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

* * * * * * * * * * * * * * * * * * * *

CASE NO. WC-0001-C-2021

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

The State of Montana ("State"), the Confederated Salish and Kootenai Tribes ("Tribes"), and the United States of America on behalf of the Tribes ("United States") (collectively, the "Compact Parties") respectfully move the Water Court to approve the Confederated Salish and Kootenai Tribes of the Flathead Reservation-State of Montana-United States Compact, codified at § 85-20-1001, MCA ("Compact"), and enter summary judgment dismissing all remaining objections to the Preliminary Decree. In support of this Motion, the Compact Parties assert:

1. All the facts relevant and material to the formation of the Compact are undisputed.

2. Those undisputed, material facts establish that the Compact was the product of good-faith, arms-length negotiations, is fair, adequate, and reasonable, and accordingly is presumptively valid.

3. Further, the Compact and the Preliminary Decree provisions arising from the Compact negotiations conform to all applicable law.

4. Consequently, the Objectors are unable to demonstrate that their interests have been, or will be, injured as a result of any illegality in the Compact.

5. The authorities cited in the *Brief in Support of Motion for Approval of the Flathead Reservation-State of Montana-United States Compact and for Summary Judgment Dismissing All Remaining Objections* establish that the Compact is entitled to a presumption of validity and, with regard to all remaining objections, "that there is no genuine issue as to any material fact and that [the Compact Parties are] entitled to judgment as a matter of law." Mont.R. Civ.P. 56(c)(3).

WHEREFORE, pursuant to §§ 85-2-234 and 85-2-702(3), MCA, 43 U.S.C. § 666, Art. VII. B of the Compact, and Mont.R.Civ.P. 56, the Compact Parties respectfully move the Court to enter an order granting this Motion, approving the Compact, issuing summary judgment dismissing all objections to the Preliminary Decree, and to enter Parts I through IV and Appendices 2 and 3 of the Preliminary Decree as a Final Decree approving the Tribal Water Right.

Respectfully submitted this 10th day of July 2024.

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

* *

CASE NO. WC-0001-C-2021

BRIEF IN SUPPORT OF MOTION FOR APPROVAL OF THE FLATHEAD RESERVATION-STATE OF MONTANA-UNITED STATES COMPACT AND FOR SUMMARY JUDGMENT DISMISSING ALL REMAINING OBJECTIONS

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FIIP	Flathead Indian Irrigation Project
FJBC	Flathead Joint Board of Control
MEFs	Minimum Enforceable Instream Flows
RDA	River Diversion Allowance – the volume of water necessary to be diverted or pumped to supply the FIIP Water Use Right.
TIFs	Target Instream Flows
UAMO	Unitary Administration and Management Ordinance a/k/a Law of Administration
WPIC	The Montana Legislature's Water Policy Interim Committee

INTRODUCTION

The Preliminary Decree based on the Confederated Salish and Kootenai Tribes of the Flathead Reservation-State of Montana-United States Compact, § 85-20-1901, MCA[1] ("Compact")—which was a product of good faith, arms-length negotiations—is fundamentally fair, adequate, reasonable, and conforms to applicable law. Objectors therefore have the heavy burden of establishing that the portions of the Compact set forth in Parts I through IV of the Preliminary Decree, along with the abstracts of water rights in Decree Appendices 2 and 3 (the "Decree"), are unreasonable. They cannot meet this burden. Objectors cannot establish that there was any impropriety in the negotiations leading to the Compact or that there is any illegality in its terms. They consequently cannot establish that their water rights will be materially injured by some failure of the Compact to conform to applicable law. The State of Montana ("State"), the Confederated Salish and Kootenai Tribes ("CSKT" or "Tribes"), and the United States of America on behalf of the Tribe ("United States") (collectively, the "Compact Parties" or, when discussing pre-Compact negotiations, "Parties"), therefore, request the Court grant summary judgment dismissing all objections and enter Parts I through IV and Appendices 2 and 3 of the Preliminary Decree as a Final Decree approving the Tribal Water Right.

I. FACTUAL AND LEGAL BACKGROUND

A. THE HELLGATE TREATY AND THE FLATHEAD INDIAN RESERVATION

Prior to their first contact with non-Indians, the Kootenai and the Salish-speaking Flathead and Pend d'Oreille Tribes occupied, hunted, and fished in its aboriginal territory, including the present-day Flathead Reservation and larger areas to the Northwest and Southeast.[2] Courts over the last century have repeatedly found that their aboriginal area included Western Montana where the rights granted in the Decree are located. This included "a vast area of land . . . located within what are now the States of Montana and Idaho." *Confederated Salish &*

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[1] Hereafter, the Compact will be cited by referencing the relevant article or appendices, rather than the full citation. *E.g.*, Article III.G.1 of the Compact will be cited as "Art. III.G.I" and not "Section 85-20-1901, MCA, at Art. III.G.1."

[2] Bill B. Brunton, *Kootenai*, *Handbook of North American Indians: Volume 12, Plateau*, 223-26 (William Sturtevant & Deward E Walker Jr., eds, 1998); Carling I. Malouf, *Flathead and Pend d'Oreille*, 297-99, 305-06.

Kootenai Tribes v. United States, 437 F.2d 458, 460 (Ct. Cl. 1971) ("*CSKT v. U.S.*") (identifying aboriginal lands that these tribes would later cede to the United States). Other courts described their aboriginal area as a "vast domain west of the Continental Divide and within what is now Montana." *Scheer v. Moody*, 48 F.2d 327, 328 (D. Mont. 1931), or "much of present day Montana . . . ." *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Jewell*, CV-14-44-M-DLC, 2015 WL 12748309, at *1 (D. Mont. May 18, 2015) ("*Jewell*"). It is these lands that the Tribes engaged in hunting and fishing, and courts have specifically recognized that the Kootenai Tribes "depended heavily on fishing." *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (1982) ("*Namen*"). The area that became the Reservation "was a natural paradise for hunting and fishing" until the early twentieth century. *See CSKT v. U.S.*, 437 F.2d at 479. Against this backdrop, representatives of the Tribes and United States met and negotiated a treaty.

On July 16, 1855, the Governor for the Washington Territory, Isaac Stevens, concluded a treaty between the United States and the Bitterroot Salish, Pend d'Oreille and Kootenai Tribes.[3] By the terms of this "Hellgate Treaty," the Tribes ceded and conveyed their aboriginal lands west of the Continental Divide to the United States, except for 1,245,000 acres in Northwestern Montana, now known as the Flathead Indian Reservation ("Reservation"), which Article II of the Treaty reserved to the Tribes for their "exclusive use and benefit."

The Hellgate Treaty is one of a series of similar Indian treaties entered into between the United States and numerous tribes in the Pacific Northwest in 1855. A common attribute of these "Stevens Treaties" is the express preservation of Tribal aboriginal hunting, fishing, and gathering rights both on- and off-reservations. For example, in Article III of the Hellgate Treaty, the CSKT reserved to themselves the "exclusive right of taking fish in all streams running through and bordering" the Reservation. They also expressly reserved the right to take "fish at all usual and accustomed" fishing sites off the Reservation and to hunt on open and unclaimed land "in common" with non-Indian settlers.[4]

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[3] Subsequently ratified by Congress and proclaimed by the President. Treaty of Hellgate, July 16, 1855, 12 Stat. 975 (ratified Mar. 8, 1859) [hereinafter "Hellgate Treaty"].

[4] "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, . . . together with the privilege of

From 1855 to 1904 the CSKT enjoyed the exclusive use of the Reservation. This included the commencement of irrigated farming by Tribal members. However, after passage of the 1887 General Allotment Act, commonly known as the Dawes Act,[5] pressure for non-Tribal settlement of lands within the Reservation began to mount. Beginning in the late 1880s and continuing into the early 1900s, the United States sought to negotiate with the CSKT for the cession of a portion of their Reservation for this purpose. The negotiations failed because the CSKT remained steadfastly opposed to further cessions of land.[6] Ultimately, in 1904, Congress acted unilaterally, over the CSKT's objection, to allot Reservation lands to individual Tribal members and open the "surplus" lands to non-Indian settlement.[7]

The Flathead Allotment Act also authorized irrigation development for Tribal members on the allotted lands by providing that half of the proceeds from the sale of surplus lands within the Reservation were to be expended by the Secretary "for the benefit of the said Indians and such persons having tribal rights on the reservation . . . in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians . . . ."[8]

In 1908, Congress amended the Flathead Allotment Act and expanded the authorization to provide for "irrigation systems" to serve all irrigable lands on the Reservation, both Indian and non-Indian.[9] These irrigation systems evolved into the Flathead Indian Irrigation Project ("FIIP"). Full construction of the project was effected by several more Congressional acts and took many decades.[10] As eventually configured, the FIIP has about 134,790 irrigated acres, of

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hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." Hellgate Treaty, Art. III, cl. 2, *supra* note 3, at 976. In *State of Montana v. Stasso*, 172 Mont. 242, 563 P.2d 562 (1977), the Court held that Article III reserved the right of CSKT members to hunt off the Reservation on open and unclaimed lands within the hunting territory.

[5] General Allotment Act, February 8, 1887, Pub. L. 49-105, 24 Stat. 388.

[6] Malouf, *supra* note 2, at 308.

[7] Act of April 23, 1904, 33 Stat. 302 [hereinafter "Flathead Allotment Act"].

[8] *Id.* at 305.

[9] Act of May 29, 1908, 35 Stat. 444, 450. The 1908 Act also provided that Indian-held lands that are irrigable by the FIIP "shall be deemed to have a right to so much water as may be required to irrigate such lands . . . ." *Id.* at 448.

[10] Act of April 30, 1908, 35 Stat. 70, 83-84; Act of March 3, 1909, 35 Stat. 781; Act of July 17, 1914, 38 Stat. 510; Act of May 18, 1916, 39 Stat. 123, 138-40; Act of May 10, 1926, 44 Stat. 453, 464-66.

which approximately ten percent is held in trust for the CSKT or CSKT members, the remainder being non-trust lands mostly owned by non-Indian irrigators.[11] The FIIP delivers water through nearly 1,300 miles of canals and laterals. There are about 10,000 structures, which include 16 dams and storage reservoirs. The reservoirs have a combined capacity of about 160,500 acre-feet. The FIIP uses approximately 90 percent of the surface water on the Reservation.[12]

B. LITIGATION CONTEXT OF THE COMPACT NEGOTIATIONS

The negotiations leading to the Compact took place against a lengthy background of judicial decisions concerning the Indian reserved water rights of the CSKT, the interests of non-Indian landowners within the Reservation, and even the basic question of what courts have jurisdiction to determine the nature and extent of the CSKT reserved water rights. This litigation, in which the Compact Parties were often on opposing sides, continued during the negotiations. The Compact consequently includes provisions intended to avoid future disputes about these matters.

1. Litigation Concerning Water Management Authority on the Flathead Reservation

Water management authority on the Reservation has been the subject of litigation involving the United States, the State, the CSKT, and private individuals since the first half of the 20th century. Therefore, the decades of litigation in both state and federal courts concerning the regulation of water uses on the Reservation are important to understanding the compromises in the Compact.

In *United States v. McIntire*, 101 F.2d 650 (9th Cir. 1939) ("*McIntire*"), the Ninth Circuit ruled that an Indian allottee or successor in interest could not acquire a state-based water right, stating that "the Montana statutes regarding water rights are not applicable [to the Reservation] because Congress at no time has made such statutes controlling in the reservation." *Id.* at 654. Accordingly, the Indian allotee's recording of a notice of appropriation under state law provided no valid water right to a non-Indian successor. *Id.* In *United States v. Alexander*, 131 F.2d 359

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[11] Mont. Dep't of Nat. Res. & Conservation, *Staff Report on the Confederated Salish and Kootenai – Montana Compact*, 38-39 (2022) [hereinafter "Staff Report"]. The Staff Report is publicly available at https://dnrc.mt.gov/Water-Resources/2022-12-12_CSKTCompact-Staff-Report_FINAL.pdf.

[12] *Id.*

(9th Cir. 1942) ("*Alexander*"), the Ninth Circuit stated that the 1855 Hellgate Treaty "impliedly reserved all waters on the reservation to the Indians" and rights to the reserved waters "could be obtained only as specified by Congress." *Id.* at 360.

Then in *Namen*, the Ninth Circuit held that the CSKT have the authority "to regulate the riparian rights of non-Indians owning land within the Flathead Reservation" in part because the conduct being regulated could "interfere with treaty fishing rights" held by the CSKT. 665 F.2d at 965.[13] Five years after *Namen*, in *Joint Bd. of Control of Flathead, Mission & Jocko Irrigation Districts v. United States,* 832 F.2d 1127, 1131-32 (9th Cir. 1987), *cert. denied,* 486 U.S. 1007 (1988) ("*Joint Bd. I*"), the Ninth Circuit upheld the United States Bureau of Indian Affairs' ("BIA") authority to operate the FIIP to protect tribal fisheries, even at the expense of irrigated agriculture (including uses by non-Indians). The Ninth Circuit examined the Hellgate Treaty and noted that the language included in it was like the language in the treaty at issue in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) ("*Adair*"). Finding that the CSKT claim to aboriginal fishing rights was "clearly a colorable one," the Court held that "[t]o the extent that the tribes did here exercise aboriginal fishing rights, the treaty language clearly preserved those rights, and the water needed for them" and that the priority date for such rights was time immemorial. *Joint Bd. I*, 832 F.2d at 1131. The Court then found that "[t]he priority date of time immemorial obviously predates all competing rights by the Joint Board for the irrigators in this case." *Id.* The district court had, therefore, erred in holding that water claimed for Tribal fishing flows must be shared with junior appropriators, including the FIIP. *Id.* A year later, the Ninth Circuit in *Joint Bd. of Control v. United States*, 862 F.2d 195 (9th Cir. 1988) ("*Joint Bd. II*"), upheld dismissal, for failure to exhaust administrative remedies, of yet another lawsuit initiated by the Flathead Joint Board of Control ("FJBC") seeking to enjoin the BIA's FIIP operations.[14]

In 1992, the FJBC and its member districts filed suit in the United States Court of Federal Claims alleging, *inter alia*, that they were entitled to operate both the irrigation and power divisions of the FIIP. The court dismissed the statutory claims for lack of subject matter jurisdiction and held that the plaintiffs did "not have a contractual right to turnover of the

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[13] The court also rejected arguments that the Flathead Allotment Act and subsequent legislation terminated the Reservation. *Namen*, 665 F.2d at 960 ("there has been no such termination.").
[14] The FJBC was an entity contractually established pursuant to §§ 85-7-1601through 1618 MCA, made up of the Flathead, Mission, and Jocko Irrigation Districts served by the FIIP.

operation and maintenance of either division of the project." *Flathead Joint Bd. of Control of the Flathead, Mission & Jocko Irrigation Dists. v. United States*, 30 Fed. Cl. 287, 294 (1993), *aff'd*, 59 F.3d 180 (Fed. Cir. 1995) (per curiam).

At the same time, the CSKT applied for treatment as a state status for purposes of adopting water quality standards on the Reservation under a rule promulgated by the United States Environmental Protection Agency ("EPA"), 40 C.F.R § 131.8(b)(3), pursuant to the federal Clean Water Act, 33 U.S.C. §§ 1251–1388. The State filed suit challenging the EPA's decision to grant the CSKT application. Several local entities, including the FJBC, sought to intervene in the case. The Ninth Circuit affirmed the lower court's decision to deny intervention and grant summary judgment for the EPA and the CSKT. *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998).

Then in *Middlemist v. Secretary of the U.S. Dep't of Interior*, 824 F. Supp. 940 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir. 1994), *cert. denied*, 513 U.S. 961 (1994), the FJBC and two individuals sought declaratory and injunctive relief invalidating a CSKT streambed protection ordinance. The district court dismissed the suit for failure to exhaust tribal remedies. The same parties then filed suit in CSKT tribal court seeking a declaration that the tribal ordinance did not apply to them. That action was likewise dismissed for failure to exhaust tribal administrative remedies. *Middlemist v. Confederated Salish & Kootenai Tribes*, No. 95-343-CV (CSKT Tribal Ct. Sept. 19, 1995), *aff'd*, No. AP-95-343-CV (CSKT App. Ct. 1996).

Turning to the State court litigation, beginning with *In Re Application for Beneficial Water Use Permit Nos. 66459–76L, Ciotti; 64988–G76L, Starner; and Application for Change of Appropriation Water Right No. G15152–S76L, Pope*, 278 Mont. 50, 923 P.2d 1073 (1996) ("*Ciotti*"), the Montana Supreme Court issued a series of rulings that State administrative decisions could unlawfully conflict with the CSKT's water rights, so long as those rights were unadjudicated. These decisions created great uncertainty for water use permitting authority on the Reservation. *Ciotti* held that, because of the nature of Indian reserved water rights, the Montana Department of Natural Resources and Conservation ("DNRC") lacked authority to grant water use permits on the Reservation until the CSKT's reserved water rights had been "quantified by a compact negotiation pursuant to § 85-2-702, MCA, or by a general inter sese water rights adjudication." 278 Mont. at 61, 923 P.2d at 1080. The Montana Legislature subsequently attempted to address *Ciotti* by amending § 85-2-311(1)(e), MCA. However, in

Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, ¶ 28, 297 Mont. 448, 992 P.2d 244 ("*Clinch I*"), the court, reading the amended statute to be consistent with the Montana Constitution, again held that DNRC could not issue water use permits on the Reservation "until the [CSKT's] rights are quantified by compact negotiation pursuant to § 85-2-702, MCA, or by a general inter sese water rights adjudication."

Three years later, in *Confederated Salish & Kootenai Tribes v. Stults*, 2002 MT 280, ¶¶ 35-37, 312 Mont. 420, 59 P.3d 1093 ("*Stults*"), the court found its previous decisions in *Ciotti* and *Clinch I* dispositive with respect to DNRC's lack of authority to issue groundwater permits. Yet in *Confederated Salish and Kootenai Tribes v. Clinch*, 2007 MT 63, ¶ 40, 336 Mont. 304, 158 P.3d 377 ("*Clinch II*"), the court indicated DNRC might have authority to process a change of use application for an on-reservation state law right.

The net effect of these decisions was a "regulatory void" concerning administration of water rights on the Reservation.[15] Filling that void by means of the Unitary Administration and Management Ordinance ("UAMO" or "Law of Administration"), § 85-20-1902, MCA,[16] was a major goal of the Compact negotiations.

2. Application of the Indian Reserved Rights Doctrine in Montana

After Montana commenced its statewide adjudication of all water rights pursuant to § 85-2-212, MCA, the United States and many tribes in the state challenged the adjudication as applied to water rights reserved under federal law. Following the decision in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), which left open the question of the adequacy of the Montana proceeding to adjudicate federal and Indian reserved water rights, *id.* at 570, n.20, the Montana Attorney General initiated litigation before the State Supreme Court to resolve *inter alia* that question. *Montana ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 219 Mont. 76, 81, 712 P.2d 754, 757 (1985) ("*Greely*"). The CSKT specifically sought to participate as a party in the case. 219 Mont. at 82, 712 P.2d at 757. The *Greely* opinion touched on many aspects of the federal law of Indian reserved water rights and established binding precedent concerning how such rights are to be adjudicated by this Court.

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[15] Staff Report, *supra* note 11, at 12.
[16] For conciseness, references to this statute will hereinafter be abbreviated as "UAMO" with appropriate subsections indicated as needed.

Greely noted that, while Montana (like most western states) follows the prior appropriation doctrine, "[t]he doctrine of reserved water rights conflicts with prior appropriation principles in several respects." 219 Mont. at 89, 712 P.2d at 762. The *Greely* court explained these differences by summarizing the United States Supreme Court holding concerning reserved rights in *Winters v. United States*, 207 U.S. 564 (1908) ("*Winters*"). It found that the *Winters* Court "implied a reservation of water to accomplish the purposes of the treaty" because before the treaty, the Tribe controlled the land and water and should be able to use them to make the reservation livable. 219 Mont. at 89-90, 712 P.2d at 762 (quoting *Winters*). The *Greely* court then concluded:

> Appropriative rights are based on actual use. Appropriation for beneficial use is governed by state law. Reserved water rights are established by reference to the purposes of the reservation rather than to actual, present use of the water. The basis for an Indian reserved water right is the treaty, federal statute or executive order setting aside the reservation. Treaty interpretation and statutory construction are governed by federal Indian law.

219 Mont. at 89-90, 712 P.2d at 762.

The *Greely* court noted that, when construing the purposes of an Indian reservation, federal Indian law imposes several key canons of construction: (1) "[a]ny ambiguity in a treaty must be resolved in favor of the Indians"; (2) "[t]reaties must be interpreted as the Indians themselves would have understood them"; and (3) "Indian treaties must be liberally construed in favor of the Indians." 219 Mont. at 90, 712 P.2d at 762-63. *Greely* then emphasized that "foremost among these federal Indian law principles is that 'the treaty is not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted.'" 219 Mont. at 90, 712 P.2d at 763 (quoting language from *Adair* which the *Greely* court noted was in turn a quotation from *United States v. Winans*, 198 U.S. 371, 381 (1905)).[17]

Greely determined that Indian reservations serve the many purposes necessary to establish a permanent home for the relevant tribe. While non-Indian federal reserved water

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[17] In *Winans*, the Supreme Court interpreted the terms of a treaty between the Yakama Nation and the United States to preserve the Indians' longstanding pre-treaty fishing practices. This rule of construction necessarily implies that aboriginal Indian rights to resources are not created by treaty, but rather by a tribe's historic, or pre-historic, exercise of dominion over a territory. To the same effect is the Court's acknowledgement in *Winters* that "[t]he Indians had command of the lands and the waters, —command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization." 207 U.S. at 576 (quoted in *Greely*, 219 Mont. at 89-90, 712 P.2d at 762).

rights apply only to the "primary" purpose of the reservation and not to "secondary" uses, Indian reserved water rights are not so limited. The purposes of Indian reservations are given "broader interpretation in order to further the federal goal of Indian self-sufficiency." 219 Mont. at 98, 712 P.2d at 767-68. Accordingly, *Greely* and subsequent Montana Supreme Court rulings relying on it, all acknowledge the purposes of an Indian reservation include water needed to make the reservation "livable." 219 Mont. at 93, 712 P.2d at 764 (citing *Arizona v. California,* 373 U.S. 346, 599-600 (1963)); *Clinch I,* ¶ 12 (same, quoting *Greely*); *Stults,* ¶ 28 (same); *see also Adair*, 723 F.2d at 1408, n.13 (citing W. Canby, *American Indian Law* 245-46 (1981) for the principle that water for the reservation must be sufficient to meet the goal of Indian self-sufficiency); *Colville Confederated Tribes v. Walton,* 647 F.2d 42, 47 (9th Cir. 1981) ("*Walton II*") (the purpose of an Indian reservation, to "provide a home for the Indians, is a broad one and must be liberally construed").

More specifically, *Greely* held that the water rights for an Indian reservation encompass many categories of use, including water "to develop, preserve, produce or sustain food and other resource of the reservation, to make it livable" and specifically water "to irrigate all the practicably irrigable acreage on the reservation." 219 Mont. at 92, 712 P.2d at 764 (citing *Arizona v. California*, 373 U.S. at 599-600); water to preserve hunting and fishing rights, 219 Mont. at 92, 712 P.2d at 764 (citing *Adair*, 723 F.2d at 1411); and water needed for "acts of civilization," 219 Mont. at 93, 712 P.2d at 765 (citing *Winters v. United States*, 207 U.S. 564, 576 (1908)). *See also Ciotti,* 278 Mont. at 57, 923 P.2d at 1077-78 (quoting *Greely* and *Winters* for water necessary for "acts of civilization"); *Clinch I*, ¶ 12 (same); *Stults*, ¶ 28 (same); *In Re Crow Water Compact Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Crow Tribe of Indians and the State of Montana,* 2015 MT 353, ¶ 27, 382 Mont. 46, 364 P.3d 584 ("*In Re Crow Compact*") ("under *Winters* and its progeny the tribe has a right to water for development of industrial purposes"). Under these broad homeland purposes, the Montana Supreme Court has specifically characterized the reserved water rights of the CSKT as "pervasive." *Ciotti*, 278 Mont. at 58, 923 F.2d at 1079; *Clinch I*, ¶ 12; *Stults,* ¶ 28 (same).

When water is reserved for an Indian reservation, it is to fulfill the present *and future* needs of the reservation. *See Arizona v. California*, 373 U.S. at 600 (the Special Master found "that the water was intended to satisfy the future as well as the present needs of the Indian

Reservations"). In *Greely,* the Montana Supreme Court followed *Arizona v. California*, explaining that "most [Indian] reservations have used only a fraction of their reserved water" and that Indian reserved water rights "reflect future needs as well as present use." *Greely*, 219 Mont. at 93-94, 712 P.2d at 765 (water needed to fulfill an Indian reservation's agricultural needs "applies to future irrigation of reservation land, not present irrigation practices and current consumptive uses"). Since *Greely*, the Montana Supreme Court repeatedly recognized that Indian reserved water rights include water to satisfy the future needs of a reservation. *See Ciotti*, 278 Mont. at 57, 923 P.2d at 1078 (it is "clear" that "Indian reserved water rights may include future uses"); *see also Stults*, ¶ 28.

Greely expressly held that the purposes of reservations can include water for non-consumptive uses (instream flows). The *Greely* court held that Indian reserved rights include water reserved to preserve tribal hunting and fishing rights and such water right "is unusual in that it is non-consumptive" and it is a right to "prevent other appropriators from depleting the stream waters below a protected level." *Greely*, 219 Mont. at 93, 712 P.2d at 764 (citing *Adair*, 723 F.2d at 1411). *See also Stults*, ¶ 28 (reserved rights "need not be diverted from the stream" and include the right to prevent others from depleting stream waters below a protected level to protect tribal fishing rights) (citing *Greely* and *Adair*).

Greely held that the priority date for a tribal reserved water right is either the date of the reservation or time immemorial. The priority date of an Indian reserved water right is different than state law water rights and "depends on the nature and purpose of the right." *Id*. at 92, 712 P.2d at 764. In contrast, the court explained that Montana state law-based water rights "originate from actual use of the water" and that their priority date is the date the water was first put to use for a beneficial purpose. *Greely*, 219 Mont at 96, 712 P.2d at 766. "As between appropriators the first in time is the first in right." *Id*. at 89, 712 P.2d at 762 (quoting § 85-2-401(1), MCA). Based on the separate rules, the court identified two different priority date categories of Indian reserved water rights. First, *Greely* held that if the use for which the water was reserved did not exist prior to the creation of the reservation, the priority date is the date the reservation was created.[18] *Id.* (citing *Arizona v. California*, 373 U.S. at 600). Second, the court

[18] Montana Compacts acknowledge that reservations are created as of the date an agreement is reached between the United States and an Indian tribe or tribes. The Blackfeet Tribe's Compact uses the treaty signature date of October 17, 1855, rather than the ratification date of April 17,

ruled that "where the existence of a preexisting right is confirmed by treaty, the courts characterize the priority date as 'time immemorial.'" *Id.* (citing *Adair*, 723 F.2d at 1414).

C. THE COMPACT

Turning to the Compact, as recounted *supra* pp. 4-11, it is against the backdrop of the decades of litigation that the Compact was negotiated. The Compact provides an end to years of uncertainty and litigation concerning the CSKT's water rights and the relationship of those rights to the water rights of others on the Reservation and elsewhere in Montana. As detailed *infra* pp. 21-39, the Compact negotiations lasted four decades, were consistent with the statutory provisions creating the Montana Reserved Rights Compact Commission ("RWRCC," "Compact Commission," or "Commission"), provided numerous opportunities for public comment, and were not different in kind from the negotiations that produced other Compacts previously approved by this Court. The Decree includes key components of the Compact that:

- quantify the CSKT water rights, including all aboriginal and other reserved water rights, in nine adjudication basins;
- protect the vast majority of junior state law water rights from a priority call by the CSKT;
- quantify, and over time improve the supply for, the CSKT's instream flow water rights on the Reservation while continuing to provide historic farm deliveries to the FIIP users and protection to irrigators outside of the FIIP;
- provide the CSKT and others with new water supplies from Flathead Lake, Flathead

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1856. *See, e.g.,* § 85-20-1501, MCA, at Art. III.C.2 and 11 Stat. 657 note A. The Fort Belknap Compact, not yet approved by Congress, does the same. *See* § 85-20-1001, MCA, at Art. III.A.2. Likewise, the priority date for the Crow Tribe's water rights is May 7, 1868, when the Treaty of Fort Laramie was signed, not the treaty ratification date of February 16, 1869. *See* § 85-20-901, MCA, at Art. I & Art. III.A.2.a, and 15 Stat. 649 note A. This Court approved both Blackfeet and Crow decrees. Consistent with this Court's rulings and applicable law, the Compact recognizes 1855, instead of 1859, as the date-of-reservation priority date for certain uses. *See*, *e.g.*, *Adair*, 723 F.2d at 1397-98, 1314-15 (finding Klamath Tribe had date-of-reservation priority of 1864, when the treaty was signed, notwithstanding that Tribe's treaty was ratified in 1866); *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 338 (9th Cir. 1939) (using 1859 as the priority date, when Interior Indian Affairs Commissioner directed that land be set apart for the tribe, rather than 1874 when an executive order sanctioned such set aside); *State ex rel. Martinez v. Lewis*, 861 P.2d 235, 239 (N.M. Ct. App. 1993) (holding priority date was 1852, date of treaty of peace with tribe, rather than dates of subsequent executive orders delineating the boundaries of the tribe's reservation).

River, and water stored in Hungry Horse Reservoir to meet instream flow and consumptive use needs on the Reservation, and to mitigate for water development off the Reservation; and

- unify water administration on the Reservation, avoiding separate and potentially conflicting administration of state law rights and Tribal rights, and provide comprehensive management of all water sources.

1. Key Benefits and Protections for Existing Water Users in the Compact

Protection of Existing Uses of Water: The Compact provides measures to protect valid existing uses of water as decreed by the Water Court or permitted by the DNRC. Specifically, the CSKT and the United States agreed to relinquish their right to exercise the Tribal Water Right to make a call against *any* non-irrigation water right as well as against groundwater irrigators that use less than 100 gallons per minute.[19] The CSKT and the United States also provide call protection for *all* water rights upstream of the Reservation, except for irrigation rights sourced from the mainstem of the Flathead River (including Flathead Lake) or from the North, South, or Middle Forks of the Flathead River.[20]

Water for the FIIP: The Compact includes River Diversion Allowances ("RDA" or "RDAs") to meet "Historic Farm Deliveries" as defined by the Compact.[21] The FIIP Project Operator will allocate this water among irrigators and conduct necessary operations as it has always done.[22] The Compact includes provisions to evaluate the RDAs and adjust them if necessary to meet Historic Farm Deliveries.[23] In the event that additional water is required to meet Historic Farm Deliveries, it would come from additional pumping from the Flathead River.[24]

Adaptive Management: The Compact includes a process to measure and allocate water

[19] Art. III.G.1-2.
[20] Art. III.G.4.
[21] Art. II. 36 & 58; Art. IV.C.1; Art. IV.D.1; Apps. 3.2 & 3.3. Specifically, the "Historic Farm Delivery" is defined, for each RDA, as the aggregate amount of water historically delivered to farm turnouts in that area.
[22] Art. II.55; Art. IV.D.2; UAMO §§1-1-104(47), 3-1-101(1).
[23] Art. IV.D.1.e.
[24] Art. IV.D.1.e.ii.

on the FIIP and to provide for within-year adjustments that are necessary to address variability in water supply. The process includes:

- Establishment of comprehensive water measurement and reporting programs that are publicly accessible;[25]
- Planning, design, and implementation of water management planning tools, including water supply forecasting methods, operational models for division of water between the FIIP Instream Flows and the FIIP Water Use Right, and water accounting programs;[26]
- Planning for and implementation of Operational Improvements and Rehabilitation and Betterment that will save water to provide instream flows;[27] and
- Establishment of a protocol to govern the exercise of water rights when inadequate water supplies impact the FIIP operations (shared shortage conditions).[28]

Funding: The Compact provides for the following State contributions:

- Four million dollars for water measurement activities;
- Four million dollars for improving On-Farm efficiency;
- Four million dollars for mitigating the loss of stockwater deliveries from the project;
- Thirty million dollars to offset pumping costs and related projects; and
- Thirteen million dollars to provide for aquatic and terrestrial habitat enhancement.[29]

The CSKT are authorized to use any portion of the $1.9 billion federal settlement funding to fund portions of the operational improvements and the rehabilitation and betterment projects for the FIIP to increase instream flows.[30]

Power Provisions: The CSKT will continue to supply the low-cost block of power from Séliš Ksanka Qĺispé Dam while the CSKT are the Dam licensee and propose to use net-revenue distributions from Mission Valley Power, when available, to support the settlement.[31]

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[25] Art. II.2; Art. IV.F; Art. IV.G.4.
[26] App. 3.5; App. 3.7.
[27] Art. II. 52 & 57; Art. IV.C.3.b; Art. IV.D.1.d; App. 3.6.
[28] Art. IV.E.
[29] Art. VI.A.
[30] Consolidated Appropriations Act of 2021, Division DD, Pub. L. No. 116-260, 134 Stat. 1182, 3008-3038 (hereinafter "Settlement Act") §§ 7(b), 8(a)-(c), 8(h), 9(a).
[31] Art. IV.H.

2. Tribal Water Rights

Quantification of CSKT On-Reservation Water Rights: The Compact quantifies the CSKT's reserved water rights. These include water rights for the FIIP,[32] instream flows,[33] and existing uses by the CSKT, tribal members, and allottees[34] (including religious and cultural uses).[35] The Compact also quantifies water rights for wetlands,[36] high mountain lakes,[37] Flathead Lake,[38] the Boulder and Hellroaring hydroelectric projects,[39] and minimum pool elevations for the FIIP reservoirs.[40] The Decree does not include the state-based hydroelectric water rights for Séliš Ksanka Qĺispé Dam, which are thus outside the scope of this proceedings.

The Compact defines the relationship between the exercise of the CSKT's instream flow water rights and the RDAs for the FIIP.[41] The Compact and UAMO also address the CSKT's instream flow water rights for streams outside the FIIP. For these "Other Instream Flows," the CSKT will defer the enforcement of their rights until enforceable flow schedules have been established that protect existing users on those streams, through a process set forth in the UAMO.[42] These requirements ensure the Tribal instream flow right will not be able to interfere with water rights as recognized in the adjudication of basins 76L and 76LJ.

Flathead System Compact Water: The Compact quantifies a water right to "Flathead System Compact Water."[43] This term describes water from Flathead Lake, the Flathead River, the South Fork of the Flathead River, and water stored in Hungry Horse Reservoir that the CSKT may use to meet instream flow and consumptive use needs on the Reservation.[44] The CSKT may also lease this water for use on or off the Reservation.[45] The Compact specifically authorizes CSKT to lease up to 11,000 acre-feet of this water from Hungry Horse Reservoir at a

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[32] Art. III.C.1.a.
[33] Art. III.C.1.d.
[34] Art. III.C.1.b.
[35] Art. III.A.
[36] Art. III.C.1.f. & k.
[37] Art. III.C.1.g.
[38] Art. III.C.1.h.
[39] Art. III.C.1.i. & j.
[40] Art. III.C.1.e.
[41] Art. III.C.1.d.ii; Art. IV.C through Art. IV.F.
[42] Art. III.C.1.d.iii; App. 12; UAMO § 2-1-115.
[43] Art. III.C.1.c.
[44] Art. II.35; Art. III.C.1.c.
[45] Art. III.C.1.c.x. & Art. IV.B.6.c.

fixed rate, to mitigate for non-CSKT domestic, commercial, municipal, and industrial water development off the Reservation.[46]

Quantification of CSKT Off-Reservation Water Rights: The Compact includes instream flow water rights for the maintenance and enhancement of fish habitat in the Kootenai River (consistent with the fishery operations at Libby Dam under the Federal Columbia River Power System Biological Opinions and the Columbia River Basin Fish and Wildlife Program), the Swan River, and the Lower Clark Fork River.[47] The CSKT also have five additional off-reservation instream flow rights in small tributaries that do not adversely impact existing uses.[48] The enforcement of several of these rights is limited by the Compact and continues the status quo. For example, irrigators using surface water or ground water on tributaries to the Kootenai in basin 76L or to the Lower Clark Fork in basins 76M and 76N are exempt from call.[49] The right to make a call for the Kootenai River right is currently suspended and significant restrictions exist on the capacity to make any call on the Lower Clark Fork River.[50]

The Compact provides the CSKT co-ownership with Montana Fish, Wildlife, and Parks ("MFWP") of existing water rights for instream flow and recreation purposes in the Bitterroot Basin, Blackfoot Basin, and Rock Creek Basin.[51] The Compact also makes the CSKT and MFWP co-owners of a water right formerly associated with the Milltown Dam.[52] Ratification of the Compact by the Montana Legislature changed the purpose of that right from hydropower to instream fishery.[53] The CSKT and MFWP must work together to develop joint management plans for the exercise of this right.[54]

3. Key Elements of the Unitary Administration and Management Ordinance

The Compact provides the framework for the administration of water rights on the

[46] Art. IV.B.7.
[47] Art. III.D.1-3.
[48] Art. III.D.7-8.
[49] Art. III.D.1.g & Art. III.D.3.e.
[50] Art. III.D.1.e & f; Art. III.D.3.g.
[51] Art. III.D.4 & 6.
[52] Art. III.D.5.
[53] Art. III.D.5.a.
[54] Art. III.D.5.b.

Reservation through the UAMO.[55] It describes the process to 1) register existing uses of water; 2) change water rights; and 3) provide for new water development.[56]

The Compact establishes the Flathead Reservation Water Management Board ("Board") to administer the Compact and UAMO on the Reservation.[57] The Board has five voting members: two members selected by the Governor based on recommendations from county commissions of the four on-Reservation counties; two members appointed by the Tribal Council; and one member selected by the other four members. The Department of the Interior can appoint a sixth, non-voting member.[58] The Compact and UAMO describe the powers and duties of the Board and the process to review the Board's decisions.[59] Neither the Board's jurisdiction nor the Ordinance's jurisdictional area extends off the Reservation.[60]

The UAMO sets forth procedures the Board is to follow for the administration of water uses on the Reservation and the process for permitting new uses of water.[61] The UAMO protects existing uses of water that fell in the regulatory void after the *Ciotti* decisions (those uses developed after August 22, 1996) and establishes necessary criteria for new uses of water and changes in use which closely mirror the Montana Water Use Act. The UAMO has been adopted in both Montana and Tribal law and has become effective.[62] It cannot be changed by one party without the agreement of the other.[63]

D. HISTORY OF THIS PROCEEDING

Upon motion by the Compact Parties, the Court issued an order on June 9, 2022, to commence special proceedings to review a preliminary decree of the Tribal Water Rights set forth in the Compact that are found in nine basins and could impact three others.[64] The Court required the United States on behalf of the Compact Parties to provide notice of the preliminary

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[55] Art. II.45; Art. IV; UAMO.
[56] *See generally* UAMO.
[57] Art. IV.I.
[58] Art. IV.I.2.d.
[59] Art. IV.I.5-6; UAMO § 1-2-107.
[60] Art. IV.I.4.
[61] UAMO §§ 2-2-101 to 128.
[62] UAMO § 1-1-101.
[63] Art. IV.J; UAMO § 1-1-101(2).
[64] Dkt. No. 18, *Findings of Fact, Conclusions of Law, and Order for the Commencement of Special Proceedings for Consideration of the Confederated Salish and Kootenai Tribes—State of Montana—United States Compact* (June 9, 2022).

decree to water users in 12 basins and have that notice explain how objections could be made to the Decree.[65] The United States served the required notice.[66] After Objectors filed approximately 1,050 objections, the Court set a mediation process.[67] Some Objectors settled with the Compact Parties, some withdrew, and some failed to participate in mediation and the Court dismissed all of them.[68] Pursuant to *Case Management Order No. 3* ("*CMO3*"), Dkt. No. 1,395, October 18, 2023, approximately 100 objections were amended by 50 court orders from January 25 to March 27, 2024. The Compact Parties file their instant Motion for Summary Judgment to Approve the Compact and to Dismiss Remaining Objections pursuant to *CMO3* at 3-4 and *Case Management Order No. 4*, Dkt. No. 1783, June 6, 2024.

II. JURISDICTION

Article VII.B of the Compact and § 10(b)(1)(A) of the Settlement Act contemplate judicial review in this Court. These provisions are consistent with other law concerning this Court's jurisdiction. The United States waived its sovereign immunity to allow its water right claims to be adjudicated in state courts in the McCarran Amendment of 1952, 43 U.S.C. § 666, including for claims on behalf of Indian Tribes. *San Carlos Apache Tribe*, 463 U.S. at 559-70. The Montana Water Use Act is consistent with this federal waiver of immunity. *Greely*, 219 Mont. at 89-96, 712 P.2d at 762-66. Section 85-2-231(2)(a)(iii), MCA, of the Water Use Act expressly authorizes the Court to enter a preliminary decree based on a Compact, and §§ 85-2-233(7) & (8), -234(2), -701, and -702(3), MCA, additionally confirm the Court's exercise of jurisdiction.

III. LEGAL STANDARD

A. COMPACT VALIDITY

In the present proceeding, the Decree is essentially a consent decree intended to be a final

[65] *Id*. at 3, 10; Dkt. No. 20, *Order Directing the United States to Mail Notice of Entry of the Confederated Salish and Kootenai Tribes—State of Montana—United States Preliminary Decree and Notice of Availability* (June 9, 2022).
[66] Dkt. No. 26, *First Notice of Actions to Comply with the June 9, 2022 Notice Order filed by United States, DOI Bureau of Indian Affairs* (July 6, 2022); Dkt. No. 27, *Second Notice of Actions to Comply with the June 9, 2022 Notice Order filed by United States, DOI Bureau of Indian Affairs* (Aug. 9, 2022).
[67] Dkt. No. 1,084, *Court Minutes and Case Management Order No. 2* (March 27, 2023).
[68] *See, e.g.*, Dkt. No. 1,394, *Eighth Order Dismissing Objections* (Oct. 18, 2023).

judgment and decree pursuant to M.R.Civ.P. 54(b) and § 85-2-234, MCA, as to all the CSKT's water rights claims in the Montana general stream adjudication. This Court may only approve the Compact or declare it void. Section 85-2-233, MCA; *In re Adjudication of Existing and Reserved Rights of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation within the State of Montana in Basins 40E, 40EJ, 40O, 40R, & 40W*, WC-92-1, 2001 WL 36525512, at *2 (Mont. Water Ct., Aug. 10, 2001) ("*Ft. Peck Op.*"). In this setting, the decision whether to approve the Decree is made "under a standard of limited review similar to that applied by the Ninth Circuit Court of Appeals to review consent decrees." *In re Adjudication of the Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the United States Department of Agriculture Forest Service within the State of Montana*, No. WC-2007-03, 2012 WL 9494882, at *3 (Mont. Water Ct., Oct. 31, 2012) (U.S.D.A. Forest Service—Montana Compact Decision) ("*Forest Service Decision*")*; see also In re: Adjudication of the Existing and Reserved Rights of the Chippewa Cree Tribe of the Rocky Boy's Reservation within the State of Montana,* WC-2000-01, 2002 WL 34947007, at *3-4 (same) ("*Chippewa Cree*"); *Ft. Peck Op*., 2001 WL 36525512, at *2-3 (same). Accordingly, the Court's review:

> must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor [the court on appeal] is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.

Officers for Justice v. Civil Serv. Comm., 688 F.2d 615, 625 (9th Cir. 1982); *see also Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990) ("Because of the unique aspects of settlements, a district court should enter a proposed consent judgment if the court decides that it is fair, reasonable and equitable and does not violate the law or public policy.").

The Montana Supreme Court has applied the standard of review in *Officers for Justice* to the review of Compacts. *In Re Crow Compact*, ¶ 18; *Final Order Approving Blackfeet Tribe—Montana—United States Compact*, 2020 WL 7329247 at *21 ("Blackfeet Compact Order").

"The Water Court presumes a compact is valid if (a) the compact is 'fundamentally fair, adequate and reasonable' and (b) the compact conforms to applicable laws.'" *Blackfeet Compact Order* at *18 (citing *In re Adjudication of Existing and Reserved Rights of Chippewa Cree Tribe*, *7). When, as here, non-parties object to the compact, the Water Court must also make a threshold determination, as part of its fairness analysis, that "'the decree was the product of good faith, arms-length negotiations.'" *In re Crow Compact*, ¶ 18 (quoting *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) ("Oregon II). If these requirements are met, "the 'negotiated decree is presumptively valid and the objecting party has a heavy burden of demonstrating that the decree is unreasonable.'" *Id. In Re Crow Compact* also approved of Water Court decisions finding "that the heavy burden the objector must show is that its interests are materially injured by operation of the Compact." *Id.* (quotations omitted) (citing both *Chippewa Cree* and *Fort Peck Op.*).

Once the Compact Parties satisfy these requirements, "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.'" *Blackfeet Compact Order* at *7 (quoting *In Re Crow Compact*, ¶ 18). Stated another way, to defeat the presumption of validity and provide a basis for the Court to consider declaring the Compact void, the Objectors must show both "that the Compact materially injures their interests and [that] [t]heir injuries occurred because the Compact does not conform to applicable law." *Crow Compact Order*, 2015 WL 5583581, at *3; *cf. Blackfeet Compact Order* at *9 ("the Court is limited to determining whether anything in the Compact's quantification provisions violate or are prohibited by applicable law").

B. SUMMARY JUDGMENT

Pursuant to M.R.Civ.P. 56(a), summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Regarding what constitute genuine issues of material fact, *Sprunk v. First Bank Sys.*, 252 Mont. 463, 830 P.2d 103 (1992), instructs:

> The determination of the existence of genuine issues of material fact is one that is not always easily ascertained. Important in the determination is whether the material facts are actually disputed by the parties or whether the parties simply interpret the facts differently. It is well established that when material facts are in dispute, summary judgment is not a proper remedy. *However, mere disagreement*

about the interpretation of a fact or facts does not amount to genuine issues of material fact.

Id. at 466, 830 P.2d at 105 (1992) (citation omitted) (emphasis added). As demonstrated herein, the facts material to approval of the Decree are a matter of public record. The disputes alleged by Objectors are at best expressions of disagreement about the interpretation of those facts.

As explained more fully below, the public record of the Compact negotiation and approval processes, and the objections that have been filed, show there are no genuine disputes about the facts material to a finding that the negotiations leading to the Decree provisions were in good faith and at arms-length, and that the Decree is "fair, reasonable and adequate." Thus, the burden is now on Objectors to demonstrate they are materially injured by some illegality in the Compact or Decree. *Crow Compact Order*, 2015 WL 5583581, at *3. However, because there is no such illegality, it is not possible for any Objector to meet this burden. Accordingly, the Compact Parties are entitled to entry of the Decree as a matter of law and urge the Court to grant the *Motion to Approve the Compact and for Summary Judgment as to Remaining Objections*.

ARGUMENT

I. THE DECREE SHOULD BE APPROVED BECAUSE IT IS FAIR, ADEQUATE, REASONABLE, AND CONSISTENT WITH APPLICABLE LAW

A. THE DECREE IS FAIR

As stated above, in determining whether a settlement is fair, courts may consider factors relating to both procedural and substantive fairness. *See, e.g.*, *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 86-89 (1st Cir. 1990) ("*Cannons*"); *Officers for Justice*, 688 F.2d at 625; *Ft. Peck Op.*, 2001 WL 36525512, at *4 (quoting *Officers for Justice*). In *Blackfeet Compact Order*, this Court explained the components of the fairness standard:

> The threshold fairness and adequacy of a compact has both procedural and substantive components. A compact meets the procedural fairness standard when the negotiation process was conducted fairly, through arms-length negotiations by the parties. For substantive fairness, the Court is not required to predict how it might have fashioned a judgment had the reserved water rights been litigated. Rather, the Court's substantive analysis is limited to "an amalgam of delicate balancing, gross approximations and rough justice." The Court need only be

> satisfied that the Compact "represents a reasonable factual and legal determination." Ultimately, "substantive fairness flows from procedural fairness."

2020 WL 7329247 at *8 (quoting *Chippewa Cree*, 2002 WL 34947007, at *3, and *Oregon II,* 913 F.2d at 581 (1990)). By this standard, the Compact is both procedurally and substantively fair.

1. The Decree is Procedurally Fair

In evaluating the procedural fairness of a settlement, courts consider such factors as: whether the negotiation was forthright and open; whether the settlement was negotiated in good faith by persons knowledgeable about the issues involved and competent to negotiate resolutions of such issues; whether governmental participants were involved in the negotiations; whether the negotiation was conducted at arm's-length and was adversarial; and the reactions of interested parties to the settlement. *See Cannon*s, 899 F.2d at 84, 86-87 ("To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance.") (citations omitted); *Officers for Justice*, 688 F.2d at 625; *Ft. Peck Op.*, 2001 WL 36525512, at *3-4. Here, the numerous opportunities for public participation in the negotiation process, the fact that each of the Compact Parties was well represented by experienced negotiators throughout, and the adversarial context for such process, confirms the Compact's procedural fairness.

(a) The Negotiations Process Offered Significant and Numerous Opportunities for Public Input and Participation

The Compact negotiations offered many opportunities for the public to express views on the terms of the Compact. The Compact Commission held more than 70 informational or negotiation sessions, all open to the public, over the decades-long process leading to the Compact.[69] Prior to these sessions, notice was widely distributed through the mail, newspapers, and later the Commission's website to ensure that interested persons were aware of the meetings. At all negotiation sessions, comments were taken from the public.[70] In addition to scheduled and noticed meetings with the CSKT and United States, the Commission also had individual

[69] Staff Report, *supra* note 11, at 34-35.

[70] *Id*. at 36.

communications with potentially affected water users in northwestern Montana through targeted meetings or direct contact:

> From 1986 through 2015, the Commission and/or Commission staff held innumerable meetings and presentations with interested stakeholders and other groups and entities. Some of these entities include city and county local governments, conservation districts, Chambers of Commerce, local legislators, and the Northwest Montana Association of Realtors. Throughout the decades of negotiations with Tribes, the Commission received hundreds of public comments at negotiation sessions, and public meetings; and through letters, emails, and phone calls.[71]

The negotiations were not conducted in secret or without opportunity for public input, as there were extensive opportunities for the public to comment on the various iterations of the Compact.[72] As was the case with the Crow Compact, "the record shows that the negotiation sessions were open to the public, noticed drafts were made public for their review in advance, and the Montana Legislature solicited public comments and held public meetings." *In Re Crow Compact*, ¶ 39.

(b) The Parties Were Represented by Experienced and Capable Negotiators Throughout the Negotiations Process

The State and Tribes had distinct, seemingly irreconcilable goals. Negotiations for the Compact alone spanned 36 years of varying intensity, including some periods during which the Parties were unable to reach agreement and ceased to meet. However, between 2007 and 2015, the parties embarked on a frequent series of meetings that resulted in the Compact. Throughout this period, the Parties developed, reviewed, and analyzed extensive technical data to provide a solid scientific foundation for the Compact, and they conducted multiple levels of legal review to ensure its terms were appropriate.

Throughout that process, experienced negotiators represented each Party and were supported by knowledgeable teams of professionals. On the State side, to facilitate the complex process of comprehensively and finally determining Indian and federal reserved water rights, the Montana Legislature created the nine-member Montana Reserved Water Rights Compact Commission. Section 2-15-212, MCA. *See also* Staff Report at 3-4 (background of the Commission). The Commission is statutorily charged to negotiate compacts for the resolution of

[71] *Id.*
[72] *Id*. at 29.

Indian tribal claims to Indian reserved water rights within the State. Section 85-2-702, MCA. It negotiates on behalf of the Governor to represent the interests of state water users in negotiations with tribes and the federal government for the equitable division and apportionment of waters. Section 85-2-701(1), MCA. In this process, the Commission negotiates with Tribes on a "government-to-government" basis and represents the people of the State as a whole, but not the interests of any particular water user individually. *Chippewa Cree*, 2002 WL 34947007, at *5 & n.10. Once the Commission and its negotiating partners agree to the terms of a compact, that compact must be approved by the Montana Legislature as well as by the other sovereigns. Section 85-2-702(2), MCA. The Commission has negotiated compacts with seven tribes in the State and the United States as trustee for those tribes, as well as with the United States for eleven different federal reservations. *See* §§ 85-20-201 through -1901, MCA. The Water Court has reviewed sixteen of the eighteen compacts negotiated and has approved all sixteen.

When negotiating the Compact, the Commission staff was led by an experienced water rights negotiator and also included scientists and attorneys who had negotiated other compacts and who worked effectively with affected state agencies.[73] The State's primary goal was to protect valid existing water uses,[74] in the context of the recent litigation that recognized those uses were junior to the CSKT on-Reservation instream water rights for fisheries.[75] The terms of

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[73] Chris Tweeten chaired the Commission for its last 25 years and led the State's efforts to protect water users' interests in nearly all the compacts in the State. *See In re Adjudication of Existing and Reserved Rights to the use of Water, Both Surface and Underground, of the United States Department of Agriculture Forest Service within the State of Montana*, No. WC-2007-03, 2012 WL 9494882 at *6; *In re Adjudication of the Existing and Reserved Rights to the Use of Water, Both Surface and Underground of the National Park Service within the State of Montana*, No. WC-94-1, 2005 WL 6965507 at *3; *Chippewa Cree*, 2002 WL 34947007 at *12; *In re Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation within the State of Montana in Basins 42A, 42B, 42C, 42KJ, & 43P*, No. WC-93-1, 1995 WL 180222729 at *3; Staff Report, *supra* note 11, at 28, n.171 (discussing Commission's experienced technical staff).

[74] Staff Report, *supra* note 11, at 6, 25, 40, 41, 43, 44 ("maintain the status quo of existing state-based water rights to the maximum extent practical"), 47, 51, 53 ("maintain the status quo on the Reservation"), 55 ("since a fundamental goal of the Commission in this and all of its other negotiations was to achieve the protection of existing water uses to the greatest extent possible.").

[75] *Id*. at 6, 11, 39, 41, 47, 56.

the Compact provide for such protection of existing uses and also provide needed flows for CSKT's on-reservation instream rights. The State accomplished the safeguards through vigorous bargaining,[76] careful study of the terms and technical details to ensure that its interests were met,[77] and utilizing available leverage.[78]

The CSKT team had lawyers experienced in protecting the Tribes' natural resources[79] and multiple scientists with extensive experience in fisheries, hydrology, and modeling.[80] The CSKT's primary goals were to provide sufficient water for their Reservation in perpetuity, to promote the local economy by protecting existing uses, and to have future administration of water rights be comprehensive and efficient.[81]

The federal legal staff and team leader were knowledgeable in the litigation and settlement of tribal water rights.[82] The United States participated in both litigation and negotiations in its role as trustee for CSKT to secure water rights sufficient for their current and future use, including the necessary flows to meet the Tribes' treaty fishing rights.[83] The United

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[76] *Id.* at 43 (Flathead Lake right kept low to protect existing users), 47 (State prevented disruption of water use in Bitterroot valley), 47-48 (demanding negotiations on scope of call protections).
[77] *Id*. at 25 (extensive technical work regarding water use), 28 (development of common data set for negotiations) (utilization of other agencies with expertise), 32 (review by WPIC technical group of water use necessary for the FIIP), 40 (review of on-reservation water use data), 38 & 49 (to accurately capture details of all rights, abstracts prepared for the rights in the CSKT Compact, unlike any other compact), 53 (joint technical work among the Parties to "accurately depict stream flows and water use throughout the year.").
[78] *Id*. at 50-51 (using Flathead System Compact Water to meet State interest in providing water for development that it could not meet otherwise), 56 (State had leverage from accepting the UMAO because Tribes could not get that in litigation).
[79] As described in Introduction section I.B.1, the Tribes' legal staff extensively litigated many water and regulatory issues from 1985 to 2005.
[80] Staff Report, *supra* note 11, at 28 n.171 & 40, n.215.
[81] *Id.* at 27, 48, 55; Draft Memorandum from Joan Specking, RWRCC to Susan Cottingham, Jay Weiner, Sonja Hoeglund, RWRCC, 2, 4 (Dec. 9, 2009), https://dnrc.mt.gov/Water-Resources/Compacts/12_09_09-CSKT_Minute_Summary.pdf.
[82] Draft Memorandum from Joan Specking, RWRCC, to Susan Cottingham; Jay Weiner; Sonja Hoeglund; Stan Jones, Bill Greiman, CSKT Negotiating Team, 2, 5 (July 30, 2008), https://dnrc.mt.gov/Water-Resources/Compacts/7-30-08-Negotiating-Session-Minutes.pdf.
[83] Draft Memorandum from Sonja Hoeglund, Project Leader & Stan Jones, Hydrologist, RWRCC to Susan Cottingham, Staff Director, RWRCC, 2 (Feb. 18, 2002), https://dnrc.mt.gov/Water-Resources/Compacts/2002-02-18_Notes-from-Neg-Session-Feb7.pdf; Draft Memorandum from Joan Specking, *supra* note 81, at 2. *See* 55 Fed. Reg. 9223, March 12, 1991.

States also had an interest in securing sufficient water for the BIA-owned FIIP, an entity it operated for all but four of the last 115 years.[84]

(c) The Adversarial Context of the Negotiations Confirm that the Decree is the Product of Good Faith, Arm's Length Negotiations

Because non-parties to the compact negotiations have filed objections, the Court must assess "whether 'the decree was the product of good faith, arms-length negotiations.'" *In re Crow Compact*, ¶ 18 (quoting *Oregon II*, 913 F.2d at 581); *see also Blackfeet Compact Order*, 2020 WL 7329247 at *7. As shown by the public record summarized below the decades-long negotiations leading to the Compact were comparable in complexity and tenor with the negotiations that produced the other compacts previously approved by this Court. For example, with respect to the Blackfeet Tribe–Montana–United States Compact:

> The Montana Legislature created the Compact Commission to negotiate government-to-government agreements with the United States and Tribes for reserved water rights. In negotiations, the Compact Commission acted on behalf of the governor. Section 85-2-701(2), MCA. There is nothing in the Staff Report or the briefing to suggest the negotiations for the Compact deviated in any material way from Compact Commission negotiations that led to the prior federal and tribal compacts.

Blackfeet Compact Order, 2020 WL 7329247 at *8.

As was the circumstance described in the *Blackfeet Compact Order*, 2020 WL 7329247, at *8, "[t]he procedural fairness of the process leading up to the Compact is underscored by its resolution of what at times was an adversarial process." In the present context, the arm's length, adversarial character of the process is illustrated by the numerous litigated matters involving the Compact Parties described *supra* pp. 4-11, including the *Namen*, *Greely*, *Joint Bd. I*, *Joint Bd. II, Montana v. EPA*, *Ciotti, Clinch I, Stults*, and *Clinch II* decisions. In addition, as detailed below, the representatives of the three governments who negotiated over four decades were all knowledgeable about the subject matters of the discussion, allowing them to vigorously advocate

[84] *See Flathead Irrigation Dist. v. Jewell*, 121 F. Supp. 3d 1008, 1010-14 (D. Mont. 2015), *aff'd sub. nom. Flathead Irrigation Dist. v. Zinke*, 725 Fed. App'x 507 (9th Cir. 2018) ("*FID v. Jewell*"); Letter from Ronald Trahan, CSKT Chairman, to Governor Steve Bullock, (April 17, 2014), https://dnrc.mt.gov/Water-Resources/Compacts/2014-04-17_CSKT-Letter-to-Governor-Re-Opening-Neg.pdf.

for their respective government to achieve a balanced settlement that secured the Tribes' water supply without diminishing existing water uses. Accordingly, the procedural fairness of the Compact, and of the Decree implementing the Compact, is manifest.

(i) The Early Stages of the Negotiations Identified Key Issues, But Did Not Resolve Them

The Commission and the CSKT held several preliminary meetings from 1979 to 1981. However, in May 1981, the CSKT withdrew from the discussions and later that year, initiated litigation challenging Montana's water right adjudication process.[85] The Commission and the CSKT resumed discussions in 1984. However, due to demands placed on Commission resources by negotiations concerning other Compacts,[86] and an extended disagreement concerning the extent to which negotiations could be confidential,[87] communications proceeded on an informal basis, focused on information development and exchange. Formal negotiations did not resume until 2000 when two public negotiation sessions were held in May and September.[88]

In June 2001, the CSKT provided a comprehensive written settlement proposal. The Commission subsequently met with local organizations and elected representatives to gauge reaction to the proposal. Via news releases and newspaper advertisements, the Commission solicited public comment concerning the CSKT's proposal and provided notice of a negotiation session on February 7, 2002, in Missoula.[89] After evaluating the feedback, the Parties continued discussions and focused on mechanisms for the quantification and administration of the CSKT water rights, while setting aside a dispute concerning the CSKT ownership of Reservation waters. Over the next four years, the parties were unable to resolve the regulatory gap exposed

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[85] Staff Report, *supra* note 11, at 7-8; *see Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation v. Montana*, 616 F.Supp. 1299 (D. Mont. 1985).
[86] These included the Fort Peck-Montana Compact, the Northern Cheyenne-Montana Compact, the Fort Belknap-Montana Compact, the Blackfeet Tribe-Montana-United States Compact, the Chippewa Cree Tribe-Montana Compact, and the United States of America, Fish and Wildlife Service, Bowdoin National Wildlife Refuge-Montana Compact. Staff Report, *supra* note 11, at 13-14.
[87] *Id.* at 14-20.
[88] *Id*. at 20.
[89] *Id*. at 20-21.

by the *Ciotti* line of cases, but created a system to review claims on the Reservation and gather background legal and technical information.[90]

(ii) Negotiations Between 2007-2013 Resolved Key Issues, But Did Not Result in an Approved Compact

In 2007, the Commission completed its work on other compacts and could bring more resources to the CSKT negotiations. During a public negotiation session in July 2007, the CSKT proposed a general framework to guide further negotiations and data collection. Key elements of the proposal were the concept of a unitary water rights administration system for the entire Reservation, protection of verified existing consumptive water uses, and the sharing of water supply shortages. These developments led the Parties to reach agreement to use a common data set for technical work in support of the negotiations.[91]

During the 2009 legislative session, with the support of the FJBC, the Parties obtained a legislative extension of the July 2009 claim filing deadline to allow additional time to gather multiple types of technical information and continue to negotiate the complex terms of an agreement. Under the amended statute, the CSKT and the United States would have to file water rights claims in the adjudication by June 30, 2015, if the Parties did not achieve an approved compact by June 30, 2013.[92] This extension provided the Parties five years that they used to carefully develop key components of the Compact described below. The compact ultimately submitted in 2013 was not approved by the Montana Legislature, and the CSKT and United States consequently had to file their claims in 2015. However, many of the concepts and provisions developed during the 2007 to 2013 negotiations were carried over into the revised Compact that did obtain legislative approval in 2015. We describe the competing interests resolved in four important Compact provisions below.

(1) Key Issues Resolved by the Parties

Flathead System Compact Water: The Parties were able to negotiate a sufficient quantity of water for the Tribes' future use consistent with federal law. *See* discussion *supra* pp. 8-10. The Parties' challenge was to maintain existing non-Tribal uses, while supplying the

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[90] *Id.* at 21-25.
[91] *Id.* at 27-28.
[92] Sections 85-2-217 and 85-2-703(3), MCA; Staff Report, *supra* note 11, at 28-29.

Tribes with a reliable water supply to meet their future needs, for a Reservation that was already short of water. *See supra* p. 5. Consequently, the Parties looked beyond the Reservation for "new" water to meet the Tribes' future needs,[93] using other Montana compacts as a model.[94]

The Parties sought to tap the more abundant water resources to the north and east of the Reservation, including Flathead Lake, the Flathead River, and the Bureau of Reclamation's Hungry Horse Reservoir. The Parties conducted significant modeling and analysis over several years to determine if available unused water existed. The modeling and analysis by the State and Bureau of Reclamation indicated that sufficient water was available from a combination of sources for Tribal withdrawals without significantly impacting endangered fish species downstream, local fish species, or existing water use.[95]

After the requisite work to assess impairments, the Parties agreed to a future oriented water right to meet the needs of the CSKT and provide significant benefits to non-Indians in the region. The resulting right termed "Flathead System Compact Water" can be sourced from Flathead Lake, Flathead River, or Hungry Horse Reservoir. It is a direct flow water right, with a

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[93] Staff Report, *supra* note 11, at 41; Draft Memorandum from Joan Specking, RWRCC, to Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team, 6-9 (Oct. 11, 2007), https://dnrc.mt.gov/Water-Resources/Compacts/2007-10-11_Minutes-Oct3-2007-Mtg.pdf; Draft Memorandum from Joan Specking, *supra* note 82, at 6-7; Draft Memorandum from Joan Specking, *supra* note 81, at 2-3.

[94] Staff Report, *supra* note 11, at 40; § 85-20-201, Art. III.F.1 (Ft. Peck Tribe, Ft. Peck Reservoir); § 85-20-301, MCA, Art. III.A.7 (Northern Cheyenne Tribe, Bighorn Lake); § 85-20-601, MCA, Art. III.C.6 (Chippewa Cree Tribe, Lake Elwell); § 85-20-901, MCA, Art. III.A.1.b (Crow Tribe, Bighorn Lake); § 85-20-1001, MCA, Art. III.H (Fort Belknap Indian Community, Lake Elwell); 85-20-1501, MCA, Art. III.G.1.d (Blackfeet Tribe, United States' remaining share of the St. Mary River); § 85-20-1501, MCA, Art. III.H (Blackfeet Tribe, Lake Elwell).

[95] Staff Report, *supra* note 11, at 41-42; Draft Memorandum from Joan Specking, RWRCC, to Jay Werner, Susan Cottingham, Sonja Hoeglund, Bill Greiman, Stan Jones, CSKT Negotiating Team, 3-6 (Oct. 22, 2008), https://dnrc.mt.gov/Water-Resources/Compacts/SKT-GEN-154739-Minute-Summary-10-22-2008.pdf; *CSKT RWRCC Team and MOU Group Meeting Minutes*, 1-3 (Nov. 3, 2009) https://dnrc.mt.gov/Water-Resources/Compacts/11-3-09-CSKT-MOU-meeting-minutes.pdf (hereinafter "2009 Commission Memo"); Draft Memorandum from Sonja Hoeglund, Project Leader, RWRCC, to Susan Cottingham, Jay Weiner, CSKT Negotiating Team, 2-7, 9-12 (April 28, 2010), https://dnrc.mt.gov/Water-Resources/Compacts/4-28-10-Negotiation-Minutes.jdw-edit.pdf; App. 7 to the Compact, Bureau of Reclamation, *Flathead Basin Tribal Depletions Study* (Sept. 2012); App. 8 to the Compact, *Montana, Hungry Horse Reservoir, Montana: Biological Impact Evaluation and Operational Constraints for a proposed 90,000-acre-foot withdrawal* (Sept. 2011).

priority date of July 16, 1855, that may be used for any beneficial purpose throughout the year.[96] The CSKT may divert up to 229,383 acre-feet per year from Flathead Lake or the Flathead River, and the CSKT uses can deplete 128,158 acre-feet per year.[97] The right is supplemented by an allocation of 90,000 acre-feet per year of storage water in Hungry Horse Reservoir to back-stop the diversion.[98] The right can be used by the CSKT and their members on the Reservation or off, and the CSKT and members can lease the water to others for beneficial use.[99]

Use of the Hungry Horse Reservoir allocation is circumscribed to protect other uses based on key results of the Reclamation and State studies.[100] Within the Reservoir release restraints, existing users are further protected by strong non-impairment restrictions comparable to those found in the State's "change in use" and adverse effect provisions in the Water Use Act. These restrictions apply to any new developments of this right and to certain off-Reservation leases.[101] The State also secured significant benefits to non-tribal water users on and off the Reservation that it had been unable to secure elsewhere.[102] The CSKT must lease the FIIP irrigators necessary water when there are water shortages.[103] And the CSKT must make 11,000 acre-feet of the 90,000 acre-feet Reservoir allocation available to lease for mitigation arising from domestic, municipal, industrial or commercial uses at a nominal price and for lengthy term to be administered by the DNRC.[104] As a result, the State protected and enhanced non-Indian water supplies.

UAMO: The Tribes and State litigated throughout the 1990s and early 2000s over administration of water rights on the Reservation. *See supra* pp. 6-7. Because most existing uses of water on the Reservation originate and are diverted from sources located on Tribal lands, the Tribes originally proposed that all water use on the Reservation should be regulated by the

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[96] Art. II.35; Art. III.C.1.c; Art. III.C.1.c.viii.
[97] Art. III.C.1.c. & App. 9.
[98] Art. II.35; Art. III.C.1.c.i & vii. The 90,000 acre-feet allocation was provided by the Act of Congress approving the Compact. The Act specified that the priority date for this water right is that of Reclamation's rights for Hungry Horse, not the earlier date otherwise applicable to the CSKT's water rights. Settlement Act, *supra* note 30, at § 6.
[99] Art. III.C.1.c.ix & x; Art. IV.B.1; Art. IV. B.5.b; Art. IV.B.6.c.
[100] Art. III.C.1.c.ii-vi.
[101] Art. IV.B.5.b & c; Art. IV.B.6.b.iv; Art. IV.B.6.c.vi.
[102] Staff Report, *supra* note 11, at 50, n.233.
[103] Art. IV.B.6.c.ii & Art. IV.E.3.d.
[104] Art. IV.B.7; Staff Report, *supra* note 11, at 51.

Tribes consistent with *Ciotti* and similar cases.[105] The State rejected the Tribes' proposal outright due to the assertion of exclusive Tribal ownership of the waters on the Reservation but agreed to work on other administration issues related to the regulatory void.[106]

In 2007, the Tribes developed a proposal for water regulation that accounted for the complex land ownership and water use patterns on the Reservation,[107] and the interconnectedness of surface and groundwater on the Reservation.[108] The proposal drew upon other joint management entities on the Reservation that administer use of natural resources.[109] The proposal provided for unitary management and administration of water on the Reservation by a single entity composed of representatives from the State and the Tribes.[110] The unitary administration proposal was inextricably linked to the Tribes' proposal for all the FIIP water users to share an 1855 priority date—based on extensive modeling—in order to simplify administration.[111]

The Parties worked from this proposal and negotiated a new code that largely mirrored the Montana Water Use Act. Throughout, the Commission continued to bring forward concerns regarding the State's role in the management system.[112] The resulting UAMO has the Board,

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[105] Staff Report, *supra* note 11, at 7, 20; *A Proposal for Negotiation of Reserved and Aboriginal Water Rights in Montana*, CSKT Negotiating Team (June 2001) ("2001 CSKT Proposal"), https://dnrc.mt.gov/Water-Resources/Compacts/2001-JuneProposalForNegoReservedAboriginalRights-cskt.pdf.

[106] Staff Report, *supra* note 11, at 21-22; Draft Memorandum from Sonja Hoeglund, *supra* note 83, at 1, 4-7.

[107] Mont. Reserved Water Rts. Compact Comm'n, State of Mont., *Report on the Proposed Water Rights Compact between the Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 17-18 (2014) ("2014 Report"), https://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/Jan-2014/RWRCC-WaterCompactReport.pdf.

[108] Memorandum from Joan Specking, Team Leader, RWRCC to Susan Cottingham, Staff Director, Jay Weiner, & Sonja Hoeglund, Project Leader, RWRCC, 2 (Sept. 30, 2009), https://dnrc.mt.gov/Water-Resources/Compacts/09_30_09-CSKT_Minute_Summary-jdw-edit.pdf.

[109] Staff Report, *supra* note 11, at 57. The Tribes have a regulatory role in other natural resources used by tribal members and others on the Reservation. *See* 2001 CSKT Proposal, *supra* note 105, at 6 (Flathead Lake Shoreline Protection Office, Reservation Fish and Wildlife Advisory Board, and the Tribal Water Quality Program). *See also* Montana's State-Tribal Cooperative Agreements Act. § 18-11-101, *et seq.*, MCA.

[110] Staff Report, *supra* note 11, at 27.

[111] *Id.*

[112] *Id*. at 29, 50, 56; 2014 Report, *supra* note 107, at 18.

described *supra* pp. 15-16, which oversees all water rights on the Reservation rather than a duplicative and potentially conflicting dual management system.[113] The State has a role in all future water development on the Reservation, including uses by the Tribes and its members—a benefit not contained in other tribal Compacts.[114] The UAMO also ensures that existing uses that were unpermitted due to the post-*Ciotti* regulatory void are protected.[115] In addition, the UAMO is consistent with the Montana Water Use Act for new permits and changes, with small variations reflecting refinements identified by DNRC's experience in administering rights across the State.[116]

Off-Reservation water rights: As explained *supra* p. 2 and *infra* pp. 50-53, the CSKT have a treaty based right to "take fish" at "usual and accustomed" locations. Instream flows are necessary at those locations to support fish populations for the CSKT to exercise that right. These water rights compete with existing irrigation diversions and would have a senior priority date, thereby threatening existing uses. Other compacts in Montana have not addressed such treaty rights. After negotiations resumed in 2007, the State reviewed the law and assessed various hydrologic and biologic factors in order to formulate a proposal that would provide water for tribal instream flow water rights while protecting existing water uses.[117]

In 2011, the State proposed that CSKT become co-owners in existing state-owned instream flow rights or through other known fish flow protective measures. The State proposal was "[c]onsistent with the Compact Commission's task of reaching a quantification agreement that both appropriately recognizes the scope of those rights and also accords meaningful protections to existing water users, and with an eye toward reaching accord on off-reservation rights at a level that provides for tangible biological benefits to affected fisheries and ecosystems and recognizes the State's need for management flexibility in basins that are not wholly appropriated . . ."[118] The Compact Commission worked with the Departments of Fish, Wildlife

[113] 2014 Report, *supra* note 107, at 18; Art. IV.I.
[114] 2014 Report, *supra* note 107, at 18.
[115] *Id.* at 12.
[116] *Id.* at 18.
[117] Staff Report, *supra* note 11, at 5-6, 10, 44; 2009 Commission Memo, *supra* note 95, at 3, 5-6.
[118] Reserved Water Rts. Compact Comm'n, State of Mont., *The State of Montana's Proposal for the Resolution of the Off-Reservation Water Rights Claims of the Confederated Salish and Kootenai Tribes*, 2 (2011), https://dnrc.mt.gov/Water-Resources/Compacts/2011-07-20_State-MT_Proposal-4-Off-Res-Rights_CSKT-Compact.pdf.

and Parks and Natural Resources and Conservation "to identify mechanisms to provide meaningful instream flow protections" on streams with "significant [Tribal] interests and colorable claims."[119] Other significant rights involved in the proposal were tied to existing fisheries flows at federally licensed facilities. The proposal covered certain parts of the Kootenai River, the Swan River, the Bitterroot River, the Flathead River, and the Clark Fork.[120] With minor adjustments, the off-Reservation rights described in the State's Proposal were ultimately included in the Compact and are defined in the Abstracts included in the Decree.[121]

FIIP: The FIIP is the largest water use on the Reservation (at least 90% of the surface water), and the largest irrigation project in Montana.[122] To ensure continued water delivery from the FIIP, the parties needed to supply the FIIP with the same amount of water (to protect existing uses) and still ensure improved flows for fisheries (to provide for a meaningful treaty right). Litigation over various issues surrounding the regulation of water within the FIIP occurred most prominently in the 1930s and 1980s. *See supra* pp. 4-6. The CSKT conclusively established in 1987 in the *Joint Bd. I* litigation that instream flows are senior to and take precedence over irrigation diversions. *See supra* p. 5. Thereafter, the BIA adopted minimum instream flows at approximately 20 locations. However, these flows were increasingly viewed by the Tribes as being insufficient for several reasons.[123]

In July 2007, the Tribes demonstrated how in one small part of the FIIP, rehabilitating project facilities and changing operations could save sufficient water to meaningfully improve fisheries.[124] Bolstered by this example, over the next several years, Tribal, state, and federal staff and contractors met frequently, shared existing and recently gathered data, and conducted

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[119] *Id*. at 2.
[120] *Id*. at 2-3.
[121] *Id.* at 3-14; Art. III.D; Apps. 25-36.
[122] Staff Report, *supra* note 11, at 6, 38.
[123] CSKT Compact Tech. Working Grp., Mont. Leg. Water Policy Interim Comm'n, *Report of Findings: Technical Review of Proposed CSKT Water Rights Settlement for the Water Policy Interim Committee* (hereinafter "TWG Report"), 44-45 (describing several instream flow methods that result in higher instream flows than the interim flows), 46 (describing problems with "Robust river" standard), 47-49 (describing problems with on-reservation fishery health) (2014), https://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/September-2014/Sept23-Complete_report-EDITED.pdf; App. 13 (listing interim instream flow locations and amounts).
[124] Staff Report, supra note 11, at 27.

analysis, to develop potential ways to protect the FIIP use while "growing" the water supply to meet instream flow needs for fish populations.[125] The Parties developed joint models that accounted for different water uses, variations in year types (e.g., dry, average, and wet), the interplay between groundwater and surface water, and identification of water shortages in stream reaches that are important to fish. Such tools are particularly important in times of drought.[126] These models allowed the Parties to see how the competing needs could be met.[127]

During this period, litigation with the FJBC declined, and the Tribes and the FJBC jointly proposed that the FIIP management functions be contractually transferred from the BIA to a new entity composed of representatives from the CSKT and the FJBC.[128] They negotiated the Cooperative Management Entity which assumed management of the FIIP in 2010.[129] The FJBC, the CSKT, and ultimately the United States negotiated a separate Water Use Agreement that addressed how the FIIP water right would be managed consistent with the CSKT's instream flow rights in the streams supplying the FIIP. The Parties intended this Water Use Agreement to be incorporated into a final water rights settlement.[130]

(2) Barriers to Compact Approval in 2013

In late 2012 and early 2013, the Parties completed all necessary documents reflecting their major compromises. Following extensive outreach and consideration of public comments, the Commission approved a compact package for the Montana Legislature. The package included both a proposed Confederated Salish and Kootenai-Montana Compact and the UAMO intended to govern all water rights and uses on the Reservation, as well as the separate Water Use Agreement negotiated with the FJBC. The 2013 Compact failed to pass the legislature in March 2013 due to a substantial number of questions from legislators and the public.[131] The FJBC effectively dissolved in December 2013 after the withdrawal of the Mission and Jocko Valley irrigation districts. The BIA reassumed operation of the FIIP in 2014.[132]

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[125] *Id*. at 25-26 n.160, 28 (describing frequency of technical work in 2008 and types of data gathered).

[126] *Id*. at 53-54.

[127] App. 3.7(2) (relying on 2011 model runs).

[128] Staff Report, *supra* note 11, at 26-7; *FID v. Jewell*, 121 F.Supp.3d at 1013-14.

[129] *Id*. at 26.

[130] *Id.* at 29.

[131] Staff Report, *supra* note 11, at 29-30.

[132] *FID v. Jewell*, 121 F.Supp.3d at 1014-15; Staff Report, *supra* note 11, at 30.

(iii) Negotiations Leading to the Final Compact Between 2013 and 2015 Demonstrate How the Parties Resolved All Outstanding Issues, including Public Concerns

The Parties tackled the uncertainty created by the failure of the 2013 Compact submittal through two intertwined processes during the next twenty months. First, the State conducted extensive review of the legal and technical fundamentals of the 2013 Compact and concluded they were sound. Second, the Parties decided to try to bring a compact to the 2015 legislative session that incorporated the key parts of the Water Use Agreement to provide instream flows for the Tribes and continue the existing project deliveries for the FIIP irrigators.

(1) The State Conducted Wide-ranging Legal and Technical Review of the 2013 Compact

After the 2013 session, Governor Bullock directed the Commission to prepare a comprehensive report addressing the questions raised about the 2013 Compact. The Commission first solicited parties' concerns about the 2013 Compact.[133] The Commission subsequently crafted a comprehensive report addressing the primary concerns of legislators and the public on the 2013 Compact and presented it to the Montana Legislature's Water Policy Interim Committee ("WPIC") at a January 2014 meeting.[134]

The Report found that all the major topics of concern at the time—including the scope and validity of off-reservation instream flow rights,[135] the constitutionality of the UAMO and the Board, the legal and constitutional authority for the 2013 Compact, and the protection of existing water uses—were not impediments to the 2013 Compact.[136] The Commission's report also

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[133] Letter from Arne Wick, Program Manager, RWRCC, to Water Policy Interim Committee Chairman and Members (Aug. 21, 2013), https://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/September-2013/RWRCC-letter.pdf.

[134] 2014 Report, *supra* note 107; *State-Tribal Relations Presentation*, RWRCC (April 28, 2014), https://leg.mt.gov/content/Committees/Interim/2013-2014/State-Tribal-Relations/Meetings/April-2014/Hornbein_Outline%20talk%20to%20STR.pdf.

[135] The Commission explained how its off-Reservation proposal included limitations and protections for State water rights, focusing on protecting "in perpetuity" "areas of the State that are particularly vulnerable to such claims, such as the Bitterroot Valley." 2014 Report, *supra* note 107, at 9.

[136] 2014 Report, *supra* note 107.

effectively negated many other allegations raised, like the Commission's authority to negotiate for the public, that the 2013 Compact did not determine others' water rights, the quantification amount of the CSKT rights, the main legal concepts underpinning the rights recognized, whether the 2013 Compact effected a "taking" of other water users' rights, and whether the Compact required environmental review.[137]

The Commission also collaborated extensively with WPIC in amassing legal and technical review and responding to apprehensions regarding the 2013 Compact. In late 2013, the Commission provided a separate lengthy legal memorandum to WPIC addressing many other concerns raised through WPIC Chairman Chas Vincent. These included questions such as: whether off-reservation instream flows with a time immemorial priority date were proper, whether Congressional actions after the Hellgate Treaty eliminated tribal rights, whether the Tribes lost some of their water rights through settling litigation against the United States over the Hellgate Treaty and the Flathead Allotment Act,[138] whether Tribal ownership of instream flow rights would lead to Tribal regulation of hunting and fishing by non-tribal members, whether the Compact lead to a reduction in available water for irrigation and other uses, and whether the UAMO and Board were legal.[139] On March 3, 2014, Commission staff again responded to WPIC inquiries regarding legal precedent for off-reservation aboriginal rights, for CSKT ownership of the FIIP rights, and CSKT's jurisdiction and tribal sovereignty with respect to the FIIP rights, concluding that the Compact's treatment of these topics was proper.[140]

In addition to the Commission's creation of the Report and related documents to answer the myriad technical and legal questions, WPIC conducted its own extensive public-facing review of the proposed settlement in 2014, holding five public meetings, hosting panels of

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[137] *Id.* at 4-10, 37.

[138] *See Conf. Salish & Kootenai Tribes v. U.S.*, Dkt. No. 61, Indian Cl. Comm. (Sept. 29, 1965); *see also Conf. Salish & Kootenai Tribes v. U.S.*, 437 F.2d 458 (Ct. Cl. 1971) (payments to the Tribes in proceedings before the Indian Claims Commission and the United States Court of Claims were exclusively for land, not water.).

[139] Letter from Melissa Hornbein, Staff Attorney, RWRCC to Chas Vincent, WPIC Chairman (Dec. 16, 2013), https://www.leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/Jan-2014/RWRCC_letter_to_Vincent.pdf.

[140] Letter from Melissa Hornbein, Staff Attorney, RWRCC to Chas Vincent, WPIC Chairman (March 3, 2014), https://www.leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/March-2014/CSKT-RWRCC_memo_March2014.pdf.

experts, and receiving hours of public testimony regarding the Compact.[141] This included both legal and technical review. The detailed legal review concerned a series of legal questions about components of the Compact: "(1) the purpose of the Flathead Indian Reservation; (2) the proposed Unitary Administration and Management Ordinance . . .; (3) the proposed off-reservation instream flow rights; and (4) compact ratification and administration."[142] Counsel for the legislature found all of these concerns to be without merit; the Compact did not suffer from illegalities.[143]

To respond to the scientific and technical aspects of the State Representatives' concerns, WPIC also developed a Technical Working Group ("TWG") to review the proposed Compact.[144] This TWG had six members—experts in hydrology, geohydrology, instream flow, and irrigation.[145] The TWG held ten working meetings, all open to the public.[146] These meetings included presentations from the Commission, CSKT, members of the public, and opponents of the 2013 Compact.[147] The TWG issued a final report to WPIC on September 23, 2014, finding that, with certain qualifications, "the modeling used to build a quantitative foundation for the CSKT water rights settlement is reasonable."[148] Thereafter, WPIC recommended some changes to the Compact, and the Parties accommodated most of them by the end of 2014.[149]

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[141] Letter from Chas Vincent, WPIC Chairman to Chris D. Tweeten, RWRCC Chairman (Oct. 30, 2014), https://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/October-2014/Exhibits/Oct_30/Exhibit1.pdf*; see generally 2013-2014 Water Policy*, MONTANA STATE LEGISLATURE, https://www.leg.mt.gov/committees/interim/past-interim-committees/2013-2014/water-policy/ (last visited June 25, 2024) (tabs for "Committee Topics" with a collection of CSKT-Compact related documents and throughout the tabs for WPIC meetings in 2013 and 2014).

[142] Memorandum from Helen Thigpen, Montana Legislative Services Division Staff Attorney, to WPIC (Aug. 22, 2014), https://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/September-2014/CSKT-Thigpen_review.pdf.

[143] *Id.*

[144] TWG Report, *supra* note 123, at 6.

[145] *Id.* at 6-7.

[146] *Id.* at 7.

[147] *Id.*

[148] *Id.* at 6; *see* Staff Report, *supra* note 11, at 32-33 (describing WPIC model review process).

[149] Letter from Chris D. Tweeten, RWRCC Chairman, to Chas Vincent, WPIC Chairman and WPIC Members (December 12, 2014), https://web.archive.org/web/20210307161928/http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/docs/cskt/wpic-2014-12-12_revised_wpic_response.pdf/at_download/file.

In summary, the Commission conducted a top-to-bottom review of the 2013 Compact and concluded there were no infirmities.

(2) The Parties Revised the 2013 Compact to Incorporate the FIIP Terms

In Spring 2014, the Parties rejoined negotiations to produce a compact to submit to the 2015 legislature. In March, after the dissolution of the FJBC, the Governor extended a formal invitation to the CSKT to reopen negotiations—specifically focused on incorporating the substantive terms of the Water Use Agreement into the Compact and leaving all other provisions unaffected.[150] The CSKT agreed to that limited scope of the reopening.[151] The State sought to ensure that the FIIP irrigators did not lose the irrigation deliveries to meet historic crop consumptive use previously negotiated in the Water Use Agreement, while ensuring that water saved through upgrades and repairs to the FIIP infrastructure would be allocated to instream flows.[152] The Commission's technical staff and its University of Idaho consultants independently reviewed the hydrologic modeling dividing water between irrigation and instream flows and found the modeling acceptable to use at the service area scale within the FIIP.[153]

The Parties transferred the necessary concepts to the Compact to protect the FIIP irrigators and allocate water saved by the FIIP improvements to instream flows.[154] The FIIP diversion right is allocated among four regions that each have separate RDA amounts.[155] For each RDA area, the Parties protected the aggregate amount of water historically delivered at each

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[150] Letter from Steve Bullock, Gov. of Montana to Ron Trahan, CSKT Chairman (March 31, 2014), https://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/May-2014/Exhibits/CSKT-Bullock_letter-March31.pdf.
[151] Letter from Ron Trahan, *supra* note 84.
[152] Staff Report, *supra* note 11, at 33; letter from Chris D. Tweeten, RWRCC Chairman to Ron Trahan, CSKT Chairman, (June 26, 2014), https://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/July-2014/RWRCC-CSKT%20Proposal-June2014.pdf (containing proposed FIIP related terms).
[153] RWRCC, *Instream Flow and Irrigation Diversion Aspects of the FIIP Water Use Agreement: State of Montana Evaluation and Recommendations*, 1 (Aug. 4, 2014), https://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/September-2014/RWRCC_evaluation_of_WUA.pdf.
[154] Sufficient water to meet existing FIIP diversions is organized by geographic area and different water year types (wet, normal, dry). Art. III.C; Art. IV.F & G; Apps. 3.5 & 3.7.
[155] Art. II.58 & 59; Art. III.C.1.a; Art. IV.D.1.a; App. 3.2.

farm turnout ("Historic Farm Delivery").[156] The Compact requires that each RDA be evaluated initially for sufficiency in meeting the Historic Farm Delivery amount, and as an ongoing obligation thereafter.[157]

There are two types of Instream Flows related to the water supply for the FIIP: Interim Instream Flows and FIIP Instream Flows (which has different amounts based on water year types).[158] Interim Instream Flows are the single value flows in place since the conclusion of the *Joint Bd. I* litigation in the late 1980s and will continue until the phased implementation of the Compact.[159] The FIIP Instream Flows start *after* "Operational Improvements" occur.[160] These are advances in the FIIP practices or upgrades to infrastructure that modify, and in many instances decrease, the amount of water diverted, while still maintaining Historic Farm Deliveries.[161] The FIIP Instream Flows have a pattern that varies by month and were developed around a water budget that meets Historic Farm Deliveries, and on-farm and canal efficiency losses.[162] The FIIP Instream Flows vary depending on the type of water year: Minimum Enforceable Instream Flows ("MEFs") and Target Instream Flows ("TIFs"). MEFs are survival fishery flows based on defined dry water year conditions.[163] TIFs are based on defined average and wet water year conditions and are intended to improve fisheries habitat above a survival level. They are for higher flows commensurate with the greater natural water supply.[164]

The fisheries and irrigation rights have a staggered priority system. MEFs have first priority, then RDAs, and finally TIFs.[165] If water conditions are below average, the Parties agreed to implement a series of measures to meet RDAs, including dropping minimum reservoir levels, pumping more water from the Flathead River to offset depleted Reservation streams, and mandatory leasing by the Tribes of Flathead System Compact Water for use within the FIIP to alleviate shortfalls.[166]

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[156] Art. II.36; App. 3.3.
[157] Art. IV.D.1.e.
[158] Art. II.44.
[159] Art. III.C.1.d; Art. IV.C.3.c; Apps. 13 & 14.
[160] Art. IV.C.3; Art. IV.D.1.c & d; App. 3.4.
[161] Art. II.54; Art. III.C.1.d.ii; Art. IV.C.3; Apps. 3.1, 3.4 & 3.6.
[162] App. 3.1.
[163] Art. II.48; App. 3.1.
[164] Art. II.64; App. 3.1.
[165] Art. IV.C.1.
[166] Art. IV.E.3.d &App. 3.5.

(3) The Parties' Ratification of the Compact

The State's comprehensive efforts to address and resolve all questions and issues posed by the 2013 Compact submittal, detailed above, culminated in the State ultimately agreeing to the Compact. The Commission voted unanimously to recommend the Compact to the 2015 Montana Legislature. The Montana Legislature approved the Compact and the UAMO in April 2015.[167]

By statute, Congress must provide the United States' approval of the Compact's recognition of the Tribes' water rights and the many limitations on the exercise of those rights. *See* 25 U.S.C. § 177. The negotiated terms of the Compact anticipated Congress would also provide extensive funds for the various improvements and repairs to the FIIP needed to allow greater instream flows for fisheries on-Reservation.[168] The Compact acknowledged that the extent of the federal contribution to implement it would be a subject of further negotiations.[169] Six years after the Montana Legislature acted, and after holding a hearing,[170] Congress ratified and funded the Compact on December 27, 2020, in the Settlement Act. In doing so, Congress appropriated $1.9 billion and authorized the CSKT to use any portion of those funds to rehabilitate the FIIP's aging infrastructure to make water available for increased instream flows to satisfy the Tribes' treaty fishing rights.[171]

2. The Decree is Substantively Fair

In evaluating the substantive fairness of a settlement, courts consider whether the issues involved in the settlement were resolved based upon reasonable standards and whether the settlement accounts for litigation risks. *See*, *e.g.*, *Cannons*, 899 F.2d at 87-89; *Officers for Justice*, 688 F.2d at 625; *Ft. Peck Op.*, 2001 WL 36525512, at *4. As previously cited:

> For substantive fairness, the Court is not required to predict how it might have fashioned a judgment had the reserved water rights been litigated. Rather, the Court's substantive analysis is limited to an amalgam of delicate balancing, gross

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[167] Staff Report, *supra* note 11, at 33-34.
[168] Art. III.C.1.d.ii & iv; Art. IV.C.3; Art. VI.B.
[169] Art. VI.B.
[170] *See Montana Water Rights Protection Act: Hearing on S. 3019 Before the S. Comm. on Indian Aff., 116th Cong.* (2020) (statement of Timothy R. Petty, Assistant Secretary for Water and Science, U.S. Dept. of Interior), https://www.doi.gov/ocl/s-3019 (Interior Department testimony).
[171] Settlement Act, *supra* note 30, §§ 7(b), 8(a)-(c), 8(h), 9(a).

> approximations and rough justice. The Court need only be satisfied that the Compact represents a reasonable factual and legal determination.

Blackfeet Compact Order, 2020 WL 7329247 at *8 (quotations omitted).

The CSKT reserved water right claims resolved by the Compact are grounded in the Indian reserved water rights doctrine that *Greely* followed and the United States Supreme Court first articulated in *Winters*. *See* discussion *supra* p. 8. Although the reserved rights doctrine's origins can be described succinctly, its application can be complicated and very resource-intensive when applying the doctrine's legal parameters to a specific case. As this Court has recognized, "the Reserved Water Rights Doctrine is vague and open-ended and has been construed both broadly and narrowly by subsequent federal and state courts." *Ft. Peck Op.*, 2001 WL 36525512, at *7. The doctrine thus provides great opportunity for litigation—or compromise. The Compact Parties ultimately chose the latter path and the resulting Compact and Decree represent a reasonable factual and legal determination that avoids years of costly litigation.

(a) The Decree is Fair with Respect to the Tribal Water Right

As detailed *supra* pp. 21-39, the quantification of the Tribal Water Right in the Compact was the product of lengthy and arduous negotiations as the Compact Parties sought to reconcile their differing positions on the basis of developed data and extensive technical and legal analysis. The compromise reached by those negotiations and the subsequent state and federal legislative processes resulting in the Decree "is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators," *Officers for Justice*, 688 F.2d at 625, nor evaluated based on "ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute." *Id.*

Considering the "uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation," *id.*, the Court should find that the Compact's protections for existing water users, and its description of the Tribal Water Right, coupled with the provisions of the UAMO, all summarized *supra* pp. 11-16, constitute a fair resolution of both past decades and potential future years of litigation concerning the CSKT water rights. That fairness is further evidenced by the following explanations of specific components of the Tribal Water Right, specifically the FIIP Water Use Right, certain water rights for individually held land within the Reservation, and the off-Reservation instream flow rights.

(b) The Decree is Fair with Respect to the Water Right for the FIIP

The Compact recognizes the "FIIP Water Use Right," as a component of the Tribal Water Right, to be held in trust by the United States for the benefit of the CSKT, their members, and allottees,[172] while also protecting non-Indian irrigators' entitlement to share in the FIIP Water Right.[173] As discussed below, legal ownership of the right by the United States in trust for the CSKT is supported by the Congressional intent expressed in 1904 and 1908 legislation regarding authorization, ownership, and operation of the project. Such ownership is also consistent with Ninth Circuit caselaw concerning the project. In addition, decreeing the FIIP Water Right as a federal reserved trust asset conforms with all other Montana water compacts involving BIA irrigation projects and with the water rights decreed for BIA irrigation projects outside of Montana.

(i) Consistency with Congressional Intent

Ownership of the FIIP Water Use Right by the United States in trust for the CSKT is consistent with treaty, legislation, and caselaw. In the Hellgate Treaty, the United States and the CSKT agreed to establish the Reservation as a homeland for the CSKT in exchange for cession of the broader CSKT aboriginal territory.[174] *See* discussion *supra* pp. 1-2. The Treaty also contemplated that Tribal members who were not agrarian before the establishment of the Reservation would have opportunities to adapt to farming and ranching.[175] In 1904, Congress authorized allotment of the Reservation and declaration of surplus lands.[176] The Flathead Allotment Act additionally authorized funding to benefit Tribal members "in the construction of irrigation ditches, the purchase of stock, cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising . . . ."[177]

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[172] Art. II.32; Art. II.67; Art. III.C.1.a; Art. IV.A.
[173] Art. II.32; Art. III.C.1.a; Art. IV.B.1; Art. IV.D.2.
[174] The cession of aboriginal territory in no way diminishes the Tribes' Treaty right to fish in the usual and accustomed places off the Reservation, reserved in Article III of the Treaty.
[175] Hellgate Treaty, *supra* note 3, at Arts. III, IV, and V (Art. III, right to pasture horses and cattle; Art. IV, monies for creating farms and building houses on them; Art. V, the United States to establish agricultural school, employ farming instructors, and provide related services).
[176] Flathead Allotment Act, *supra* note 7, at §§ 2, 9, 33 Stat. 302, 303-04.
[177] *Id.* § 14, 33 Stat. 302, 305.

In 1907, the Commissioner of Indian Affairs started an investigation of conditions on the Reservation in order "to recommend the legislation needed for an adequate system of irrigation for the Indians to be allotted and for the lands to be disposed of under [the Flathead Allotment Act]."[178] Further legislation in 1907 and 1908 then authorized preliminary surveys, plans, and estimates for an irrigation system to irrigate allotted and surplus lands of the Reservation.[179] In 1908, Congress also further amended the Flathead Allotment Act, providing authority and funding for "irrigation systems" to serve all irrigable lands on the Reservation, both Indian and non-Indian.[180] At the time, approximately half of the served lands were allotted, and half were surplus.[181] These federally authorized and constructed irrigation systems eventually became the FIIP. No later statute changed the ownership of the project.

The Ninth Circuit subsequently recognized the ownership of the project water right as a federal reserved right in the *McIntire* and *Alexander* cases (also discussed *supra* pp. 4-5). In *McIntire*, the plaintiff sued the United States for building a FIIP canal that essentially dewatered her ditch. 101 F.2d at 652. The plaintiff alleged that she had a prior right under state law through the construction of her ditch on allotted land. The Court of Appeals disagreed. Citing *Winters*, the Court held that "[t]he United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians," and therefore "[b]eing reserved, no title to the waters could be acquired by anyone except as specified by Congress." 101 F.2d at 653. In *Alexander*, the United States filed suit to enjoin certain Indian landowners from diverting water in excess of the amounts allocated by the Secretary of the Interior. Although the Ninth Circuit denied injunctive relief because of insufficient proof of wrongful diversion, the court noted that the Hellgate Treaty "impliedly reserved all waters on the reservation to the Indians," 131 F.2d at 360, and followed the holding in *McIntire* that water rights for allotments on the Reservation could be obtained only as specified by Congress. *Id*. The Compact's recognition that title to the

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[178] *Report of the Commissioner of Indian Affairs*, 1907, H.R. Doc. No. 60-5, at 52, https://www.govinfo.gov/app/details/SERIALSET-05296_00_00-002-0005-0000.

[179] 1907 Indian Department Appropriations, 34 Stat. 1015, 1034; 1908 Indian Department Appropriations, 35 Stat. 70, 83.

[180] § 15 of the 1908 Act, 35 Stat. 444, 449-50 (amending Flathead Allotment Act § 9).

[181] *See Tenth Annual Report of the Reclamation Service*, 1910-1911, H.R. Doc. No. 62-133, at 123 (paragraph concerning "Present status of irrigable land") (1912), https://www.govinfo.gov/app/details/SERIALSET-06258_00_00-002-0133-0000.

FIIP is in the name of the United States as trustee for the Tribes is consistent with these Ninth Circuit precedents.

The statutes creating and expanding the FIIP also make clear that irrigators served by the FIIP receive a conditional entitlement to use a share of the FIIP Water Right, not an individual water right recognized under state law. The Decree correctly captures this conditional entitlement to delivery of project water.[182] Through the 1908 Act, Congress authorized both allottees and homesteaders to use a proportionate share of the FIIP water supply, but it treated non-Indian homesteaders differently than allottees. The 1908 Act required homesteaders to pay the appraised value of their lands and conditioned a homesteader's entitlement to a proportionate share of the FIIP water to both the repayment of his share of construction costs and the payment of annual operation and maintenance charges.[183] Allottees, by comparison, were not required to pay for their lands nor required to repay the United States for the FIIP construction costs. Allottees were entitled to "a right to so much water as may be required to irrigate" their lands.[184] However, like homesteaders, allottees were required to pay annual operation and maintenance charges to be able to receive a proportionate share of FIIP water.[185]

Subsequent FIIP statutes did not change the legal status of the FIIP as a federal Indian irrigation project owned and operated by the BIA, or that the FIIP's water right is held in trust by the United States and individual irrigators receive only a conditional right to use the FIIP water, not an individual water right under state law.[186] Indeed, Congress passed multiple statutes

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[182] Art. II.32; Art. III.C.1.a; Art. IV.B.1; Art. IV.D. 2.

[183] § 15 of the 1908 Act, 35 Stat. 444, 449-450.

[184] *Id.* at 450.

[185] Contentions that § 15 of the 1908 Act created a right to ownership of the FIIP or to the FIIP water rights are unfounded. The 1908 Act amended § 9 of the Flathead Allotment Act by adding a provision directing the transfer of the FIIP *operation and management* under certain conditions and subject to terms acceptable to the Secretary. However, that provision was eliminated by the Settlement Act, § 13(a)(1) (striking the relevant provision of the Flathead Allotment Act that had been added by the 1908 Act).

[186] The Act of July 17, 1914, 38 Stat. 510, adopted certain provisions in a 1912 Reclamation Act amendment to alter the way the FIIP settlers could obtain patents for their farm units, but it did not incorporate other laws related to Reclamation projects, nor did it make the FIIP a Reclamation project. Although the Bureau of Reclamation, under the auspices of the Interior Department, partnered with BIA in the early construction of the FIIP, the FIIP is not a Reclamation project. 48 Pub. Lands Dec. 475, 476 (1921), 58 I.D. 41 (1942). Reclamation statutes and caselaw do not apply to the FIIP. Reclamation projects are authorized by the 1902 Reclamation Act, as amended. Unlike the statutes creating the FIIP, § 8 of the 1902 Reclamation

between 1920 and 1948 that dealt with repayment of construction costs but did not address the ownership of the FIIP water.[187] The *McIntire* and *Alexander* cases make clear that FIIP-related statutes after 1908 did not alter the legal character of the FIIP water right.

(ii) Consistency with the Treatment of BIA Irrigation Project Water Rights in Previous Montana Compacts

Treating the FIIP right as a part of the Tribes' water right aligns with all other relevant Montana tribal compacts. All other Montana tribal compacts involving BIA irrigation projects treat the water rights for such projects as part of the pertinent tribal reserved water right. This Court has approved compacts and entered associated decrees for the BIA irrigation projects on three separate reservations, all as part of the tribal reserved water rights that are held in trust: Fort Peck Compact;[188] Crow Tribe Compact,[189] and Blackfeet Tribe Compact.[190] The Fort Belknap Compact takes the same approach,[191] although it has not yet been approved by Congress or this Court.

(iii) Consistency with the Treatment of BIA Irrigation Project Water Rights in Decrees Outside of Montana

The Decree's treatment of the FIIP right is also consistent with the decrees entered concerning BIA irrigation projects outside Montana. For example, in the Snake River Basin Adjudication, title to the BIA's Fort Hall Project water rights serving both tribal and non-Indian-owned lands on the Fort Hall Reservation were decreed in 2014 as held in trust by the United

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Act directed the United States to obtain water rights for Reclamation projects pursuant to state law. 43 USC § 383.

[187] Act of May 10, 1926, 44 Stat. 453; Act of February 14, 1931, 46 Stat. 1115; Act of January 26, 1933, 47 Stat. 776; Act of March 3, 1933, 47 Stat. 1427; Act of May 9, 1935, 49 Stat. 176; Act of June 13, 1935, 49 Stat. 337; Act of June 22, 1936, 49 Stat. 1803; Act of August 5, 1939, 53 Stat. 1221; Act of July 26, 1947, 61 Stat. 494; and Act of May 25, 1948, 62 Stat. 269.

[188] § 85-20-201, MCA, Art. II.9; Art. III.A; Art. III.B.4.

[189] § 85-20-901, MCA, Art. II.10; Art. III.A.1.a(3); Art. III.B.1.b; Art. III.C.1.b; Art. IV.A.1. Art. IVA.3.c

[190] § 85-20-1501, MCA, Art. II.14; Art. III.I; Art. IV.A; Art. IV.B.1.

[191] § 85-20-1001, MCA, Art. II.20; Art. III.A.1.a; Art. IV.A.1.

States.[192] Similarly, in 2019 Washington state courts decreed the water rights for BIA's Wapato Irrigation Project to be held in trust as part of the Yakama Nation's reserved rights.[193]

(c) The Decree is Fair with Respect to Water Rights for Individually Held Land within the Reservation

In the Flathead Allotment Act of 1904, Congress authorized both Indian and non-Indian individual land ownership within the boundaries of the Reservation. That Act authorized the allotment of parcels to individual Indians to be held in trust for 25 years before transferring to the allottee in fee.[194] In addition, the Act opened the unallotted "surplus" lands to non-Indian entry and settlement under the public land laws.[195] Consequently, the Reservation today is made up of a complex weave of tribal trust land, trust allotments, and fee lands held by both Indians and non-Indians. This mix of individual land ownership has varied water rights and entitlements.

There are three types of individual land ownership on the Reservation with associated water rights or entitlements. First, allotted lands held in trust for Indian allottees carry a right to share in the tribal water right for agricultural and related purposes. Second, allotted lands now held in fee by non-Indians may have succeeded to the allotment's right to share in the tribal water right ("Walton rights"). Third, Reservation lands declared "surplus," opened to entry, and held in fee by non-Indians through homestead patents have water rights that are usually governed by state law.

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[192] Final Unified Decree, *In re SRBA*, No. 39576 (Idaho 5th Jud. Dist. Ct. Aug. 26, 2014)) at 10-11 ¶¶ 2 & 5 & Att. 4, Water Right Partial Decrees at 1-3, 6-7, 12-13, 18-20, http://srba.idaho.gov/finaldecree.HTM & http://srba.idaho.gov/Images/federal/shoban%20partials.pdf.

[193] Final Decree, *In re Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin*, No. 77-2-01484-5 (Wash. Super. Ct. May 9, 2019) at 2 ¶ 1(a) (adopting the "Final Schedule of Rights"), https://appswr.ecology.wa.gov/docs/WaterRights/wrwebpdf/yrb-finaldecree/FinalDecree.pdf; Final Schedule of Rights, *In re Yakima River*, at 68-70, 73, 74, 75, 100, 101, 2131, 2137, https://appswr.ecology.wa.gov/docs/WaterRights/wrwebpdf/yrb-finaldecree/2022FSOR.pdf.

[194] 33 Stat. 302, 303 (§ 2, providing for allotment under U.S. allotment laws); Act of Feb. 8, 1887, 24 Stat. 388, 389 (§ 5, allotments held in trust for 25 years).

[195] *See* 33 Stat. 302, 304 (title referring to unallotted "surplus" lands; § 9, opening surplus lands to settlement and entry with particular provisions applicable to "settlers under the homestead law").

(i) Allottee Water Rights[196]

As acknowledged in *Greely*, discussed *supra* pp. 7-11, the *Winters* doctrine provides the foundation for Indian reserved water rights. Tribal water rights for the reservation are generally communally held. *See United States v. Powers*, 305 U.S. 527, 532 (1939) (citing *Winters* for the proposition that water rights were "reserved for the equal benefit of tribal members"); *United States v. Washington*, 520 F.2d 676, 688 (9th Cir. 1975) ("Individual Indians had no individual title to property, but participated in the communal rights of the tribe."). The concept of individualized Indian interests on most western Indian reservations first arose with passage of the General Allotment Act in 1887. Section 7 of that Act, now codified at 25 U.S.C. § 381, specifically provided that the Secretary would secure for Indian allottees a "just and equal distribution" of reservation water for agricultural purposes, and thus "a right to use reserved water." *Walton II*, 647 F.2d at 49-51 (citing *Powers*); *see also Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985) ("*Walton III"*).

Importantly, any equitable sharing, like that contemplated by 25 U.S.C. § 381, only applies to water reserved for agricultural and related purposes and used on allotments, not water reserved for other purposes such as CSKT's treaty-reserved aboriginal fishing rights. *Joint Bd. I*, 832 F.2d at 1131-32 (citing *Walton III*, 752 F.2d at 405); *see also Adair*, 723 F.2d at 1411, 1416 n.25. Sharing in the tribal right brings similar characteristics to the allottee's entitlement. For example, the right of use has the same date-of-reservation or other relevant priority. Additionally, an allottee's right cannot be lost by non-use. *Walton II*, 647 F.2d at 51. Allottee rights, however, are derivative of the tribal right and therefore, allotment of land "did not result in a severance of *Winters* rights for the benefit of allottees, nor did it create separate reserved rights for the benefit of allottees." *In re Adjudication of Existing and Reserved Rights to Use of Water, Both Surface and Underground, of Crow Tribe of Indians of the State of Montana*, No. WC-2012-06, 2014 WL 12963057, at *6 (Mont. Water Ct. July 30, 2014).

On the Reservation, Congress specifically delineated allottee rights to agricultural and related purposes water for allotted lands when it authorized the FIIP. The 1908 Act provided

[196] The discussion herein concerns only the type of allotments found within the Reservation. Public domain allotments, such as those involved in the Montana Water Court's *Final Decree of Water Rights for Turtle Mountain Band of Chippewa Indians* (July 12, 2021), are subject to different legal considerations.

that allotted lands irrigable under the project "shall be deemed to have a right to so much water as may be required to irrigate such lands." 35 Stat. 444, 450. "Thus[,] water rights were allocated to each parcel of the irrigable land in an amount 'as may be required to irrigate such lands.'" *McIntire*, 101 F.2d at 654. In *McIntire*, an allottee, Michel Pablo, had constructed a private ditch and appropriated water. *Id.* at 651. In 1914, as part of the FIIP, the United States constructed a feeder canal above Pablo's ditch. *Id.* at 652. Pablo's successor-in-interest, McIntire, claimed that Pablo's original ditch right was one governed by state law, had passed to McIntire, and should therefore be honored apart from the FIIP. *Id.* at 652-53. The Ninth Circuit rejected that position, viewing it as claiming "a right wholly separate and distinct from whatever allocation the Secretary of the Interior might make." *Id.* at 654. Thus, an allotment within the FIIP service area was only entitled to a share of the FIIP water and an allottee could not acquire a separately owned water right by prior appropriation or any provision of Montana's statutes. The Ninth Circuit implicitly recognized that the allocation of a quantity of the FIIP water to an allottee effectively implemented 25 U.S.C. § 381: "In the event that the supply of water was insufficient to furnish that amount, then the provision of [§ 381] requiring 'just and equal distribution' of the water . . . would be applicable." *McIntire*, 101 F.2d at 654.

Under the Compact, the existing water uses of allottees are handled in two ways. Those individual uses by allottees outside of the FIIP, arising under federal law, and not otherwise specifically quantified in the Compact, must be registered in accordance with the UAMO.[197] The priority date for these allottee uses is July 16, 1855.[198] As for allottee lands *within* the FIIP, those are included within the FIIP water right.[199]

(ii) Walton Rights

A non-Indian who purchases a former trust allotment in fee may succeed to the allottee's right to share in a tribe's water rights. The *Walton* series of federal court cases, *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978) ("*Walton I*"), *rev'd in part, Walton II*, 647 F.2d 42, (9th Cir. 1981); and *Walton III*, 752 F.2d 397 (9th Cir. 1985),

[197] Art. III.C.1.b.i (including existing uses under federal law for the Tribes and members not quantified elsewhere in Art. III); Art. III.C.1.b.ii (excluding state-law rights held by the Tribes and members that will be determined in the adjudication) & Art. III.C.1.b.iii (requiring registration process under the UAMO for the federal law rights included within Art. III.C.1.b.i).
[198] Art. III.C.1.b.v.
[199] Art. III.C.1.a.

provides the most expansive discussion of allottee water rights and established federal common law about the water rights acquired by successors-in-interest to allottees. The *Walton II* court recognized that "Indian allottees have a right to use reserved water." 647 F.2d. at 50 (citing *Powers*). It then reasoned that restricting the transferability of an allottee's water rights would constitute a "'diminution of Indian rights' that must be supported by a clear inference of Congressional intent." *Id*. Finding no such evidence, the *Walton II* court determined that the fee title conveyed from an Indian allottee to a non-Indian successor includes "the appurtenant right to share in reserved waters." *Id*.

Such successors' "Walton rights" retain the priority date of the allottee's right. *Walton II*, 647 F.2d at 51. The successor also obtains an entitlement to use the same quantity of water available to the allottee and can expand the use within a reasonable time after purchase up to the limit of the allotment's ratable share. *Id.* Despite the similarities to the original allottee's entitlement, however, a Walton right may be lost to non-use. *Id.*

Generally, a non-Indian purchaser of an allotment succeeds to the ratable share of the reserved water right held by the allottee. *See Walton II*, 647 F.2d at 50 (an "allottee may sell his right to reserved water"; "the fee [title] included the appurtenant right"). For allottees within the FIIP service area using FIIP water, however, Congress defined an allottee's right to share in the tribal right for irrigation and related purposes as an allocation from the FIIP system, subject to regulation by the Secretary.[200] That is the only irrigation right an allottee within the FIIP service area held and thus could transfer to a later purchaser. Much as the Ninth Circuit stated in *McIntire*, a Walton purchaser of an allotment within the FIIP cannot "claim a right wholly separate and distinct from whatever allocation the Secretary of the Interior might make." 101 F.2d at 654.

The Compact does not address or determine the process for filing Walton right claims.[201] However, the FIIP water use by the non-Indian successors to allotted lands *within* FIIP is

[200] 1908 Act, 35 Stat. 444, 450.

[201] The Compact encompasses the rights of the Tribes and the United States in trust for the Tribes, tribal members, and allottees, and the entitlement to use the FIIP Water Use Right. Art. II.67, Art. III (concerning "[t]he water rights of the Tribes"); Art. IV.A. The Compact determines no other water rights. Art. V.B.6 & 7.

included within the FIIP water right[202] and is subject to the same regulatory conditions applicable to use by the original allottee.

(iii) Homestead Rights

Surplus lands subsequently homesteaded generally carry no federal reserved rights or entitlements to share in the tribal right. *United States v. Anderson*, 736 F.2d 1358, 1363 (9th Cir. 1984). "[W]here the land has been removed from the Tribe's possession and conveyed to a homesteader, the purposes for which *Winters* rights were implied are eliminated . . . . Therefore, a homesteader is not entitled to rely on the *Winters* doctrine." *Id.* (citation omitted). Often, this means a homesteader must rely on state appropriation laws to secure water rights. *Id.* However, when Congress opens a reservation to settlement of "surplus" lands, it may dictate the method and consequences of disposing of former reservation lands. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004) ("the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive'").

Relevant caselaw and statutory law specific to the Reservation redefines this category within the FIIP. In caselaw addressing water rights on the Reservation, the Ninth Circuit found that "[t]he treaty impliedly reserved all waters on the reservation to the Indians. Being reserved, water rights could be obtained only as specified by Congress." *Alexander*, 131 F.2d at 360 (citing *Winters*, 207 U.S. at 577); *see also McIntire*, 101 F.2d at 653 (same); *Winters*, 207 U.S. at 577 ("The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."). Consistent with this holding, Congress authorized in the 1908 Act that surplus lands within the FIIP service area could obtain a share of the FIIP irrigation water supply, provided they met certain conditions and requirements. 35 Stat. 444, 449 ("the entryman [on Reservation lands opened to settlement] or owner of any land irrigable by any system hereunder constructed . . . shall in addition to the payment required . . . be required to pay for a water right the proportionate cost of the construction of said system"). Thus, under governing federal law, a share of the FIIP water was the only entitlement available to homesteaded lands located within the FIIP service area.

If surplus lands are held in fee *outside* the FIIP service area, those landowners will have the opportunity in the Montana adjudication to defend their claims to water use filed under the

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[202] Art. III.C.1.a.

Montana Water Use Act. The rights of the Tribes and the United States recognized in the Compact resolve no other entity's water rights.[203] As for the homesteaded lands within the FIIP, their water use is included within the FIIP water right. The Compact and the Decree protect Historic Farm Deliveries of such water.[204] The Compact also provides an optional mechanism for owners of homesteaded lands within the FIIP Influence Area to enter into agreements with the CSKT and the United States to protect their junior irrigation rights from call.[205]

(d) The Decree is Fair with Respect to Off-Reservation Indian Reserved Water Rights

The CSKT hold rights to fish outside the Reservation at all "usual and accustomed places." Hellgate Treaty, Art. III. Ninth Circuit precedent establishes that Indian reserved water rights are implied by such treaty provisions and are not limited to water sources on a reservation. In *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1033-35 (9th Cir. 1985) ("*Kittitas*"), the Yakama Nation sought protection for certain stream flows in the Upper Yakima Basin, approximately 50-miles from the Yakama Reservation, to protect salmon spawning habitat. The Nation's claimed right to instream flows was predicated on provisions in an 1855 treaty, nearly identical to provisions in the Hellgate Treaty, which reserved to the Yakama Nation "the exclusive right of taking fish in all the streams . . . bordering the reservation . . . also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." *Kittitas*, 763 F.2d at 1033 (quoting the Yakama Treaty, 12 Stat. 951, 953 (1855)). Irrigation districts opposed the Yakama Nation's requested relief. The Ninth Circuit affirmed the district court decision which, *inter alia*, authorized releases of water from a reservoir far outside the reservation's boundaries. In rejecting the irrigation districts' objections, the Ninth Circuit confirmed that the district court had authority to order water released from a federal reservoir to support the Yakama Nation's fishing right. *Kittitas*, 763 F.2d at 1033, 1035.

Later, during the state-court adjudication of the Yakima River Basin, the state court confirmed that the Yakama Nation's water rights extend beyond the boundary of the Yakama Reservation to support the migratory lifecycles of fish. *Wash. Dep't of Ecology v. Acquavella*, No. 77-2-01484-5, slip op. at 9 (Wash. Super. Ct. Sept. 1, 1994) (memorandum opinion entitled

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[203] *See supra* note 201.
[204] Art. II.36 & Art. IV.D.1.e.
[205] Art. II.32 & Art. III.G.3.

Treaty Reserved Water Rights at Usual and Accustomed Fishing Places) ("*Acquavella*").[206] The court observed that "[f]ish life cannot be maintained without a place for fish to spawn." *Id*. The geographic scope of the reserved water rights to support the Yakama Nation's fishing rights, therefore, "includes all Yakima River tributaries affecting fish availability [at locations where the Nation can harvest fish]." *Id*. at 15 (emphasis in original). Accordingly, the Yakama Nation's adjudicated water rights extend throughout the Yakima River Basin based on the migratory lifecycle of the relevant fish species, even though the Reservation only occupies the southwestern portion of Basin.

Other recent cases reinforce the correctness of *Kittitas* and *Acquavella*. In 2017, the Ninth Circuit once again rejected the contention that off-reservation treaty fishing rights cannot be protected like on-reservation fishing rights. *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided court*, 584 U.S. 837 (2018). The dispute centered on whether and to what extent the treaty fishing rights of the affected tribes at "usual and accustomed" locations prohibited the State of Washington from installing structures (such as culverts and drains) that blocked the migration of anadromous fish to and from the ocean in salmon-bearing streams.[207] The State contended it owed no treaty-based duty to avoid blocking salmon-bearing streams supplying usual and accustomed fishing grounds, even structures that blocked every salmon-bearing stream in the Puget Sound drainage. *Id*. at 962. The Ninth Circuit rejected the State's one-sided view. "The Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs." *Id*. at 963-66 (determining that the State undermined the treaty rights by blocking fish passage).

Importantly, the *United States v. Washington* court analogized the relevant treaty provisions at stake in that case to the promises made in the Klamath Tribes' 1864 Treaty. Relying on *Winters* and *Adair*, the Court of Appeals emphasized the water rights protected by the 1864 Treaty were central to fulfilling the treaty's fishing and hunting provisions:

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[206] Document available at:
https://fortress.wa.gov/ecy/wrdocs/WaterRights/wrwebpdf/yrbmemoorder/doc.09778.pdf.

[207] The treaties at issue in *Washington* had provisions concerning tribal fishing rights at "usual and accustomed" locations very similar to those in the Hellgate Treaty. *U.S. v. Washington*, 853 F.3d at 954; Hellgate Treaty, *supra* note 3, at Art. III.

> The [Klamath] treaty promised that the tribe would have the right to "hunt, fish, and gather on their reservation," . . . [and a] primary purpose of the treaty was to "secure to the Tribe a continuation of its traditional hunting and fishing" way of living. Because game and fish at the Klamath Marsh depended on a continual flow of water, the treaty's purpose would have been defeated without that flow. In order to "support the purpose of the agreement," we inferred a promise of water sufficient to ensure an adequate supply of game and fish.

853 F.3d at 965. The court further explained that:

> Just as [in the *Winters* case] the land on the Belknap Reservation would have been worthless without water to irrigate the arid land, and just as [in *Adair*] the right to hunt and fish on the Klamath Marsh would have been worthless without water to provide habitat for game and fish, the [Washington] Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish.

Id. The Ninth Circuit ultimately upheld an injunction requiring the removal of the barriers to protect fish passage as necessary to make the treaty fishing right meaningful and consistent with the understanding of the Tribes at the time of the Treaties. *Id*. at 966, 970-80.

In *John v. United States*, 720 F.3d 1214 (9th Cir. 2013) ("*Katie John*"), the Ninth Circuit rejected the position that federally reserved water rights apply only to waters within the borders of a reservation. The State of Alaska argued that "federal reserved water rights arising by implication exist only within the borders of the federal reservations, not beyond them." *Id*. at 1229. The Ninth Circuit categorically rejected that argument, stating:

> We disagree. The federal reserved water rights doctrine allows the United States to reserve waters "appurtenant" to federally reserved lands in order to fulfill the purposes of that reservation. While the cases do not define "appurtenancy," there is an apparent consensus that it does not mean physical attachment . . . .
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> . . .
>
> [T]he Supreme Court has recognized that federal water rights may reach sources of water that are separated from, but "physically interrelated as integral parts of the hydraulic cycle" with, the bodies of water physically located on the reserved land . . . The relevant question, then, is not where these waters are located, but rather whether these waters are "appurtenant" to the reserved land.

Id. at 1229-30 (citing and discussing *Cappaert v. United States*, 426 U.S. 128, 143 (1976)).

As part of its analysis, the Ninth Circuit quoted with approval statements in David H. Getches, *Water Law* 349-50 (4th ed. 2009) that "the fact that a reservation was detached from water sources does not prove an absence of intent to reserve waters some distance away" and that "[j]udicial references to such rights being 'appurtenant' to reserved lands apparently refer not to

some physical attachment of water to land, but to the legal doctrine that attaches water rights to land to the extent necessary to fulfill reservation purposes." *Katie John*, 720 F.3d at 1229-30.

Accordingly, there is sound precedent for CSKT water rights to off-reservation instream flow based on the Hellgate Treaty's preservation of the right to fish in the usual and accustomed places. The Decree's recognition of CSKT interests in such water rights is well-supported by applicable law and fair.[208]

(e) The Decree is Fair with Respect to Other Water Rights

As summarized *supra* pp. 12-13, the Compact includes provisions that will protect many valid existing uses of water that may be decreed by this Court from a potential priority call by the CSKT or the United States. Included in that call protection are all non-irrigation uses as well as groundwater irrigation using less than 100 gallons per minute. The call protection also extends to all irrigators upstream of the Reservation not using water sourced from the mainstem of the Flathead River, including Flathead Lake, or the North, South, or Middle Forks of the Flathead River. Further, historic FIIP deliveries are maintained.

The fact that some irrigators using surface water or more than 100 gallons per minute of groundwater are not so protected does not render the Compact, or the Decree implementing it, unfair. Since the *Winters* decision, the law has been clear that senior reserved water rights may be enforced against junior rights. That this may inconvenience the juniors is simply an inherent consequence of western water law and the prior appropriation system. In *Cappaert v. United States,* 426 U.S. 128 (1976), the Supreme Court rejected the State of Nevada's argument that a "balancing of competing interests" was relevant when considering the existence or extent of a federal reserved water right. The court noted that the *Winters* decision did not consider impacts to non-Indians, even though substantial impacts to non-Indians were evident in the record.

> Nevada argues that the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in *Winters v. United State*s . . . the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversions of the water. The "Statement of the Case" in *Winters* notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest.

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[208] Art. III.D.

> The Court held that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation.

426 U.S. at 138.

In *Joint Bd. I*, the Ninth Circuit specifically held that the senior rights of the CSKT should be protected without regard to potential impacts on junior irrigators:

> At oral argument, the Joint Board contended that the law would not permit the tribal fisheries to be protected in full if the result was to deprive a much larger number of farmers of the water needed for irrigation. This contention ignores one of the fundamental principles of the appropriative system of water rights. *See e.g., Morris v. Bean*, 146 F. 423 (C.C.D.Mont.1906) (Montana water law requires that senior rights be fully protected, even though more economic uses could be made by junior appropriators). "Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users."

832 F.2d at 1131-32 (quoting *Walton III*, 752 F.2d at 405).

A fundamental characteristic of Montana's prior appropriation doctrine is that junior users are subject to call by senior users. *Mettler v. Ames Realty Co*., 61 Mont. 152, 201 P. 702 (1921). In *Fort Peck*, this Court recognized the challenge for the negotiating parties to protect certain junior state users while quantifying senior tribal reserved water rights. *Fort Peck Op.*, 2001 WL 36525512, at *22 (recognizing it would be unreasonable to expect the tribe involved in that case to subordinate all the senior tribal water right to all existing junior uses and that it was rational and reasonable for the State to protect subsets of existing junior users.). The CSKT senior rights have a priority date of time immemorial for inflow stream rights and an 1855 priority date for other on-Reservation water rights.

Further, the Montana Supreme Court has addressed issues regarding objectors' alleged harm to their future water use and theoretical calls. *In re Crow Compact* saw individual objections to the compact chiefly on the grounds that the objectors owned land and water rights within the exterior boundaries of the Crow Reservation and accordingly asserted that the Crow Compact would adversely affect their future water appropriations. *In re Crow Compact*, ¶¶ 8, 34-35. The Montana Supreme Court said that the Water Court correctly explained that the objectors did not have a property interest in future appropriations or changes in use. *Id.* at ¶ 35 (citing *Seven Up Pete Venture v. State*, 2005 MT 146, ¶ 26). Moreover, the *In re Crow Compact* court held the objectors' contention in that case that "future potential problems may arise within the administration of water rights under the Compact" was speculative and inapt. *Id.* at ¶ 35. Similar objections raised in the present case should likewise be disregarded. It is sufficient that

the Decree clearly quantifies the Tribal Water Right through voluminous abstracts and that it will be administered in a manner consistent with established law.

As further discussed *infra* pp. 57-59, the Decree does not prejudice the adjudication of non-CSKT water rights, and the possibility that some junior water rights may be subject to a CSKT call is not an unconstitutional taking of those junior rights. Accordingly, the possibility that the Decree may, in years of short supply, result in the curtailment of some junior irrigators, does not render the Decree unfair.

B. THE DECREE IS ADEQUATE AND REASONABLE

In evaluating the adequacy and reasonableness of a settlement, courts consider whether the settlement adequately and effectively resolves the issues involved in light of alternative approaches considered. *See*, *e.g.*, *Cannons*, 899 F.2d at 89-90; *Officers for Justice*, 688 F.2d at 625; *Ft. Peck Op*., 2001 WL 36525512, at *4. Further, "[a] compact may be unreasonable if it follows an approach to quantify and allocate water rights that departs from existing law." *Blackfeet Compact Order*, 2020 WL 7329247 at *11 (citing *In Re Crow Compact*, ¶ 24).

The Decree's quantification and administration provisions reflect the Compact Parties' efforts to achieve an equitable agreement—one that minimizes or eliminates the impact of the Tribal Water Right on water rights recognized under state law, while also protecting existing uses of the Tribal Water Right and ensuring sufficient water for the Tribe's future needs. As demonstrated immediately above and, *infra*, pp. 57-69, the compromise they achieved is consistent with all applicable law. In addition, the Decree and UAMO relieve pre-existing regulatory uncertainty within the Reservation, resolve potential litigation affecting both Basins 76L and 76LJ and many basins outside the Reservation, and, via the federal and state appropriations contingent upon approval of the Decree, provide vital funding to improve infrastructure serving both CSKT and non-CSKT water users.

One key benefit reflected in the Decree is how it remedies the regulatory uncertainty left by the *Ciotti* line of cases. As discussed *supra*, p. 6, beginning with *Ciotti* in 1996 and culminating in *Stults* in 2002, the Montana Supreme Court found that the DNRC lacked certain regulatory authorities necessary to permit new uses of water within the Reservation's boundaries. The net effect of these decisions was a "regulatory void." The need to fill that void drove the negotiators to create an appropriate entity that could grant water use and groundwater permits, and process change of use applications, for on-reservation tribal and state law rights. Ultimately,

the negotiators created the UAMO to meet this regulatory need. As reflected in the Staff Report, negotiators engaged in careful drafting of the UAMO to mirror relevant provisions of the Montana Water Use Act and, from the State's perspective, protect valid existing water uses on the Reservation.[209] Given the intertwined and often complex nature of water rights on the Reservation, the UAMO is preferable to an alternative system that separates State and Tribal administration within the Reservation and could result in conflicting decisions on overlapping issues or uses.

Further, approval of the Decree will benefit all users—not just CSKT and its members—by enabling significant state and federal funding for infrastructure development. For example, Congress authorized CSKT to use the $1.9 billion of federal funding that will become available under the Settlement Act to rehabilitate the FIIP's aging infrastructure.[210] These operational upgrades and repairs will preserve water supplies through improved efficiencies, which will in turn make more water available for increased instream flows to satisfy the CSKT treaty fishing rights. All FIIP users will benefit from this rehabilitation. A further benefit to the FIIP users was the provision of one priority date for the entire project. This provision aligns with the FIIP's historical operations and makes its administration simpler and less costly.[211]

Additionally, the Decree will allow "new" sources of water to be available to meet CSKT's and others' needs. These additional sources will mitigate the potential for a call on junior users. For example, the Flathead System Compact Water can be sourced from Flathead Lake, Flathead River, or Hungry Horse Reservoir.[212] This direct flow water right may be used for any beneficial purpose throughout the year, lessening the demand CSKT may have on other shared water sources. Existing users are protected by restrictions on this right comparable to the non-impairment restrictions found in the State's "change in use" provisions in the Water Use Act.[213] The Decree also includes significant benefits obtained by the State negotiators for non-

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[209] Staff Report, *supra* note 11, at 58 (the Parties "painstaking[ly] negotiated the [UAMO]"); 6, 25, 40, 41, 43, 44 ("maintain the status quo of existing state-based water rights to the maximum extent practical"); 47, 51, 53 ("maintain the status quo on the Reservation"); 55 ("since a fundamental goal of the Commission in this and all of its other negotiations was to achieve the protection of existing water uses to the greatest extent possible.").
[210] Settlement Act, *supra* note 30, §§ 7(b), 8(a)-(c), 8(h), 9(a).
[211] Staff Report, *supra* note 11, at 32 & n.195, 39, 51.
[212] Art. II.35; Art. III.C.1.c.
[213] Art. IV.B.5.b-c; Art. IV.B.6.b.iv; Art. IV.B.6.c.vi.

tribal water users on the Reservation in times of water shortages,[214] as well as safeguards for businesses in need of mitigation water to offset new developments throughout the Clark Fork and Flathead River basins.[215]

Another benefit to water users throughout the State is the resolution of the Tribal instream flow claims. Consistent with §§ 85-2-217 and 703(3), MCA, the CSKT and United States had to file water right litigation claims in June 2015.[216] These included nearly 2,200 claims for off-reservation water rights in over 50 basins both west *and east* of the Continental Divide. Under the Compact and Decree, the 2015 claims will be waived.[217] Consequently, the Decree provides only a limited number of off-reservation instream flow rights. The Decree rights are in nine basins west of the continental divide. These rights are largely co-extensive with rights already held by the State or recognized for present or former hydroelectric projects.[218] All off-Reservation rights in the Compact are subject to the Call Protection provisions of the Compact shielding all non-irrigation water uses of any size and groundwater irrigation of fewer than 100 gallons per minute,[219] and there are additional protections unique to several of the off-Reservation rights.[220]

C. THE DECREE IS CONSISTENT WITH STATE AND FEDERAL LAW AND POLICY

Many Objectors assert that the Compact, and the Decree derived from it, violate numerous state and federal constitutional and statutory rights. These objections are rooted in the Objectors' fundamental misunderstanding of tribal reserved water rights and the priority system that applies under state law. Objectors speculate that the exercise of CSKT water rights will infringe upon their own rights resulting in some constitutional or statutory violation. Such

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[214] Art.IV.B.6.c.ii & Art. IV.E.3.d.
[215] Art. IV.B.7; Staff Report, *supra* note 11, at 51.
[216] The Tribes filed 1,720 on-Reservation claims and 1,094 claims off the Reservation. The United States also filed 1,094 off-Reservation claims and for essentially the same water using several different approaches to claim filing, submitted 6,073 claims for uses on the Reservation.
[217] *See* Mont. Dep't of Nat. Res. & Conservation, Water Resources Division, *Comparison: Adjudication of CSKT Claims vs. CSKT-MT Compact Rights* (Feb. 2019), https://dnrc.mt.gov/_docs/water/CSKT-Compact-vs-Adjudication-of-CSKT-Claims--No-Compact1.pdf; Settlement Act, *supra* note 30, § 10(a)(1) & (2).
[218] Art. III.D; Staff Report, *supra* note 11, at 44-46.
[219] Art. III.G.
[220] Art. III.D.1.g; Art. III.D.3.e; Art. III.D.3.g.

speculation about future administration of water rights is improper and should not be considered. *In re Crow Compact*, ¶ 35; *Blackfeet Compact*, 2020 WL 7329247, at *10. Moreover, Objectors fail to identify any constitutional or statutory infirmity with the Compact. The fact that CSKT's rights may be senior to Objectors' rights, and such rights may be enforced against some Objectors at some future time, does not violate either the Montana Constitution or United States Constitution. Nor does it violate any state or federal law.

As the *Greely* court found:

> State appropriative water rights and Indian reserved water rights differ in origin and definition. State-created water rights are defined and governed by state law. Indian reserved water rights are created or recognized by federal treaty, federal statute or executive order, and are governed by federal law.

219 Mont. at 89, 712 P.2d at 762 (citations omitted). Thus, while water rights arising under state law and the CSKT's Indian reserved water rights are both adjudicated under the Montana Water Use Act, the law that determines the character of each class of right is different. Montana state water rights "originate from actual use of the water," and "their priority date is the date the water was first put to use for a beneficial purpose." *Greely*, 219 Mont at 96, 712 P.2d at 766. In contrast, Indian reserved water rights may include water not yet used but reserved for future uses. *Id.*, 219 Mont at 93-94, 712 P.2d at 765. And the priority date of such rights is either "the date the reservation was created" for "a use that did not exist prior to the date the reservation was created" or "[w]here the existence of preexisting tribal use is confirmed by treaty, . . . 'time immemorial.'" *Id.*, 219 Mont. at 764, 712 P.2d at 92 (quoting *Adair*, 723 F.2d at 1414). Thus, the CSKT's reserved water rights, whether historically used or not, are all senior in priority to any state law appropriative rights commenced after the July 16, 1855 date of the Hellgate Treaty. Nothing about the Decree's implementation of these legal principles gives rise to any violation of Objectors' constitutional rights, including due process, equal protection, or takings. Nor does the Compact violate any state or federal law.

1. The Decree is Consistent with the United States and Montana Constitutions

(a) The Decree Does Not Constitute a Taking

Some objectors have asserted that the Compact effects a "taking" of their water. The Takings Clause of the United States Constitution provides that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V. Similarly, Article II,

Section 29 of the Montana Constitution states that "[p]rivate property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner." The Decree is consistent with these provisions, notwithstanding Objectors' arguments to the contrary. It does not give new rights to CSKT or transfer title from private parties. The Decree instead recognizes CSKT's long-established rights and their priority within Montana's water allocation system.

The Decree recognizes CSKT's senior rights and defines how CSKT may exercise these rights (including its agreement to subordinate its senior rights to many junior users). It does not and cannot harm or otherwise take the rights of junior appropriators. *See Baley v. United States*, 134 Fed. Cl. 619, 679-80 (2017), *aff'd*, 942 F.3d 1312 (Fed. Cir. 2019) (rejecting irrigators' takings argument when tribes' senior instream flow claims disrupted irrigation) ("the fact is that the Tribes' reserved water rights are senior to the water rights held by the plaintiffs and, therefore, plaintiffs had no entitlement to receive any water until the Tribes senior rights were fully satisfied"). The Decree does not prevent other parties from establishing the priority dates or other elements of their own water rights.[221] The fact that the Decree recognizes water rights that may be senior to state law water rights, and that some of those state right holders may be subject to a call, does not effect a taking of a property right,[222] or otherwise violate the Takings Clauses of either the United States Constitution or the Montana Constitution.

(b) The Decree Does Not Violate Equal Protection

Many Objectors contend that, because the CSKT rights are senior, or because the CSKT rights are not subject to the same state law-based restrictions that govern the Objectors' rights, the Decree "discriminates" on the basis of race, religion, or national origin in violation of the

[221] *See, e.g.,* Art.V.B.6 (explaining that the Compact cannot "be construed or interpreted" to "limit in any way the right of the Parties or any other Person to litigate any issue or question not resolved by th[e] Compact."); Art. V.B.7 (explaining that the Compact cannot be construed or interpreted to "authorize the taking of any water right that is vested under State, Tribal or Federal law"); Art. V.B.15 (explaining that the Compact cannot be construed or interpreted to "prevent the Montana Water Court from adjudicating any properly filed claims or objections to the use of water within the Flathead Indian Reservation.").

[222] Under similar logic and for similar reasons, the Decree does not interfere with valid contract obligations, criminalize conduct, punish anyone, seize property, or inflict any other harm on which Constitutional claims may be based. The Decree solely adjudicates CSKT's rights, based on the settled law governing the Decree and enforcement of such rights.

Equal Protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Art. II, Section 4 of the Montana Constitution. They make a similar contention because on-Reservation parties are subject to Board authority while off-reservation users are not.

As set forth below, these misguided views are without merit. Objectors are not similarly situated to CSKT. The distinct treatment of the CSKT rights is based on political classifications subject to rational basis scrutiny. The Decree is rationally related to legitimate federal and state law purposes; and both federal and state law recognize the CSKT as a government with authority to regulate use of reserved water rights on the Reservation.

(i) Objectors Are Not Similarly Situated to CSKT

Equal protection under the United States Constitution and the Montana Constitution requires that "all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *A.J.B. v. Mont. Eighteenth Jud. Dist. Ct., Gallatin Cnty.*, 2023 MT 7, ¶ 24, 411 Mont. 201, 523 P.3d 519 ("the law must treat similarly-situated individuals in a similar manner"). But "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1985). The threshold question, then, is whether Objectors are similarly situated to CSKT. Manifestly, they are not.

The CSKT are a federally recognized Indian tribe with inherent sovereign authority. The Compact, upon which the Decree is based, was executed by three sovereigns engaging in government-to-government relations: the CSKT, the United States, and the State. The CSKT reserved rights set forth in the Decree arise under federal law due to the Tribes' inherent sovereign authority and their rights under the Hellgate Treaty. That inherent authority includes the right to act as a government in regulating water uses on the Reservation.

Objectors are not similarly situated to the CSKT. Any water rights they may possess are private property interests defined and limited by state law. Thus, neither the United States nor Montana is required to treat Objectors the same as the CSKT with respect to water rights.

(ii) Every Classification Created by the Decree is Rationally Related to a Legitimate Government Interest

The dissimilar treatment the CSKT receive with respect to their water rights (*i.e.*, possessing reserved water rights under federal law instead of water rights arising under state law) reflects a political distinction, not a classification on the basis of race, religion, or national origin. Moreover, as discussed *supra* pp. 53-55, the potential for junior users to be subject to a call under the Decree is simply a consequence of the priority system and does not establish any infringement on fundamental personal rights. Even if the Decree is considered to make distinctions based on tribal membership, that is not a classification "drawn upon inherently suspect distinctions such as race, religion, or alienage," and Equal Protection Clause analysis therefore requires "only that the classification challenged be rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Morton v. Mancari*, 417 U.S. 535, 553 (1974) (Indian preference "does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference."); *State v. Shook*, 2002 MT 347, ¶ 15, 313 Mont. 347, 67 P.3d 863 ("the state equal protection guarantee under Article II, Section 4 [of the Montana Constitution], must allow for state classifications based on tribal membership if those classifications can rationally be tied to the fulfillment of the unique federal, and consequent state, obligation toward Indians").

Since 1974, the Supreme Court has repeatedly held that federal statutes enacted for the benefit of federally recognized Indian tribes and their members do not impose suspect racial classifications. *Mancari*, 417 U.S. at 554-55; *see also, e.g., United States v. Antelope*, 430 U.S. 641, 643-47 (1977); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479-80 (1976) (specifically rejecting a contention that application of federal law tax immunity to CSKT members constituted "invidious discrimination against non-Indians on the basis of race"); *Fisher v. District Court*, 424 U.S. 382, 390-91 (1976). Similarly, legislation of this kind does not constitute discrimination on the basis of national origin, *E.E.O.C. v. Peabody W. Coal Co.*, 773 F.3d 977, 988 (9th Cir. 2014), or discrimination on the basis of religion, *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1215-17 (5th Cir. 1991). Such legislation instead reflects a *political* classification that derives from the sovereign status of federally recognized Indian tribes and is upheld "[a]s long as the special treatment can be tied rationally to the

fulfillment of Congress' unique obligation toward the Indians" and the goal of furthering "Indian self-government." *Mancari*, 417 U.S. at 555. *See also Shook*, ¶ 15 (same, with respect to the Montana Constitution). As explained above, the reserved water rights in the Decree derive from the status of the CSKT as federally recognized Indian Tribes and signatories to the Hellgate Treaty. Thus, to the extent the Decree, the Compact from which it derives, or the federal and state legislation enacted to ratify the Compact reflect any classification, it is a rationally based political classification derived from the government-to-government relationship among the State, Tribes, and United States.

Likewise, the fact that the Board allows the CSKT and the State to jointly regulate on-Reservation water uses, but not off-reservation water uses, does not give rise to any Equal Protection violation. Simply put, on-Reservation water users are subject to Board authority due to their residence within the exterior boundary of the Reservation. The CSKT jurisdictional authority within that boundary stems from their political status as a federally recognized Indian tribal government. As detailed above, the Board fills the "regulatory void" created by the complex jurisdictional issues present on the Reservation. Off-Reservation uses are not subject to Board regulation because of their location off-Reservation, not because of any discrimination against on-Reservation users based on race, religion, national origin, or otherwise.

Like the decree this Court considered when it approved the Fort Peck Compact, CSKT's Decree is "the result of a negotiation process intended to serve the legitimate governmental purpose of completing the state-wide adjudication process as quickly and efficiently as possible, thereby providing certainty and finality for all water users and developers." *Fort Peck Op.*, 2001 WL 36525512, at *21. The Decree reflects compromises by all Parties resulting in certainty for all Montanans concerning the scope of the CSKT's reserved water rights and how such rights will be implemented and administered. These are legitimate bases for government action and rationally relate to fulfilling obligations to the CSKT. *See Stults*, ¶ 46 (concluding that DNRC could not determine whether water was legally available on the Reservation "until the Tribes' water rights are defined and quantified"). *See also Arizona v. California*, 460 U.S. 605, 620 (1983) ("Certainty of rights is particularly important with respect to water rights in the Western United States."); *Walton II*, 647 F.2d at 48 (unless and until tribal water rights are quantified, "state-created water rights cannot be relied on by property owners"). Thus, while the Decree and the process leading to it treated CSKT differently than Objectors or other state law water users,

that distinction is rooted in the sovereign status of the CSKT and the Hellgate Treaty. Neither the Decree nor the negotiation process violate the equal protection guarantee under either the United States Constitution or the Montana Constitution. *See Mancari*, 417 U.S. at 553-55; *Shook*, ¶ 15.

(c) Neither the Decree, Nor the Process Leading to It, Reflect Any Due Process Violation

Many Objectors assert, without support, that the Decree, or the process leading to it, violated their due process rights. The Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, as well as Art. II, Section 17 of the Montana Constitution, prohibit the United States and the State from depriving anyone of "life, liberty, or property, without due process of law." These clauses protect "individuals against two types of government action." *United States v. Salerno*, 481 U.S. 739, 746 (1987). Procedural due process ensures that, if a liberty or property interest is at stake, a party is given notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The procedures required depend on what "the particular situation demands." *Id.* at 334; *State v. Pyette*, 2007 MT 119, ¶¶ 13-14, 337 Mont. 265, 159 P.3d 232 (procedures required to satisfy due process are adapted to "the specific situation"). "Substantive due process prevents the federal government from engaging in conduct that shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty." *Id.* (quotations and citations omitted). *See also Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 28, 302 Mont. 518, 15 P.3d 877 (substantive due process "bars arbitrary governmental actions").

As set forth below, the process leading to the Decree has provided Objectors with the requisite notice and opportunity to be heard, demonstrating no procedural due process violation occurred. Additionally, neither the Decree nor the process leading to it violated any Objectors' substantive due process protections, as the Parties' negotiation and ratification of the Compact were lawful and reasonable.

(i) Procedural Due Process was Provided

To sustain a procedural due process claim, a party must first show that a property or liberty interest is at stake. *Gilbert v. Homar*, 520 U.S. 924, 928 (1997); *State v. Egdorf*, 2003

MT 264, ¶ 19, 317 Mont. 436, 77 P.3d 517. As a threshold matter, it is not clear that objections premised on Objectors' misunderstanding of the priority system or their right of representation in the Compact negotiation process plausibly involve property or liberty interests within the meaning of the Due Process Clauses of the United States and Montana constitutions. Nevertheless, even if Objectors have such interests at stake, they received notice and were provided an opportunity to be heard, which demonstrates no procedural due process violation occurred.

As detailed *supra* pp. 21-22, the public received adequate notice of Compact negotiations and on numerous instances provided input on settlement terms. In this way, the public was given more than what procedural due process requires. *See Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 283 (1984) ("The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."); *Crow Allottees Ass'n v. U.S. Bureau of Indian Affairs*, 705 Fed. Appx. 489, 492 (9th Cir. 2017) (political process was the only process due to parties challenging a water rights compact); *Hill v. Dep't of the Interior*, No. 22-CV-1781, --- F.Supp.3d ---, 2023 WL 6927266, at *17 (D.D.C. Oct. 19, 2023) ("*Hill v. DOI")* (same).

As the Montana Supreme Court summarized with respect to the Crow Compact:

> [T]he record shows that the negotiation sessions were open to the public, noticed drafts were made public for their review in advance, and the Montana Legislature solicited public comments and held public meetings. Therefore the Compact did not violate the Objectors' due process rights because Objectors had opportunities to be heard and to comment on the Compact.

In re Crow Water Compact, ¶ 39. The process leading to the present Compact offered no less public representation and participation than that leading to the Crow Compact. Moreover, after the legislature ratified the CSKT Compact, Montana citizens enjoyed a full and fair opportunity to present constitutional arguments about that ratification to Montana Courts. *See*, *e.g.*, *Flathead Joint Bd. of Control v. State*, 2017 MT 277, ¶ 12, 389 Mont. 270, 405 P.3d 88, ("*FJBC v. State*"). Finally, this very proceeding demonstrates that the public, through the objections process, has had the opportunity to be heard by opposing the Decree. No procedural due process violation occurred regarding either the Decree or the process leading to it.

(ii) Substantive Due Process was Provided

The substantive component of due process guards against unreasonable state action and requires Courts to balance citizens' rights and remedies against the legislature's purposes in enacting laws. *Powell*, ¶ 28. This component's purpose is to protect citizens from "arbitrary" or "oppressive" government action. *Egdorf*, ¶ 19 (rejecting substantive due process challenge to statute that was rationally related to a permissive legislative purpose). *See also Hill v. DOI,* 2023 WL 6927266, at *18 (rejecting substantive component of due process challenge to Crow Compact because, *inter alia*, plaintiffs failed to allege "genuinely drastic" and "egregious government misconduct" that "shock[s] the contemporary conscience.") (citations omitted).

Here, the Decree rights meet the requisite of substantive due process for the same reasons that the Decree is procedurally fair, substantively fair, adequate, reasonable, and not the product of fraud, collusion, or overreaching. *See supra* pp. 20-58, and *infra* pp. 69-70. At bottom, the Parties have not acted arbitrarily or oppressively. Instead, they have spent decades using a structured process to advocate for their constituents' collective best interest, as informed by the constituents themselves, and the professional judgment of public servants who work on their behalf. The Decree, and the Compact from which it derives, is the product of a developed legal backdrop informing reasonable policy choices and decision making by the CSKT, the United States, and the State. Allegations to the contrary fly in the face of the public record.

2. The Decree is Consistent with the Montana Statutes and Caselaw

Several Objectors wrongly contend that the Compact, and the Decree based on it, violate Art. IX, Section 3(4) of the Montana Constitution and the Montana Water Use Act. The Compact was expressly enacted into state law and thus there can be no dispute that it is consistent with state law and policy. *See Ross v. City of Great Falls*, 1998 MT 276, ¶ 17, 291 Mont. 377, 967 P.2d 1103 ("The Montana Legislature is presumed to act with deliberation and with full knowledge of all existing laws on a subject[.]"). And the legislature acted after an entire year of study by its committee that reviewed major technical questions and nearly all the legal issues raised by Objectors in these proceedings and found the Compact to be entirely supported. *See supra* pp. 34-37.

Montana law expressly allows the State to negotiate compacts like the Compact at issue

here. Montana Indian Tribes and the State have authority to negotiate and agree "upon the extent of the reserved water rights of each tribe." *Greely*, 219 Mont. at 91, 712 P.2d at 763. Doing so is consistent with state law and advances the State policy set forth in §§ 85-2-701 to 703, MCA. Those statutes direct the Compact Commission to negotiate equitable quantification agreements with the Indian tribes and federal agencies claiming Indian and federal reserved water rights in Montana. The Montana Legislature has thus provided compact negotiation authority to the Compact Commission to ensure reserved water rights, including those held by Indian tribes, could be adjudicated as part of the state-wide adjudication contemplated under the Montana Water Use Act. Section 85-2-701, MCA. And the purpose of the state-wide adjudication was to implement Art. IX, Section 3(4) of the Montana Constitution. Section 85-2-101, MCA.

That is precisely what the CSKT Compact does. Consistent with Art. IX, Section 3, the Compact does not cede ownership of State water. Instead, it provides a negotiated settlement of competing water use claims in a manner that ensures continued use by non-CSKT water users. Without the Compact, those claims would only have been resolved by lengthy resource-intensive litigation. It is thus entirely meritless for Objectors to argue that the State's efforts to negotiate, execute, and ratify the Compact violated state law in any way. The State's actions demonstrate that the Compact is entirely consistent with Montana state law, not contrary to it.[223]

(a) The UAMO and the Flathead Reservation Water Management Board are Lawful Under State Law

Some Objectors claim that the UAMO and the Flathead Reservation Water Management Board created to administer it on the Reservation are unlawful and could violate their rights. As explained below, however, the UAMO and the Board were properly established and structured consistent with state and federal constitutional and statutory law, including the Montana Water Use Act. The UAMO and the Board provide a rational way to administer water rights on a reservation where regulatory authority has been repeatedly litigated. This solution violates

[223] Several Objectors assert that the Compact's immunity provisions violate state law. But the Montana Supreme Court flatly rejected that argument. *FJBC v. State*, 2017 MT 277, 389 Mont. 270, 405 P.3d 88 (immunity granted to Board members in the Compact was not a new immunity and thus was "consistent with Art. II, Section 18 of the Montana Constitution" and did not require two-thirds majority vote).

neither the Water Use Act nor the Montana Constitution.

Despite Objector allegations to the contrary, the Compact does not relinquish the legislature's control and administration of water rights by creating the Board. Just as the legislature can delegate authority to the DNRC to manage water rights, it can also delegate authority to the Board, which is comprised of both State and CSKT representatives. This shared, cooperative approach to water use regulation on the Reservation is a solution that allows for the proper exercise of both State and CSKT regulatory authority, consistent with previous legal precedents. The Montana Legislature may delegate authority to regulate water uses within the State, whether to DNRC or the Board, in accord with the Montana Constitution. Art. IX, Section 3(4) of the Montana Constitution provides that "[t]he legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records." As this Court has noted, "Montana has broad authority over the administration, control and regulation of water within its boundaries." *Chippewa Cree*, 2002 WL 34947007, at *6. This constitutional provision does not limit the State's authority to develop appropriate mechanisms for administering water rights nor does it require that water rights administration be restricted to any particular administrative entity.

Here, the Montana Legislature enacted the Compact and the UAMO to fulfill the State's obligation to provide for administration of water rights in a specific region in Montana. These duly enacted statutes quantify the CSKT reserved water right and resolve the regulatory void regarding water administration on the Reservation. The Board administers the UAMO, which is designed to mirror the Montana Water Use Act. Just as DNRC administers water rights elsewhere in Montana, the UAMO establishes a process to administer existing uses and permit new uses of water on the Reservation.[224] The UAMO establishes a method of administrative and judicial review of water distribution disputes[225] and ensures that new permits and changes will be entered into DNRC's statewide system of centralized water rights records.[226] The UAMO applies equally to both CSKT and non-CSKT water users on the Reservation and provides for

[224] UAMO, §§ 2-2-101 to -109.
[225] UAMO, §§ 2-2-109 to -112 (appeals of permit decisions) and 3-1-101 to -117 (process for distribution disputes and enforcement actions).
[226] § 1-1-108, MCA.

judicial review of administrative decisions just as the Water Use Act allows for judicial review of DNRC water rights decisions. That the UAMO contemplates more than one court may have jurisdiction to review Board decisions, depending on circumstances, does not displace or usurp the authority of state courts. Given the longstanding, and long-litigated, issues concerning the authority to regulate water uses on the Reservation, (e.g., the *Ciotti* line of cases discussed *supra* p. 6, and even jurisdiction to review regulatory decisions, e.g., the *Middlemist* cases discussed *supra* p. 6), the Montana Legislature's enactment of the UAMO, and the establishment of the Board, is reasonable, lawful, and an exercise of sound policy.[227]

3. The Decree is Consistent with Federal Law

Several Objectors contend, again without support, that the Compact violates federal law. But just as those arguments fail with respect to state law, so too with federal law. First, the Compact was enacted as federal law by Congress and signed by the President "to authorize, ratify, and confirm" the Compact. Settlement Act, § 2(2). Congress authorized the Secretary of the Interior to execute the Compact so long as nothing in the Compact conflicted with the terms of the Act. *Id.* § 2(2)-(3). The Secretary of the Interior executed the Compact on September 17, 2021. There is nothing about the passage of the Settlement Act or the Compact's ratification that was unlawful or demonstrates any illegality with respect to the Compact.

Objectors' other bare assertions of federal statutory violations fail. For example, any contention that the Compact's execution was subject to environmental review under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"), is belied by express terms exempting the Secretary's execution of the Compact from such requirement. *See* Settlement Act, § 4(c)(3)(A). Nonetheless, Congress required the Compact to be implemented consistent with NEPA, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and other environmental laws. Settlement Act § 4(c)(1). The federal statute further directs the Secretary to "ensure compliance with all Federal laws and regulations necessary to implement the Compact and this Act." *Id.* § 4(c)(3)(B). Objectors' speculation that the Compact will not be implemented consistent with

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[227] For these same reasons, Objectors' allegations that the adoption of the UAMO and establishment of the Board violate Art. V, Section 12 of the Montana Constitution as reflecting a "special or local act when a general act is, or can be made, applicable," should be rejected. There was no "general act" to apply with respect to water use regulation on the Reservation, given the *Ciotti* line of cases. The Compact resolves, consistent with applicable law, the unique regulatory issues the courts identified on the Reservation.

its express terms or the Settlement Act's requirements fails to meet Objectors' burden of demonstrating the Compact is unlawful.

D. OBJECTOR ALLEGATIONS OF "FRAUD, OVERREACHING, AND COLLUSION" ARE MERITLESS AND UNSUSTAINABLE

Some objectors have alleged that the proposed Compact is the result of fraud, overreach, or collusion. However, Objectors have failed to assert any facts to support such allegations. As noted *supra* p. 18, the *Officers for Justice* standard approved by the Montana Supreme Court for review of Compacts begins with a limited review "necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." 688 F.2d at 625. In *Barrett v. Holland & Hart*, 256 Mont. 101, 845 P.2d 714 (1992), the Montana Supreme Court discussed what must be proven to establish fraud:

> The nine elements of fraud which must all be proven are:
>
> 1. a representation;
> 2. its falsity;
> 3. its materiality;
> 4. speaker's knowledge of the falsity or ignorance of its truth;
> 5. speaker's intent that the representation be relied upon;
> 6. hearer's ignorance of the falsity;
> 7. hearer's reliance on the representation;
> 8. hearer's right to rely on the representation; and
> 9. hearer's consequent and proximate injury caused by the reliance.

256 Mont. at 106, 845 P.2d at 717. And M.R.Civ.P. 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."

Perhaps realizing the difficulty of proving, or even alleging with particularity, all nine elements of fraud with respect to any party involved in the negotiation and legislative approval of the Compact, some Objectors opt to invoke instead the statutory definition of constructive fraud in § 28-2-406(1), MCA:

> Constructive fraud consists of:
>
> (1) any breach of duty that, without an actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under the person in fault by misleading another person to that person's prejudice or to the prejudice of anyone claiming under that person.

However, constructive fraud only omits proof of the fifth element of ordinary fraud. In *Town of Geraldine v. Montana Mun. Ins. Auth.*, after discussing the standard nine elements of fraud, the Montana Supreme Court said "[w]hile a claim of constructive fraud requires similar proof, a plaintiff need not prove the fifth element relating to intent to deceive or dishonesty of purpose." 2008 MT 411, ¶ 28, 347 Mont. 267, 198 P.3d 796 (internal quotation omitted).

Collusion is a species of fraud. *See Abbey/Land, LLC v. Glacier Constr. Partners, LLC,* 2019 MT 19, ¶ 42, 394 Mont. 135, 433 P.3d 1230 ("Collusion is an agreement between two or more persons to defraud another of his or her rights by the forms of law or to secure an object forbidden by law. Collusion, as far as the law is concerned, has been deemed to be a species of fraud.") (quoting 37 Am. Jur. 2d Fraud and Deceit § 5). The concept of overreach is less precise, but generally refers "to one party's unfair exploitation of its overwhelming bargaining power or influence over the other party." *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 21 (1st Cir. 2009).

None of these concepts have any plausible application to the Compact, or the negotiation and legislative processes that produced it. The essence of all three concepts is that one or more parties have caused unfair injury to some other party through either deceit or unequal position. As detailed *supra* pp. 20-55, the Compact, and specifically the Decree implementing it, arise from negotiations that were between sovereigns and is neither premised on deception nor involved parties with unequal bargaining power. The result is both procedurally and substantively fair.

The *Cannons* court observed that the general policy favoring settlements "has particular force where . . . a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." 899 F.2d at 84. Here, three government actors, including two broadly committed to the protection of the public interest, have pulled the laboring oars for decades to produce a fair agreement that the democratically elected legislature of the State of Montana found fit to be *enacted into law* and that the United States Congress found fit to be funded with federal appropriations of $1.9 billion. Any assertion that this process reflects fraud, collusion, or overreaching is entirely unsupported and meritless.

E. THE COMPACT IS ENTITLED TO A PRESUMPTION OF VALIDITY

The Compact, as demonstrated above, was the product of good-faith, arm's-length

negotiations, is fair, adequate, and reasonable, and comports with all applicable law. The Compact is thus presumptively valid. *In re Crow Compact*, ¶ 18 (citing *Oregon II*, 913 F.2d at 581).

II. THE OBJECTORS CANNOT CARRY THE HIGH BURDEN OF DEMONSTRATING MATERIAL INJURY STEMMING FROM ANY ILLEGALITY OF THE COMPACT

As just explained in section I, the Court should find that the Compact is presumptively valid. This finding then places on the Objectors the "'heavy burden of demonstrating that the decree is unreasonable.'" *Id.* To defeat the presumption of validity and provide a basis for the Court to consider declaring the Compact void, the Objectors must show both "that the Compact materially injures their interests and [that] [t]heir injuries occurred because the Compact does not conform to applicable law." *Crow Compact Order*, 2015 WL 5583581, at *3; *cf. Blackfeet Compact Order*, 2020 WL 7329247, at *9 ("the Court is limited to determining whether anything in the Compact's quantification provisions violate or are prohibited by applicable law").

Objectors are unable to satisfy this burden. Above, the Compact Parties established that the Decree recognizes Tribal water rights consistent with the Hellgate Treaty, subsequent federal statutes, and a century of caselaw development. Many of these rights are like those this Court has repeatedly approved under other tribal water rights compacts, and those that differ do so because of the unique nature of the Hellgate Treaty. And the water rights administration system is one that the Montana Legislature and the United States Congress had the constitutional authority to approve. No Objector can demonstrate the necessary illegality in the Compact to even *start* the material injury analysis. And as shown above, Objectors' attempts to allege a material injury are all premised on a substantial misunderstanding of the governing law. *See supra* pp. 53-55, 57-69. Such misinterpretations must be rejected. Therefore, this Court should grant the Compact Parties' motion for summary judgment, dismiss all objections, and approve the Decree.

CONCLUSION

For the foregoing reasons, the Compact Parties respectfully request that the Court (i) conclude that the Compact Parties have met their burden to show that the Compact is procedurally and substantively fair and have thereby shifted the burden to Objectors; (ii)

determine that Objectors have failed to demonstrate any illegality in the Compact and therefore cannot demonstrate a material injury to carry their burden; and (iii) enter the Decree.

Respectfully submitted this 10th day of July 2024.

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DATED: July 10, 2024 *<u>/s/ Molly Kelly</u>*
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Motion for Approval of the Flathead Reservation-State of Montana-United States Compact and for Summary Judgment Dismissing All Remaining Objections* and *Brief in Support* were served by email to the Objectors and counsel as set forth below this 10th day of July, 2024.

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