superintendent discretion in granting or denying a petition for change in territory. Thus it failed to provide sufficient checks on the local official's discretion in deciding whether to grant a territory transfer request. *Id*. at 451.

As the state Supreme Court identified there:

> A statute granting legislative power to an administrative agency will be held to be invalid if the legislature has failed to proscribe a policy, standard, or rule to guide the exercise of the delegated authority. If the legislature failed to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, the statute is invalid.

Id. at 450 (cleaned up) (citing, *inter alia*, *Matter of Auth. to Conduct Sav. & Loan Act.*, 182 Mont. 361, 369-70, 597 P.2d 84, 89 (1979)).

Similarly, in the *In R*e *Authority* case, the Montana Supreme Court held unconstitutional the statute granting to the Department of Business Regulation the power to approve or disapprove applications for mergers of savings and loan institutions. 597 P.2d at 88-90. As the state Supreme Court stated there:

> A delegation of power to determine who are within the operation of the law is not a delegation of legislative power . . . But it is essential that the Legislature shall fix some standard by which the officer or board to whom the power is delegated may be governed, and not left to be controlled by caprice.
>
> We agree with this statement of law and go further by saying that the standard must not be so broad that the officer or board will have unascertainable limits within which to act.

182 Mont. at 369-70, 597 P.2d at 89-90 (cleaned up). Thus, in *In Re Authority*, the state Supreme Court held that the statutory standards or guidelines, to the extent there were any, were insufficient to satisfy the requirements for a constitutional delegation of legislative authority from the legislative branch to an executive branch agency or board.

The Montana Supreme Court has applied the restrictions of Article III, Section 1 not only to attempted delegations of legislative authority, but also to attempted delegations of judicial authority by the Legislature to another branch of government. For example, in *Seubert v. Seubert*, 301 Mont. 382, 13 P.3d 365 (2000), the state Supreme Court held that Montana Code Annotated Sections 40-5-272 and -273 were an unconstitutional delegation of the judicial power to the Child Support Enforcement Division. Those provisions purported to grant CSED the "judicial power" to make and enforce binding child support orders without automatic and mandatory judicial review, thus constituting an unconstitutional violation of the separation of powers clause of Article III, Section 1. 301 Mont. 382 at ¶ 48, 13 P.3d at 396.

For the Compact, the provisions of the Compact as approved by the legislature, including the Unitary Administration and Management Ordinance, violate both aspects of the separation of powers and delegation restrictions of Article III, Section 1. The Compact makes an unconstitutional delegation of the legislative authority to the Board to "administer the use of all water rights on the Reservation" upon the effective date of the Compact without sufficient standards or principles to guide that delegation. Also, the Compact grants the judicial power to the Board and subsidiary administrative personnel, including the engineer, to determine issues concerning conflicts between water rights users and the uses of water rights on the Reservation, without automatic judicial review and without providing for judicial review in a Montana state court, as generally otherwise provided for Montana citizens by the Montana Constitution. *See* Montana Constitution Article VII, §§ 1–2, 4.

The situation created by the Compact is similar to that in Wyoming where its Constitution likewise "recognize[d] that state control of water is essential to the development and prosperity of Wyoming" and directed that a state engineer supervise the waters of the state, but a

district court judge "assign[ed] the duties of administering state water within the reservation to the tribal water agency." *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 835 P.2d 273, 281 (Wyo. 1992). The Wyoming Supreme Court concluded that "the district court had no 'inherent equitable enforcement authority,' as argued by the Tribes, to effectuate a de facto removal and replacement of the state engineer as the administrator of state water within the reservation." *Id.* at 282.

Similarly, here, the Legislature and the Montana Department of Natural Resources cannot replace their control over the regulation of the water rights within the state with the Board through the Compact. This unreasonable element of the Compact follows "an approach to quantify and allocate water rights that departs from existing law," *Blackfeet* at *33, and deprives Objectors of their rights under Article III, Section 1 of the Montana Constitution.

B. *The Court should enter an order consistent with this analysis.*

1. Based on the analysis above, the Court should enter an order confirming that: The Compact's creation of exclusive jurisdiction for the Board over any controversy over the right to the use of water between the Compact Parties violates Article III, Section 1 of the Montana Constitution.

IV. The Compact Violates Article V, Section 12 of the Montana Constitution.

A. *The Compact improperly adopts a special or local act.*

Article V, Section 12 of the Montana Constitution mandates that "[t]he legislature shall not pass a special or local act when a general act is, or can be made, applicable." A local law is one which "operates in a particular locality rather than the entire state." BLACK'S LAW DICTIONARY (11th ed. 2019). A special law "pertains to and affects a particular case, person, place, or thing, as opposed to the general public." *Id.*

To implement the Montana Constitution's mandate that the Legislature "administer[], control, and regulat[e]" Montana water rights, the Legislature passed the Montana Water Use Act of 1973, which "comprehensively adjudicate[s] existing water rights and regulate[s] water use within the state." MONT. CODE ANN. § 85-2-101(2), (6). The Montana Water Use Act applies to the seven Tribal Reservations within Montana and allows for compacts with Tribal groups to quantify a Tribe's water rights. This process normally includes "[v]arious technical reports … to quantify the available water, the anticipated water needs of the Tribe, potential impacts to . . . other water users, and other related issues." *Blackfeet* at *5.

But unlike other compacts that settled quantification disputes, *see, e.g., id.*, the Compact *creates* such disputes and provides an ongoing water administration regime that is both unique to the Reservation and outside of the Montana Legislature or judiciary's jurisdiction. The Compact created a UAMO, which within the Reservation purports to "govern all water rights, whether derived from tribal, state or federal law, and shall control all aspects of water use, including all permitting of new uses, changes of existing uses, enforcement of water right calls and all aspects of enforcement within the exterior boundaries of the Reservation. Any provision of Title 85, MCA [Montana Water Use Act], that is inconsistent with this Law of Administration is not applicable within the Reservation." MONT. CODE ANN. § 85-20-1902 (1-1-101(3)).

By going beyond settling water claims and instead creating a new, localized system of administration, the Compact's UAMO is a "local act" over a "particular locality" that "operate[s] over a select class" of Montanans and CSKT members on the Reservation. The UAMO therefore unreasonably violates "applicable law" under the Montana Constitution by creating a new set of laws for a specific locality, materially injuring Objectors under the "substantive term[s]" of the Compact. *Blackfeet* at *24–25.

To be sure, the Montana Supreme Court recognizes that the prohibition of Article V, Section 12 is not absolute. "The legislature is enjoined from passing a special or local act only when a general act is or can be made applicable." *Grossman v. Dep't of Natural Resources*, 209 Mont. 427, 446, 682 P.2d 1319, 1329 (1984). In this instance, the Compact violates this prohibition as articulated by the Montana Supreme Court. A general act, the Montana Water Use Act, was already applicable to the Reservation and the regulation and administration of the non-Indian water rights diverted upon and put to beneficial use upon the lands within the exterior boundaries of the Reservation. But for the special and local act of the Compact and its UAMO, the Water Use Act, its administrative and regulatory structure, and the integration of state law-based and federal reserved and other water rights claims (as provided by the McCarran Amendment and otherwise) would apply on the Reservation.

Indeed, the fact that a prior water compact with a Tribe in Montana allowed for the continued application of the Montana Water Use Act to non-tribal water rights on the reservation at issue there underscores this point. In the Crow Compact, that compact specifically provided that "the Tribe shall not administer any water right recognized under state law." *In re Crow*, ¶ 31 (cleaned up). By contrast here, the Compact and UAMO establish a separate—*i.e.*, a special and local—administrative body to regulate and administer state-law based water rights on the Reservation. *See supra* at Section III.

The Compact approach to displace the general legislation of the Montana Water Use Act is unnecessary. Instead, it was a choice made by the Compact Parties. But it was not a choice that the Montana Constitution permits in these circumstances. Accordingly, the Compact—including the UAMO—violates Article V, Section 12 of the Montana Constitution as a prohibited special or local act. *Grossman*, 209 Mont. at 446, 682 P.2d at 1329; *see also Sjostrum*

v. State Highway Comm'n, 124 Mont. 562, 568, 228 P.2d 238, 241 (1951) ("In determining whether a law is general or special, statewide or local, public or private, the courts will look to its substance and practical operation, rather than to its title, [or] form and phraseology.") (citation omitted) (upholding district court determination that state highway commission contract with private railway company to pay state highway funds for benefit of the company was impermissible local or special legislation under the former Montana Constitution Article V, Section 26 (1889)).

B. *The Court should enter an order consistent with this analysis.*

1. Based on the analysis above, the Court should enter an order confirming that: The Compact's UAMO creates a special and local law applicable only to the Reservation and violates Article V, Section 12 of the Montana Constitution.

As the foregoing arguments demonstrate, the Compact is inconsistent with the state constitution. At the same time, the Compact Parties could have avoided these objections. The state constitution can be amended in three different ways: (1) constitutional convention, through a two-thirds vote of all members of the legislature; (2) legislative referendum, proposed by a vote of two-thirds of the legislature and then approved by a majority of voting electors at the next election; or (3) initiative, if a valid petition signed by ten percent of the state's qualified electors is submitted and the amendment is then approved by a majority at the next election. MONT. CONST. art XIV, §§ 1, 8, 9. If the Compact Parties had utilized any of those three mechanisms to amend the state constitution, the Compact would not be susceptible to the Objectors' complaints. Their failure to do so is fatal to the Compact.

CONCLUSION

For the above reasons, Objectors request that the Court grant their motion.

Dated this 10th day of July, 2024.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was served to the following persons as noted below, on the date herein.

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Dated this 10th day of July, 2024.

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

CASE NO. WC-0001-C-2021

AFFIDAVIT OF WILLIAM SEGO

STATE OF MONTANA)
: ss.
County of Lake)

William Sego, being first duly sworn, says:

1. I am over the age of 18 years and am a party to the above-entitled action.

2. If called as a witness, I have personal knowledge of the matters set forth herein, and could and would competently testify thereto if called upon to do so.

A. Mr. Sego's Interests and the Injuries Under the Compact

3. I own, through entities I control, approximately 910 acres located in portions of Sections 32, 33 and 34, Township 19 North, Range 19 West, P.M.M., and Section 4, Township 18 North, Range 19 West, P.M.M., within the exterior boundaries of the Flathead Indian Reservation, formerly known as the Pope Ranch (hereinafter referred to as the "Sego Ranch"). The Sego Ranch is owned by Bill and Irene LLC, which in turn is owned by the William A. and Irene Sego Revokable Trust, of which I am a trustee.

4. The Sego Ranch consists of a combination of grazing land, irrigated crop production land, mature growth timbered areas, a residence and various improvements, including water-related capital improvements (e.g., ditches, stock ponds, and diversion structures).

5. Title to the Sego Ranch traces back to several parcels allotted to individual Indians in a series of conveyances generally occurring between 1904 and 1912. Patents were later issued to these Indian allottees. After mesne conveyances, Bill & Irene LLC holds the title to the allotted parcels.

6. The Sego Ranch is located in proximity to Ashley Creek, in Basin 76L, and derives a significant portion of its water supply from Ashley Creek pursuant to the water rights described below. Ashley Creek is a tributary of Post Creek, which is a tributary of the Flathead River below Flathead Lake.

7. I also own approximately 668 acres in Sections 16, 17, and 21, Township 19 North, Range 21 West, P.M.M., near the town of Moiese, located within the exterior boundaries of the Flathead Indian Reservation ("Sego Moiese Property"). The Sego Moiese Property is owned by Bill and Irene LLC, which in turn is owned by the William A. and Irene Sego Revokable Trust, of which I am a trustee.

8. The Sego Ranch and Sego Moiese Property are located within the Flathead Irrigation Project ("Flathead Project" or "FIP") and have historically been irrigated with water delivered from the FIP.

9. Additionally, I own approximately 22 acres adjacent to Flathead Lake in Lake County on which I maintain a residence for myself and my family ("Sego Lake Property"). The Sego Lake Property is owned by the William A. and Irene Sego Revokable Trust, of which I am a trustee.

10. I or the above-mentioned entities of which I am a member or trustee own numerous water rights and interests in water appurtenant to or associated with the above-described properties. These water rights are now and have historically been used for a variety of beneficial uses on the Sego Ranch, Sego Moiese Property, and the Sego Lake Property, including, without limitation, irrigation for haying and ranch operations, stock watering, and domestic purposes. These water rights are described with greater particularity below:

a. Water Right Claim Nos. 76L 15152-00 (irrigation); 76L 15151-00 (stock); and 76L 15150-00 (domestic) (collectively, "Ashley Creek Water Rights."). These water rights divert from Ashley Creek, and supply irrigation, stock, and domestic uses, respectively, on the Sego Ranch. The priority dates for these water right claims as stated in the claim files are December 31, 1889. These are state law based water right claims pending adjudication in the Basin 76L general adjudication.

b. Secretarial Water Rights. "Secretarial Water Rights," or "private water rights," are historic uses of water within the Flathead Indian Reservation by the original Indians that preceded the Treaty of Hellgate and reflect some of the earliest uses of water in Montana. These water rights are unique to the Flathead Reservation and were granted by the Assistant Secretary of the Department of the Interior on November 25, 1921, in order to protect such senior private rights from disruption upon establishment of the Flathead Irrigation Project. The

beneficial use of such water rights on what is now the Sego Ranch is documented in historical records, including records of the Department of the Interior dating to at least as early as 1915.

c. Walton Water Rights. As a successor in interest to Indian allottees, I acquired appurtenant rights to share in the reserved water rights of those tribal members with a priority date as of the date the Reservation was created, or "*Walton* Water Rights." *See Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

d. Rights to receive Flathead Irrigation District water deliveries pursuant to, among others, Water Right Nos. 76L 30052932 (Preliminary Decree) and 76L166594 (Mission-Jocko-Flathead-District filing), Nos. 59, 60 (two diversion points from the Pablo Feeder Canal); and Nos. 111, 112 (two diversion points from the Hillside Ditch).

e. Water Right Claim Nos. 76LJ 37244-00 (groundwater well); 76LJ 39717-00 (Flathead River/Lake Pump); and 76LJ 80351-00 (developed spring, exempt). These are groundwater rights associated with the Sego Lake Property.

11. The water rights described above (the adjudication of which are not part of the Compact proceedings) have all been claimed or asserted in the pending adjudication proceedings for Basin 76L and 76LJ in the Montana Water Court. Upon information and belief, my ability to exercise and place to beneficial use my water rights, whether vested or claimed, would be impaired and adversely affected by the approval of the Compact.

12. Among other things, the Compact and the Unitary Administration and Management Ordinance ("UAMO") purport to establish an entirely new system for water rights administration that is geographically specific to all water rights within the Flathead Reservation. Upon information and belief, under this proposed new system the nature, scope, and relative priority of my water rights would be determined by the Flathead Reservation Water Management Board ("Board"), and not the Montana Water Court and I would be deprived of my right to seek redress in the Montana Court system.

13. Though the Compact has not yet been approved by the Water Court, the Board, and the Compact Implementation Technical Team ("CITT") have already begun to exercise authority and make determinations regarding operations of the FIP that have resulted in reduced irrigation deliveries to my property. *See* Compact Appx. 3.4, "Implementation Schedule."

14. The Compact states that irrigators within the Flathead Project who hold state law-based water right claims can enter into "consensual agreements" with the Board to determine the amount and priority of their water rights. Without such an agreement, my water rights will presumably have to wait for adjudication in the Basin 76L and 76LJ adjudications, which are currently stayed, but by that time the priority of my water rights may have already been determined as either a legal or practical matter to be junior or subordinated to the sweeping water right claims made in the Compact.

B. Traceability

15. These injuries to my interests are fairly traceable to the Compact. The Board, as created by the Compact pursuant to Mont. Code Ann. § 85-20-1901 to implement the UAMO pursuant to Mont. Code Ann. § 85-20-1902, purports to be the exclusive regulatory body for the

Compact's new water rights administration program geographically specific to all water rights within the Reservation. Mont. Code Ann. § 85-20-1901, art. III, § I(1), (5). The creation of the Board was authorized by the Compact which became effective on September 17, 2021, and the Board appears to have held its first public meeting in January 2022 and is currently operational.

16. I have already seen material and costly reductions in both the timing and amount of water deliveries for my Flathead Project rights resulting from management decisions affecting the Project under the umbrella of the Compact and Board. The UAMO would effectively render my Secretarial water rights junior to the FIP, reversing the historic seniority of the Secretarial water rights to the Project. I and other water users who hold and rely upon Secretarial water rights would lose the ability to utilize these water rights for irrigation and stock uses under their historical priority dates and would instead be subjugated to the FIP and the Compact water rights.

17. The Claimed CSKT Compact Water Right Nos. 76L 300052707, 76L30052708, 76L30052834, 76L 30052835, and 76L 30052836 all claim surface water rights in Ashley Creek or its tributaries, for fish and wildlife uses, with a time immemorial priority date. The amounts claimed range from 18.50 cfs and up to 134.70 cfs. Upon information and belief, the mean discharges of Ashley Creek range from lows of around 2.0 cfs to a monthly high of only 54.32 cfs during peak spring flows. Despite the fact that these claimed Compact water rights appear to be for instream uses, and are thus nonconsumptive, they have measurement points located downstream of the diversion points for my Ashley Creek water rights and claim far more than the available flow in the stream. As such, my Ashley Creek Water Rights will be subject to call in the event that the Compact rights are not satisfied.

18. Upon information and belief, my Secretarial Water Rights will be subject to reduction or cancellation by operation of the Compact water rights as set forth in the Preliminary Decree. Upon information and belief, the newly constituted Board has already indicated that it does not recognize the full scope of Secretarial Water Rights on the Reservation and will take actions to reduce or eliminate historical canal crossings, stock water uses, and other components of Secretarial Water Rights. Such action will result in material injury to my Secretarial Water Rights. My ability to exercise my Secretarial Water Rights is threatened by the Compact's claimed time-immemorial instream flow rights on Ashley Creek and Post Creek downstream of my diversions. Implementation and priority administration of these excessive and unsupported instream flows would result in my water uses being curtailed, and this in turn would negatively affect subflow and subirrigation of my property.

19. Such action will result in material injury to my Ashley Creek Water Rights and my Secretarial Water Rights.

C. Redressability

20. These injuries to my interests are redressable by this Court. An order declaring that the Compact does all or part of the following: violates the Montana Constitution; requires quantification of the Tribal Water Right or other water rights provided by the Compact; limits the federal reserved rights portion of the Tribal Water Right to *Winters* doctrine-based purposes; imposes appropriate limits on any treaty-reserved based portion of the Tribal Water Right;

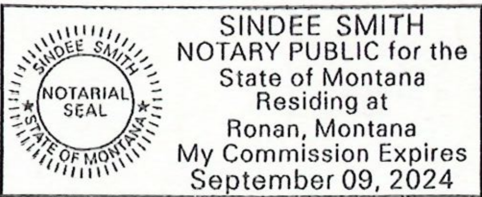
requires protection of my and others' due process rights in seeking to regulate our water rights, or any portion thereof, would provide relief from some or all of the injuries to my interests imposed by the Compact and preclude or lessen the adverse application of the Compact to my water rights. Such a declaration or declarations would also support an ultimate judgment by this Court that the Compact is not fundamentally fair, reasonable, or adequate and is therefore invalid, further providing redress for the injuries to my interests as noted above.

Dated this 9th day of July, 2024.

By: ______________________
William Sego

STATE OF MONTANA)
: ss.
County of Lake)

This record was signed and sworn to before me on July 9, 2024 by William Sego.



Notary Signature
[Affix seal/stamp as close to signature as possible]

SINDEE SMITH
NOTARY PUBLIC for the
State of Montana
Residing at
Ronan, Montana
My Commission Expires
September 09, 2024

NOTARIAL SEAL — SINDEE SMITH — STATE OF MONTANA

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ATTORNEYS FOR OBJECTORS
WILLIAM SEGO AND BILL & IRENE, LLC,
AND GRACE SLACK

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

CASE NO. WC-0001-C-2021

AFFIDAVIT OF GRACE SLACK

STATE OF MONTANA)
: ss.
County of Lake)

Grace Slack, being first duly sworn, says:

1. I am over the age of 18 years and am a party to the above-entitled action.

2. If called as a witness, I have personal knowledge of the matters set forth herein, and could and would competently testify thereto if called upon to do so.

A. Ms. Slack's Interests and the Injuries Under the Compact

3. I own land in Lake County, including approximately 637 acres in portions of Sections 8, 10, 17, 18, and 19 in Township 19 North, Range 19 West, P.M.M.; and Section 21 Township 19 North, Range 20 West, P.M.M., known as the Doubleshoe Ranch (hereinafter, the "Slack Property") and numerous water rights in Basin 76L ("Slack Water Rights"). Together with my late husband, William ("Bill") Slack, I have lived on and irrigated this land since January 1967. The land is held both in my name and my son Alan Slack's name.

4. The Slack Water Rights include the water rights listed below. Depending on the individual water right, the Slack Water Rights are owned by myself and my late husband Bill Slack; or myself, Bill, and my son Alan Slack.[1]

a. Water Right Claim Nos. 76L 134609-00; 76L 134611-00; 76L 134614-00; 76L 134615-00; 76L 100386-00; 76L100387-00; 76L 100481-00; 76L 100482-00; 76L 100483-00; and 76L 100484-00. These water rights include ditches which divert from Post Creek and/or its tributaries, spring rights and wells, and supply irrigation, stock and domestic uses on the Slack Property. The priority dates for these water right claims date to as early as the 1880s, and in some cases to 1855. These are state law based water right claims.

b. Water Right Nos. 76L 30052932 (Preliminary Decree) and 76L 166594 (Mission-Jocko-Flathead District filing) (F Canal). These water rights are part of the Flathead Irrigation Project.

c. Secretarial Water Rights. "Secretarial Water Rights," or "private water rights," are historic uses of water within the Flathead Indian Reservation by the original Indians that preceded the Treaty of Hellgate and reflect some of the earliest uses of water in Montana. These water rights are unique to the Flathead Reservation and were granted by the Assistant Secretary of the Department of the Interior on November 25, 1921, in order to protect such senior private rights from disruption upon establishment of the Flathead Irrigation Project. The beneficial use of such water rights on what is now the Slack Property is documented in historical records, including records of the Department of the Interior dating to at least as early as 1915.

d. Walton Water Rights. As a successor in interest to Indian allottees, I acquired appurtenant rights to share in the reserved water rights of those tribal members with a priority date as of the date the Reservation was created, or "Walton Water Rights." *See Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

e. Rights to receive Flathead Irrigation District water deliveries pursuant to, among others, Water Right No. 76L190 096 00 (Post F Canal).

5. The water rights described above (the adjudication of which are not part of the Compact proceedings) have all been claimed or asserted in the pending adjudication proceedings for Basin 76L in the Montana Water Court. Upon information and belief, my ability to exercise and to place to beneficial use my water rights, whether vested or claimed, would be impaired and adversely affected by the approval of the Compact.

6. Among other things, the Compact and the Unitary Administration and Management Ordinance ("UAMO") purport to establish an entirely new system for water rights administration that is geographically specific to all water rights within the Flathead Reservation. Upon information and belief, under this proposed new system the nature, scope, and relative priority of my water rights would be determined by the Flathead Reservation Water Management Board ("Board"), and not the Montana Water Court and I would be deprived of my right to seek redress in the Montana Court system.

[1] In the case of Water Right Claim Nos. 76L134611-00, 76L-100483 and 76L 100484-00, there are also unrelated third parties that own or claim an interest in the water rights.

7. Though the Compact has not yet been approved by the Water Court, the Board, and the Compact Implementation Technical Team ("CITT"), have already begun to exercise authority and make determinations regarding operations of the FIP that have resulted in reduced irrigation deliveries to my property. *See* Compact Appx. 3.4, "Implementation Schedule."

8. The Compact states that irrigators within the Flathead Project who hold state law-based water right claims can enter into "consensual agreements" with the Board to determine the amount and priority of their water rights. Without such an agreement, my water rights will presumably have to wait for adjudication in the Basin 76L adjudication, which is currently stayed, but by that time the priority of my water rights may have already been determined as either a legal or practical matter to be junior or subordinated to the sweeping water right clams made in the Compact.

9. Conversely, if I were to enter into a Consensual agreement with the Tribes for the Post F Canal portion of my water rights, these water rights would be subject to new restrictions, fluctuations (due to adaptive management), and shutoffs of the Post F Canal. Regulation of stock water uses under the Post F Canal will further negatively impact my ability to distribute and water my stock as was customary prior to the Compact.

B. Traceability

10. These injuries to my interests are fairly traceable to the Compact. The Board, as created by the Compact pursuant to Mont. Code Ann. § 85-20-1901 to implement the UAMO pursuant to Mont. Code Ann. § 85-20-1902, purports to be the exclusive regulatory body for the Compact's new water rights administration program geographically specific to all water rights within the Reservation. Mont. Code Ann. § 85-20-1901, art. III, § I(1), (5). The creation of the Board was authorized by the Compact which became effective on September 17, 2021, and the Board appears to have held its first public meeting in January 2022 and is currently operational.

11. I have already seen material and costly reductions in both the timing and amount of water deliveries for my Flathead Project rights resulting from management decisions affecting the Project under the umbrella of the Compact and Board. The UAMO would effectively render my Secretarial Water Rights junior to the FIP, reversing the historic seniority of the Secretarial Water Rights to the Project. I and other water users who hold and rely upon Secretarial Water Rights, which include some of the oldest ditches in existence on the Flathead Reservation, would lose the ability to utilize these water rights for irrigation and stock uses under their historical priority dates and would instead be subjugated to the FIP and the Compact water rights.

12. Upon information and belief, my Secretarial Water Rights will be subject to reduction or cancellation by operation of the Compact water rights as set forth in the Preliminary Decree. Upon information and belief, the newly constituted Board has already indicated that it does not recognize the full scope of Secretarial Water Rights on the Reservation and will take actions to reduce or eliminate historical canal crossings, stock water uses, and other components of Secretarial Water Rights. My ability to exercise my Secretarial water rights on multiple ditches currently in use by me (and my neighbors) are threatened by the Compact's claimed, time-immemorial instream flow rights on Post Creek downstream of my diversions. Implementation and priority administration of these excessive and unsupported instream flows would result in my water uses being curtailed, and this in turn would negatively affect subflow and subirrigation of my property.

13. Such action will result in material injury to my Secretarial Water Rights.

C. Redressability

14. These injuries to my interests are redressable by this Court. An order declaring that the Compact does all or part of the following: violates the Montana Constitution; requires quantification of the Tribal Water Right or other water rights provided by the Compact; limits the federal reserved rights portion of the Tribal Water Right to *Winters* doctrine-based purposes; imposes appropriate limits on any treaty-reserved based portion of the Tribal Water Right; requires protection of my and others' due process rights in seeking to regulate our water rights, or any portion thereof, would provide relief from some or all of the injuries to my interests imposed by the Compact and preclude or lessen the adverse application of the Compact to my water rights. Such a declaration or declarations would also support an ultimate judgment by this Court that the Compact is not fundamentally fair, reasonable, or adequate and is therefore invalid, further providing redress for the injuries to my interests as noted above.

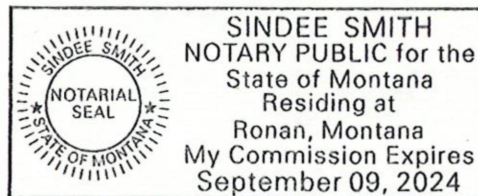
Dated this 9th day of July, 2024.

By: Grace Slack
Grace Slack

STATE OF MONTANA)
: ss.
County of Lake)

This record was signed and sworn to before me on July 9, 2024 by Grace Slack.

Notary Signature
[Affix seal/stamp as close to signature as possible]



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