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

WC-0001-C-2021

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Motion Dealing with the Fairness and Adequacy of the Flathead Water Compact

The signed objectors submit their Motion with Brief on the Lack of Fairness and Adequacy of the Flathead Water Compact.

SUMMARY OF THE ISSUES

Due to the complexity of the many issues with the origin and ratification of the Flathead Water Compact by the Montana Legislature and the Congress, it is very difficult to summarize the many issues. Here is what we think they are:

1. Are many of the definitions and terms used in the Compact incorrect, misleading or fraudulent? If they are, how do they relate to the fairness and adequacy of the Compact?

2. Has the purpose of the Flathead Reservation been corrupted through the proclamation of revisionist history and by fraudulent means?

3. Do certain provisions of the Compact dealing with its implementation fail or violate the constitutional standards of both the Montana and U.S. Constitution?

4. Is the issue of off-reservation water rights an example of overreaching?

5. Is the removal of water rights of irrigators to a junior status an example of a taking?

6. Did the 2015 Montana Legislature - with individuals colluding - violate their own rules in passing the Compact?

7. Does the ceding of lands by the CSKT through the Hellgate Treaty also mean they relinquished all water rights off-reservation?

8. Did supporters of the Compact, including the MRWRCC, use false claims, judicial economy, fear tactics and coercive efforts in proposing the Compact? Were they blinded to the actual purpose of the Flathead Reservation due to their zeal in proposing and supporting the Compact?

9. Did the 2015 Legislature give an informed consent to the Compact?

10. Does any government have the authority as per any Indian Treaties to "secure" water for tribal members?

11. Does a supposed "tribal water right" get senior status over a Walton Water Right?

Preface

This comes before the Court as per CMO's 3 and 4. The Title of the Motion is somewhat unusual as no previous Compacts have this Title in any motions/briefs filed. In the past, Motions of Summary Judgment have been the standard Motions (besides Motions to Dismiss).

This Motion is the product of several objectors. It is an amalgamation of the facts and legal issues brought forth in objectors' Amended Objections with some filing Statement of Joinders. Throughout this Motion/Brief, there will be documents incorporated by references. Those document numbers filed are: #1453; #1451; #1513; #1462, #1491 and # 456. Also incorporated by reference are the numerous exhibits and affidavits filed in the above-mentioned document numbers. These will be listed as a separate document. A Statement of Disputed Facts will also be attached to this document to show the necessity of an evidentiary hearing to determine with finality these disputed facts.

Why the objections of the objectors are not sufficient to address the issues of law is a mystery. There was nothing in the briefing schedule ordering the Compacting Parties to address the objectors legal issues other than Motions to Dismiss. The fact that Compacting Parties did not file Motions to Dismiss the objections of many objectors is prima facie evidence that the

objectors' objections had merit. Of course, this will be denied. It does beg the question, other than having official standing with the Water Court, what was the purpose of objections if Compacting Parties do not have to respond to the legal and factual issues contained therein?

This Water Court Case and the Compact have several perplexities. Some of them have to do with procedural rules, forms and the ambiguities of CMO's. However, there are others that have profound effects as to how this case will be decided. Some of these perplexities are:

1. **Discovery** – Why discovery was not allowed to cement the potential effects of the Compact through admissions and interrogatories prior to this motion.

2. **Words and Their Meanings** – The words that everyday citizens use do not have normal definitions and applications when it comes to dealings with tribes. An excellent example of this is the **Moe v Salish & Kootenai Tribes** (425 U.S. 463, 1976) decision. There the Court made this extraordinarily pragmatic statement, quoting a previous decision, **Morton v Mancari** (417, U.S. 535, 1974):

> Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized**.**

The Court went on to justify this obvious equal protection violation by stating:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

Notice the Court's argument is pragmatic rather than constitutional! Furthermore, tribal members are U.S. citizens. No explanation is ever given why they should be treated differently once they became citizens. The unfairness of this is obvious to the average non-Indian citizen but not to the Courts.

We have another example of how words do not have their ordinary meaning in Court decisions. In **Washington vs Washington State Commercial Passenger Fishing Vessel Ass'n** (443 U.S. 658, 1979), we have this perplexing statement:

> It is true that the words "*in common with*" may be read either as nothing more than a guarantee that individual Indians would have the same right as individual non-Indians or

> as securing an interest in the fish runs themselves. If we were to continue to construe these words by reference to 19th century property concepts, we might accept the former interpretation, although even "learned lawyers" of the day would probably have offered differing interpretations of the three words.

There are four key words in this statement: *common, securing, and differing interpretations*. In Washington, the Court recognized how the words "in common with" would have been understood in the 19th century; however, we must disregard this today. Apparently, citizens must understand that today the previous words used, with their common understanding at the time, have evolved when it comes to Court decisions dealing with tribes.

3. **Federal Law** – What is to be understood when Courts refer to federal law? Montana has recognized reserved Indian water rights as indicated in 85-2-702 MCA. And 43 U.S. Code § 666 enacted by Congress has allowed applicable state law in dealing with the use of water where the United States is the owner or administers such waters. However, rarely do Courts quote such statutes contextually. Whenever the Water Court refers to law, it usually refers to Court cases. In the Fort Peck Decision in August of 2001, the issue of groundwater was addressed by the Water Court. It states on page 23 the following, "*The Objectors contend that extension of the Tribal Water Right to groundwater is either not supported by or is contrary to federal law*." The Court went on to refer to at least five Court decisions about this issue. The Court concluded on page 24 by stating:

> Given the unsettled state of federal and state law with respect to these issues, the Water Court finds that extension of the doctrine to groundwater in Article III is neither supported by, nor prohibited by, controlling federal law.

So federal law means court cases. Decisions of courts are not law. Only the Legislative Branch can make law. This is why many court decisions, particularly at the appellate level, are labeled "Opinions". Notice the Fort Peck Decision does not refer to any guidance on this issue from the Montana Constitution (applicable state law).

4. **Ceded Land** – Well, what is to be understood by the words "*ceded land*". The word "ceded" is used often when dealing with the historical context of treaties. It is used in Article I of the Hellgate Treaty of 1855. The word is used in the DNRC Exhibit VI-15 entitled **Indian Land Cessions**. The word is used in the Flathead Reservation Timeline put together in 2017 as part of the Indian Education for All Unit from OPI. That the Tribes who signed the Hellgate

Treaty ceded lands outside of the Reservation is accepted by all. However, what is not understood is the language of relinquishing all "right, title and interest" to these ceded lands. Off - reservation, exactly what did the Tribes give up? Water has always been understood to be part of the land. We use the term "appurtenant" today. This concept goes back for centuries. One of the reasons for this is that while people can survive without hunting or fishing, they cannot survive without water. Today, groundwater is the primary use of most people for their source of water. The pursuit of water is a fundamental right for "life's basic necessities," which is inferred in Art. II Section 3 under Inalienable Rights of the Montana Constitution.

Even the definition of land in common law was understood to include water. In **Holmes vs United States** (53 F. 2d 960, 10th Circuit, 1931) the Court stated:

> The primary meaning of the word "land" at common law is "any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, waters, marshes, furzes and heath.

Montana has adopted this common law definition in 70-15-105 MCA where land is defined as: "Land is the solid material of earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance. It then adds in 70-15-105 a definition of "incidental or appurtenant:" "*A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse or of a passage for light, air, or heat from or across the land of another*." So when the Tribes ceded land, the question must be asked: Did they cede all right and claim to water with the land that was ceded? It appears that ceded land to many courts today has a different interpretation than what was historically and commonly understood.

So when the Tribes ceded land, the question must be asked: Did they cede all right and claim to water with the land that was ceded? It appears that ceded land to many courts today has a different interpretation than what was historically and commonly understood.

5. Federal Reserved Water Rights

This concept, originating from a Court, is one of the most perplexing phrases of all the terms used in reference to Indian tribes. That the federal government has reserved land for a particular

use is self-evident. The Hellgate Treaty does not specifically mention or claim "water rights" for the tribes or to fulfill the purpose of the reservation. It secured "the right of taking fish" to the Indians.

What Courts and other governmental entities should have stated to remove all the confusing terms dealing with water rights is to say the Indian has an **inalienable right** to pursue water within the allotted land given to him. While the land was reserved temporarily for them, the water was not because they already had that right to begin with. Did not the Indian camp near sources of water for his beneficial use? And, of course, since we are to understand the Indian way of thinking in the 19th century, for the Indian to believe he **owned** water would have been foreign and abstract. The tribal and nomadic hunter/gatherer lifestyle made it so.

Informed Consent

One of the Standards of Review in this case is the idea that the Compact is an example of a consensual agreement. Did the 2015 Legislature give informed consent to the Compact? Now informed consent is a very important issue when it comes to contracts, legal documents and the relationship between doctor and patient. One of the important issues in giving an informed consent is the social forces at play in giving one's consent. People are highly influenced by so-called experts in their field. Some of this is understandable. We want a doctor who knows his stuff, the plumber, the electrician, etc. Sometimes we are told to get a second opinion. If the 2nd, the 3rd, and so on all say the same thing, you can be almost certain the information you are given is correct. But what if all the opinions rely on other opinions who relied on other opinions until you find out the original opinion was based on faulty information? That would be shocking. However, how many people do that kind of extensive research?

Another challenge to informed consent is the perplexity of the issues. Since we have difficulty understanding legal jargon, we must rely on others to explain them. However, what happens if the one explaining these concepts is blinded by his or her own zealotry to get you to approve the issue at hand?

Conflict of interest can also challenge informed consent. Did the so-called experts of this Compact have conflicts of interest which blinded them to other issues that did not concern them? It was obvious that supporters of the Compact had no knowledge or concern of what the

historical purpose of the Reservation was. We believe they were so blinded to this issue they falsified some of their definitions. The blindness of individuals to see or perceive something because of bias or self-interest is self-evident. In the political arena it is common that individuals are blinded to the character and policies of certain politicians, only to be awakened later, after much damage is done.

Coercion can also be a major influence when giving consent. We believe coercion is evident in this case.

Finally, we have the "limited information" challenge in giving one's consent. Did Legislators have the time (the time crunch of a 90 day legislative session) to really search the information to give their informed consent? There is nothing more shocking for an individual to find that he did not have all the information before giving his consent.

Objectors admit that much of the material in this brief will be repetitive due to so many issues being related to one another. For example, when using the word "fraud," sometimes the history of how the Flathead Indian Reservation came to be and what happened to it with further acts of Congress must be mentioned several times. Certain court cases will be repeated for emphasis as they are connected to both the history of the relationship of the tribes of North American with the U.S. government and how certain terms and concepts have evolved over the years. There will be particular emphasis on the actions of the 2015 Montana Legislature concerning their ratification of the Compact. This brief will also address the so-called "unique obligation" the U.S. has with the tribes of North American and particularly in this instance, the Confederated Salish Kootenai Tribes (CSKT).

Introduction

In this contested matter, objectors have clear disadvantages, which are listed below:

a. Negotiations of reserved Indian water rights have been given *"highest priority"* by both the Federal government and the State of Montana (see 85-2-701 (2) MCA).

b. Objectors have three parties who negotiated against him or her and who have unlimited resources in making sure the compact is finalized.

c. History and precedence are against the objectors. All previous 6 Compacts

dealing with the tribes of Montana have been ratified with, presumably, all objectors denied. This indicates a grim prospect of any objector succeeding.

d. The issues require much research and knowledge of the history of the Hellgate Treaty, of tribal water rights, of federal and state court cases and of legal terms that are outside the normal understanding and eloquence of the average objector. Subsequently, it will be difficult for the average objector to articulate in writing the serious historical fallacies contained in the Compact, and the constitutional issues which are ignored or denied. Objectors suspect the compacting parties, whether wittingly or unwittingly, took advantage of this situation and tried to exhaust the financial resources of the average objector by having to possibly hire an attorney.

e. The politics of dealing with the tribes is so strong that, historically, it overrides any legitimate attempt to reasonably bring up issues that would challenge the status quo. For the state of Montana to give negotiations concerning tribal water rights its "highest priority" indicates that the politics of guilt and false compassion, along with revisionist history, is behind this priority.

f. None of the terms are properly defined in the Water Court's Preliminary Decree. Nor do we see these terms properly defined in any court case or in the statutes of Montana.

g. The Water Court in its Preliminary Decree has stated: "the Water Court's review of the Compact is "*limited* to the contents of Appendix 38 {of the Compact} and may *extend* to other sections of the Compact to the extent that they relate to the determination of water rights and their administration." Additionally, the purpose of judicial review is to make sure "the agreement is not the product of *fraud* or *overreaching* by, or *collusion* between the negotiating parties." Later we see a further purpose for judicial review where the Water Court states concerning the Compact: "it is fair and reasonable to those parties and the public interest who were not represented in the negotiation but have interests that could be *materially injured* by the operation of the compact" (emphasis on certain words is ours). Nowhere do we read of any judicial review on the constitutionality of the Compact. Even the Montana Supreme Court has not addressed the constitutionality of all aspects of the Compact. Since the word used by the Water Court is "*limited*", the inference to the objector is that he or she cannot bring up constitutional issues. Yet the

Water Court judge who must decide the Compact has taken an oath to uphold both the State and U.S Constitutions.

Definition of Terms

In any contested matter, the parties should define their terms.

In this contest, terms such as water rights, federal reserved water rights, applicable law, time immemorial, fraud, overreach and collusion need to be defined so everyone is on the same page. Unfortunately, these terms are not defined in the Water Court's Preliminary Decree. These definitions are also listed in Amended Objections #1453, #1451, #1491 and #1462.

The objectors hereby provide the following legal terms and definitions with commentary for the duration of this brief. (There will be other terms properly defined later in this brief):

a. **Water right** – according to 85-2-102 ((32) – "the right to appropriate water pursuant to an existing right, a permit, a certificate of water right, a state water reservation, or a compact." Of course, the term "water right" is specious. This is true of many of the words used in the Recitals of the Compact; words that are plausible but wrongfully used or defined. Montana supposedly owns all water within the boundaries of the state, per its Constitution. Apparently, what you have is a "beneficial use" of the water. The term "water right" diminishes and compromises the concept of a "right."

In Art. II of the Compact there is no definition for "water right users" except such as "Tribal Water Right" and "Water Rights Arising Under State Law".

{According to the Montana Constitution, Art IX section 3, (3), Montana owns all the water within its borders, including "ground, flood, surface, and atmospheric water – rain. In essence you have a "***beneficial use privilege***". Yet, objectors read in Article II under Declaration of Rights that many rights are inalienable. Montana has accepted and declared Article II as an enumeration of "fundamental rights" which requires "strict scrutiny". Therefore, these rights are given precedence or higher priority over governmental actions. Section 3 of Article II states we have the fundamental right of "*pursuing life's basic necessities*". What is more necessary to life than food and **water**? Due to this fact, states, counties and cities have worked for decades to provide or to allow water for their citizens. In ancient times, no one denied the principle of water as a necessary right for life, which is why ancient tribes lived near a source of water whether it was a river, an oasis, or a dug out well. Towns were established near a water supply.}

Common sense and natural law states that the pursuit of water to sustain life is an "**inalienable right**". It is undoubtedly "self-evident" that water is a gift from God. Therefore

Article IX, section 3, (3) and Article II, Section 3 in the Montana Constitution conflict with each other and create confusion. At best, government can **secure** these rights. It cannot grant them nor take them away. Unfortunately, both the Legislature and the Courts have ignored this. It has been said somewhere "Water is God's gift. . . but He forgot to lay the pipes." Objectors want to be clear about one thing: While water is an inalienable right, that does not mean it is the right or duty of the government to freely provide it.

Therefore, the objectors, with the above in mind, suggest the proper definition of "water right" as follows:

> The right to pursue water in order to provide for life's basic necessities such as life, cleanliness (hygiene), property, crops, animals and agriculture. All human beings have a right to water or their property (which includes their own body). Such a right is inherent and is implied by natural law and common sense. Hence, all human beings have "*implied water rights*".

So how do we define "**inalienable**?" It is a common law term. The common definition is "a right that cannot be taken away, denied, or transferred to another person." The only exception to this is through due process and a trial, but even then, the burden is heavy to take away fundamental rights. In essence, all human beings including Indians who settled in the land now called Montana already had inherent implied water rights – the pursuit of water for life's necessities. **No government entity could confer this right!** Since the pursuit of water is inalienable, then the Water Court must apply a strict scrutiny standard to this Compact concerning the water rights of Indians and non-Indians affected by this Compact.

One may ask: "How does agreeing that a "water right" is inalienable help the objector?" The objectors are requesting that this definition be used in all subsequent papers and in the Final Decree or Summary Judgment. Furthermore, by declaring a "water right" is inalienable, it provides that the Court use the strict scrutiny standard concerning the Compact's effects on the water rights of all individuals. Finally, when it comes to ground water there is no such thing as senior or junior status as long as you do not affect the neighbor's groundwater.

b. **Fraud** – According to the Preliminary Decree, this is one of the words to describe what objectors must prove to negate the Compact. Fraud is defined by the State of Montana. The definition of constructive fraud is applicable there. **Constructive Fraud** is defined in 28-2-406 MCA thusly:

> (*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;*

This brief will state the compacting parties did not commit actual fraud but constructive fraud in that though they did not intend to mislead or deceive, the Legislative laws passed in producing the Compact, did, in fact, mislead the public, violate their oath of office and erroneously made several claims not based on law but political expediency.

The objectors request that the Water Court use this definition in subsequent papers and in its Final Decree or Summary Judgment.

c. **Collusion** – Again, just like "water right," this word is nowhere defined in the statutes of Montana, the Compact, nor in the Preliminary Decree. The word is referred to in the Montana Code. Black's Law Dictionary defines it as:

> An agreement between two or more people, to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind.

This brief will later explain how the compacting parties have colluded to defraud individuals of their rights. Again, the objector requests that this definition be used in subsequent papers and in the Final Decree or Summary Judgment.

d. **Overreach** – While the term has been used in court cases particularly in regards to creditors, the term is, again, not defined by either the Water Court or the Montana Statutes. According to the Merriam-Webster Legal Dictionary, we have the following definition:

> (*1) Conduct that exceeds established limits (as of authority or due process).*
>
> *(2) The gaining of an unconscionable advantage over another, especially by unfair or deceptive means*.

Therefore, for objectors to prove fraud, overreach, or collusion, they do not have to prove intent but that unwitting conduct was done which led to the defrauding of objectors of their constitutional rights. The Compact as written, while perhaps innocently done, was so overreaching that it violated the due process and equal protection rights of objectors, both within and without the Reservation.

e. **Time Immemorial** – The words are used numerous times in the Summary Portion of the Preliminary Decree. The terms are not in the Montana Statutes. The words were created by judicial fiat regarding the rights of Indians. It, too, is a specious phrase!! The phrase goes back to at least the 12th century and refers to a time that is supposedly outside of recorded history. Concerning its use with Native Americans, Chief Justice John Marshall, states in ***Johnson & Graham's Lessee v. McIntosh*** (21 U.S. 543 – 1823) the following:

> That from *time immemorial* and always up to the present time, all the Indian tribes or nations of North America, and especially the Illinois and Piankeshaws and other tribes holding, possessing, and inhabiting the said countries north and northeast of the Ohio east of the Mississippi and west of the Great Miami held their respective lands and territories each in common, the individuals of each tribe or nation holding the lands and territories of such tribe in common with each other, and there being among them no separate property in the soil, and that their sole method of selling, granting, and conveying their lands, whether to governments or individuals, always has been from *time immemorial* and now is for certain chiefs of the tribe selling to represent the whole tribe in every part of the transaction to make the contract, and execute the deed, on behalf of the whole tribe, to receive for it the consideration among the individuals of the tribe, and that the authority of the chiefs so acting for the whole tribe is attested by the presence and assent of the individuals composing the tribe, or some of them and by the receipt by the individuals composing the tribe of their respective shares of the price, and in no other manner.

The question is: Has any tribe held land or certain rights to streams, rivers, and lakes since "time immemorial"? Which tribe? What time? It has been established that all the tribes of North and South America came because of migration from the eastern hemisphere.

> Indian tradition agrees in essentials with the finds of scientific investigators. The Isleta, for instance, has a tradition that its people came from the north, that they crossed the sea "where it is so narrow that a ten-year-old boy could throw a stone across it," and then, finding very little sun, that they came farther and farther south until they finally settled in Isleta. More than one archaeologist is satisfied that the Pueblo people did come from the north, crossing the Bering Strait and drifting south. Taos, according to their tradition, came north, following a bird and making many villages, until they finally found the right location at the foot of their sacred Pueblo Peak and on both sides of their ever-running stream. This movement northward also has its scientific supporters, who think that these Indians came from Mexico, off shoots perhaps of the Aztec stock. . . . . The Hopis have a legend, for instance, that their ancestors undertook to build a great temple, that they were struck with a confusion of tongues and had to leave it unfinished, and that they then moved south and established the present Hopi villages. Archaeologists, excavating at the Mesa Verde, uncovered there what they chose to call the Sun Temple. It was obviously a very important effort, probably for ceremonial purposes only, and it was left unfinished

for obscure reasons. A Hopi Indian, visiting the place soon after the discovery of the Sun Temple, identified it absolutely and with great excitement as the very place of the legend. See http://www.sacred-texts.com/nam/sw/dg/dg03.htm.

Ultimately, the territorial boundaries of these migrating tribes were constantly in dispute due to constant warfare between the tribes. It appears most, if not all, the Indian tribes were in possession of their territory, at the time of the European conquest, due to the same old concept of "*discovery and/or conquest*." And this was going on even as European explorers were arriving.

At the time of Lewis and Clark, the Mandans told the explorers that they had migrated from the lower Missouri (near modern day Bismarck) and Minnesota due to being forced out by the Sioux and others. They settled among the Pawnees. Then, due to war, migrated further west to western North Dakota, near the confluence of the Knife River and the Missouri (see De Voto, **Journals of Lewis and Clark**, page 57 – 65).

The Lemhi Shoshones, who had lived on the plains of Montana, were driven to the mountains by the Blackfeet, Atsinas and Hidatsas. A Hidatsa warrior, in responding to Clark's admonitions for peace among the tribes, responded thusly, "*If we have peace, how will we have chiefs*"? See http://www.pbs.org/lewisandclark/living/idx_6.html.

Finally, we are told concerning the Shoshones, "*All the natives of the Missouries below make war on them & steal their horses.*" (See Ambrose, **Undaunted Courage**, page 206).

So, the great error Marshall and the courts have made is to assume that the territorial boundaries of the Indians were not, themselves, the result of migratory patterns and through conquest and war. For example, who truly owned the hunting grounds of Eastern Montana? The following tribes all hunted there: The Salish, the Kootenai, the Shoshones, the Blackfeet, the Crow and the Assiniboine. The Blackfeet were determined to keep it as their hunting territory.

{The Fort Laramie Treaty of 1851 supposedly helped settle hunting grounds for 8 tribes. It is interesting that the Lakota Sioux were given exclusive treaty rights to the Black Hills over the objections of the Cheyenne and Arapaho. To this day the Northern Cheyenne believe this was illegally given to the Sioux. The Arapaho Chief Black Coal complained bitterly about the Sioux.}

It is a fiction to suggest that the lands settled by the current Indians are due to senior status by way of possession. More than likely, the tribes, currently present, were there due to migration or through conquest, thereby subjugating existing tribes or forcing them to flee. So,

who truly used the land or the water since time immemorial? No one really knows. And for legal entities to use that legal fiction is to take advantage of present-day people and, in essence, commit fraud.

Is it First in Time or Last in Time?

Of course, in his decision Marshall did not have the complete picture of the migration of the North American Indians as we do today. His knowledge was limited to the tribes of the east and Midwest and consisted of their cultural practices rather than their migration history. While we do not know the exact time of the migration of Indians to North America, we do know it took place after the confusion of tongues which the historical Bible refers to and the Hopis confirm in their oral tradition. This took place around 2000 B.C. It was not time immemorial. This phrase also justifies the concept of **First in Time, First in Right** concerning Indian law. However, this is spurious. The problem is that historically, it is **Last in Time, First in Right** that really is applicable. And it is a false application to apply this to groundwater and instream water flows.

Tribal ownership came up in Dinesh D'Souza's book **America: Imagine a World Without Her.** D'Souza is having a dialogue with White Face, a Sioux Indian and a spokesperson for the tribe's national council. She reveals the fact that she is guilty of revisionist history.

White Face wants Mt. Rushmore to be abandoned and the Black Hills returned to the Sioux. She wants the land restored so that the Sioux people can once again commune with the spirits. D'souza writes the following on page 92:

> I reminded White Face that before the Sioux, there were Cheyenne Indians and other tribes on that land. So if Americans stole that land from the Sioux, didn't the Sioux steal the land from the Cheyenne and other tribes? White Face looked flustered. She said that, long before the white men came, American Indians had certain "dominant" tribes and the Sioux happened to be one of them. Accurate history has a way of flustering people…

It must be pointed out that the Confederated Salish and Kootenai tribes have their own definition of "time immemorial" and their own revisionist history. OPI (Office of Public Instruction) in 2017 published their timeline (a combination of tribal representatives, oral history and existing texts) as part of their Indian Education for All (IEFA). This timeline defines "time immemorial" as follows:

> The Creation and time of the animal people. Coyote and Fox travel the earth preparing the world for human beings.

Of course, there is no way Chief Justice John Marshall in his decisions understood "time immemorial" that way. Nor does the average person in America understand it that way. So here we have opposing worldviews concerning the creation of human beings. Since **Winans** tells us, regarding treaties, we must understand the Indian point of view, how should the objectors interpret these words used by the Water Court? It is truly unfortunate that some 29 federally recognized tribes have endorsed *Time Immemorial* curriculum (see **ospi.k12.wa.us).** Perhaps due to the above Timeline definition, the Compact does not define "time immemorial". Let us get specific, can we peg a certain date in human history when aboriginal tribes came to settle certain territories?

The objectors request that the phrase "time immemorial" not be used in subsequent papers nor in the Final Decree of Final Judgment.

f. **Tribal** – We read much about Tribal water rights but exactly what is the definition of "tribe" or "tribal". Normally, it means a group of individuals joined together by a common ancestor and a common culture. It can also mean a group of individuals or families who live in a settled territory or homeland. So, we read that tribes assert they have a permanent homeland which can include a piece of land reserved for them. A good example of how the term "tribes" was used in ancient times is the tribes of Israel. Their allotment is described in Joshua 13 – 19. Certain territories were given, as well as certain existing towns. Does this mean that there was no individual property ownership…that land was entirely tribal in the sense of collectively owned?. By no means! There were individual landowners within the territorial boundaries of the tribes of Israel as revealed in the story of Naboth (I Kings) who owned a vineyard. Private ownership with boundary lines is also suggested in Deuteronomy 19:14.

Yet, among the Indian Tribes of America, outside of a lodge (whether earth or wood) or tipi, fishing rights and hunting grounds; the individual ownership of land or water was a foreign concept. The concept of land ownership was the nub of the conflict between Indians and white men, and it must be understood that this conflict is also part of the Compact. So, it was a mixed bag as to how the Indians understood the concept of selling or owning land. Some understood they were relinquishing possession totally. Others believed they were only granting hunting and fishing rights to white settlers or the right of passage over their land. The Indians did for the most part have a noble attitude of the land: to be caretakers and stewards of it. Still, it was their

understanding of the land, combined with the greed of white settlers that led to the diminishment of their way of life. They resisted the white man's concept of civilization. Two examples show this. The Kiowas Chief White Bear said in 1876, "I do not want to settle down in houses you would build for us. I love to roam over the wild prairie. There I am free and happy." Many a white man has had similar sentiments. Nine years later White Bear committed suicide in a prison hospital. Chief Seattle in 1854 was reported as saying the following:

> How can you buy or sell the sky, the warmth of the land? The idea is strange to us. If we do not own the freshness of the air and the sparkle of the water, how can you buy them?

Ultimately the term "tribal" is about collective ownership. That courts and legislatures are acknowledging such a system here in America reveals a compromise based on political considerations rather than constitutional principles. This compromise reveals the confusing nature of how treaties are interpreted today. In the 19th century, treaties were formed to help change the Indian way of life, whether nomadic or whether they settled in a certain territory, to a more agrarian/private property culture. This included allotting land within the Reservation to individual ownership. This was one of the purposes of Reservations that courts seem to ignore today as tribes incrementally try to go back to a collective concept of land ownership – in other words, tribal. Therefore, even the phrase "Tribal Water Rights" is a collective term used by the Courts to interpret federal reserved water rights. This is so unnecessary if one sees the plain language of the Hellgate Treaty.

g. Tribal water rights – This, of course, is the big reason for the Compact in the first place. What does this mean?

When Lewis and Clark began their journey up the Missouri in 1804, it never occurred to them that they possibly were navigating on the territorial water rights of the native Indians. In the 19th century, of course, water was important to Indians but the concept of a "water right" would have been foreign to them. Remember they had a collective mentality concerning property. The Hellgate Treaty, which is the foundation of all things concerning the Compact says NOTHING about water rights. The closest it comes to this issue is the "exclusive right of taking fish" within or near the reservation and "the right of taking fish at all usual and accustomed places in common with Citizens of the Territory" elsewhere. This phrase has since evolved to "reserved Indian water rights" or "Tribal water rights." All of this came about due to

the historical legal fiction of "time immemorial" used by the courts to justify aboriginal rights. Ironically the Indians at the time of the Hellgate Treaty would not have understood the concept of "water rights." How do we *evolve* from the taking of fish to "Tribal water rights?"

Two landmark cases concerning water rights have been: ***United States vs Winters****, 207 U.S. 564(1908)* and ***United States vs Winans***, *198 U.S. 371 (1905).* In regard to the Indians, *Winters* refers to their water rights as "reserved rights." *Winans* (the issue was the right to fish) agrees with the objectors (although for different reasons) that the Yakima Indians already possessed these rights. The *Winans* case never referred to "reserved water rights," though it did establish an assumed doctrine that treaties need to be analyzed as the Indians *would have understood them,* but the Court did not differentiate between those who did understand and those who did not. It is intellectually dishonest to apply 21st century concepts and ideas upon the 19th century.

{It has been stated the North American Indian was "*unlettered*". This is true, but this does not mean they were stupid. For example, many who signed the Hellgate Treaty possibly did not totally understand its provisions. We don't know for sure since we were not there. Chief Charlo understood that his tribe could still settle in the Bitterroot Valley. The fact that so many did move to the Jocko tells us that many did understand where the Reservation was. So, was Charlo guilty of misunderstanding or being rebellious? By the early 1900's the Indians on the Reservation clearly understood the practical effects of allotment as stated in the Treaty. Therefore, we must be careful when we refer to the Indian's understanding of a Treaty. Which time are we referring to?

Nor can it be argued there was ambiguity in the Hellgate Treaty concerning its provisions. The doctrine that any ambiguity in a treaty is to be resolved in favor of the Indian is, of course, discrimination and condescending. Indians are no different than other people when it comes to understanding. How many white people do not understand complex legal documents and court decisions, today!! But clarity does come with time.}

The Montana Legislature in 1987 passed 85-2-701 and we now read in paragraph (1) that reserved water rights are now called *"reserved Indian water rights"*. This was probably influenced by ***United States vs Adair****, 723, F.2d 1394 9th Cir. 1983* where the Court referred to an "aboriginal right to the water used by the tribe (Klamath) as it flowed through its homeland."

{The court also said the Klamath tribe had lived in central Oregon and northern California for more than a thousand years; yet it provided no hard evidence for that assertion.}

The final influence was ***State ex rel. Greely v Confederated Salish & Kootenai Tribes****, 219, Mont 76 (1985)*, the Court bifurcated *Indian reserved water rights* which "exist from time

immemorial" and those water rights that are merely recognized by the document that reserves the land and federal reserved water rights.

{*Greely* went on to admit the Water Use Act does not explicitly state "*that the Water Court shall apply federal law in adjudicating Indian reserved rights.*" Yet the Court went on to pontificate that the Water Court should follow federal law.}

Taking the **Winans** doctrine at face value, there is no way the Indians at the time the Hellgate Treaty was signed understood it that way. All people owned or shared the water, the sky, the air, the land according to Indians.

The problem here is giving a labeled, distinctive term, for pragmatic reasons to Indians, called "*aboriginal water rights*." However, all humans have the inalienable right to water. There is no distinction; for all were created, as Jefferson said, by a common Creator. One could say water rights move with the individual. If occupancy and possession of land is one of the triggers of "time immemorial" then the Salish, Kootenai tribes might have a claim for the Bitterroot and the Kootenai River but not the Flathead. So, who technically has senior rights to the waters of the Flathead, Mission Valley and the Clark Fork?

The objectors have shown the evolution from reserved rights to Indian reserved water rights. All of this has been done by Court decisions. However, some of their inexplicable decisions are taking the plain language of "*in common with*" and distorting the common understanding of these words. Courts in the past have continually distorted words such as "time immemorial" and "in common with" to benefit the Tribes. In ***Washington vs Washington State Commercial Passenger Fishing Vessel Ass'n*** *443 U.S. 658*, we have this breathtaking distortion or worse yet ignoring plain speech:

> It is true that the words "*in common with*" may be read either as nothing more than a guarantee that individual Indians would have the same right as individual non- Indians or as securing an interest in the fish runs themselves. If we were to continue to construe these words by reference to 19th century property concepts, we might accept the former interpretation, although even "learned lawyers" of the day would probably have offered differing interpretations of the three words.

The Court went on to disregard these three words and give greater importance to other words! So here again, to give "special treatment" to Indians, we must distort or ignore the ordinary meaning of words. If we accept the plain language of "*in common with,*" then the rights of Indians concerning the "pursuit of water" do NOT have a higher priority but stand on an equal footing with non-Indians.

That special treatment which has been given to the tribes has been admitted by the courts. In ***Moe v Salish & Kootenai Tribes****, 425 U.S. 463 (1976)* the court justifies it without any shame! They state:

> Literally every piece of legislation dealing with Indian tribes and reservation . . . singles out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

The court did not articulate specifically what this commitment was, but this kind of thinking is similar to past affirmative action programs in America for blacks which have discriminated against other Americans.

The courts could care less what the U.S. Constitution says about special treatment. The U.S Constitution addresses the Tribes in two ways: commerce (a source of much mischief and intervention by the federal government) and treaties (Article VI). Nowhere does the Constitution require special treatment concerning "rights." Can a treaty between Indian tribes and the federal government diminish, deny, or abrogate the inalienable rights of non-Indians who live within the reservation. No, it cannot!

{Treaties are always made with foreign nations. Secondly, it is absurd to interpret treaties as the Supreme Law of the land therefore usurping the proper Supremacy of the U.S. Constitution. In 1855, the Hellgate treaty recognized the tribes as foreign entities. Thirdly, the goal of the Hellgate treaty was *assimilation*. While native tribes have tried to maintain their cultural language and heritage, the goal of assimilating Indians as equal citizens with non-Indians was accomplished politically. Citizenship was granted to Indians in the 19th century (**Dawes Act**) and was finalized with The **Indian Citizenship Act of 1924** which granted citizenship to all Indians born in the U.S. All Indians are bound to honor and obey the U.S. Constitution, notwithstanding the Hellgate Treaty. However, in Montana, according to the Constitution and By-Laws of the CSKT, they do not take an oath to the Montana Constitution – so they are not bound to defend or protect the provisions of the Montana Constitution.}

The objectors proclaim special treatment to the Tribes is unconstitutional due to the fact they have citizenship. Citizenship removed much of the so-called "unique obligation" to the Tribes.

h. **Flathead Indian Reservation** – In Article II, (33) the Compact defines this as: "all land within the exterior boundaries of the Indian Reservation established under the July 16, 1855

Treaty of Hellgate (12 Stat. 975), notwithstanding the issuance of any patent, and including rights-of-way running through the Reservation."

Is this definition correct? Is it fraudulent? A brief history of the creation of this reservation is important and one of the signed objectors will borrow much material from his official objection filed with the Water Court. A proper definition will be provided.

1. History

The definition supplied by the Compact is historically accurate from 1855 to 1887. However, it is not a correct definition for the 21st century. The historical deviation from the historical Reservation must be given.

The Dawes Act - The Reservation began to change with the Dawes Act of 1887 (also known as the General Allotment Act). This act provided the allotment of lands to Indians individually rather than as members of a tribe. The law authorized the President to allot reservation land, which was held in common by the members of a tribe, into small allotments to be parceled out to individuals. The overall purpose was to break up the collective mind set of a "tribe" so they would gradually assimilate, through agriculture and property ownership, into American culture. It was still a reservation, but now individual Indians could own land. This did lead to complicated results but overall, the reservation, while intact, had started to change.

Enabling Act of 1889 – This permitted the entrance of Montana into the United States, and it addressed the status of Indian lands. Notice it refers to an individual Indian as well as Indian tribes: "All lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the Congress of the United States . . . until revoked by the consent of the United States and the people of Montana." This Enabling Act language was incorporated into Article I of the Montana Constitution.

Flathead Indian Reservation Allotment Act of 1904 - This allowed for the survey and allotment of lands now embraced within the limits of the Flathead Reservation, in the State of Montana, AND the sale and disposal of all SURPLUS lands after allotment.

Indian Reorganization Act of 1934 (also called the Wheeler/Howard Act - This act changed federal Indian policy when it established "That hereafter no land of any Indian reservation. . . shall be allotted in severalty to any Indian." The Act also authorized the Secretary of the Interior "… to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened. . ."

{These lands had to be "***restored***" to tribal ownership because, by virtue of such acts of Congress as the Flathead Allotment Act, they had been REMOVED from tribal ownership and subject to allotment or SALE.}

However, Section 3 of the Act is clear insofar as lands previously withdrawn from reservation status when it states: "**Provided, however, that valid rights or claims of any persons to any lands so withdrawn . . . shall not be affected by this Act. . ."** So now federal policy has changed. Arbitrarily, it now assumes to repatriate the original reservation by restoring all surplus lands back to tribal ownership, jurisdiction, or control.

The U.S. Department of Interior has officially recognized that federal policy at one time was to break up reservations. It states (emphasis in bold is provided by objectors):

> During the Allotment Era of the late 1800s and early 1900s, the federal government parceled out millions of acres of Native American lands to individual Native Americans **in an effort to break up reservations.** . . Furthermore, non-allotted lands were often declared "surplus land" by the federal government, which opened them to homesteaders. This accelerated the loss of Native American land to non-Native Americans. . . The policy of allotment reduced the amount of land owned by tribes. In 1887, tribes held 138 million acres. Forty-seven years later, in 1934, they owned 48 million acres. . . In addition to **diminishing** the total acreage owned, the allotment policy also left behind a checkerboard of land ownership on many reservations, {with} individual parcels of land sometimes owned by a tribe or tribes, Native American individuals, and non-Native Americans.

(See **U.S. Department of Interior, Natural Resources Revenue Data**, "*Native American Ownership and Governance of Natural Resources*" on **www.revenuedata.doi.gov**)

Notice the Department of Interior admits reservations have been "***diminished***". In short, the Flathead Indian Reservation as it now stands is legally diminished and title to private land within the boundaries is justified and valid because those lands have been withdrawn from the reservation. In essence we have a Flathead Reservation comprised of both private and trust Lands.

Even the Tribe has conceded the point. In a document dated February 13, 2018, addressed to Department of Interior, it states:

> Over the past 100 years with the passage of the Flathead Allotment Act and its Amendment (similar to the Dawes Act), the opening of the reservation to homesteading and various other federal actions, the CSKT and the resource base within and outside the exterior boundaries of the Reservation has been severely injured and diminished. (See **www.bia.gov, 21-CSKT.pdf**)

Historically, the objector's land currently owned by Rick and Nancy Jore was legally withdrawn from Reservation status in 1920 by Joseph C. Meingassner, who was granted a Land Patent on the property dated January 10, 1920, from the United States of America. The Patent Number is 726673.

Finally, the State of Montana affirms this diminishment by exercise of state jurisdiction over state citizens on private and state-owned land, including rights-of-way, and taxes within the exterior boundaries of the reservation; thereby confirming these lands are not "*under the absolute jurisdiction and control of Congress*."

So, what should be the proper definition of the current "Flathead Indian Reservation".

2. **Flathead Indian Reservation** - Proposed Modern Definition.

The objectors, based on the historical timeline outlined above dealing with the Flathead Indian Reservation, propose an accurate modern definition:

> Land within the exterior boundaries of the reservation established by the Hellgate Treaty which now includes both trust and private land. Within the Reservation private land is owned by both Indian and non-Indian. Therefore, the Reservation has been diminished from its original status.

Some may ask, what does it matter what definitions we use? Well, it mattered in the Compact. **It lists 71 definitions**!! Definitions set the tone of how we write and speak to one another, enabling us to communicate clearly. Definitions must address the common reality and must not distort, twist or wrangle the historical meaning of words. If one does this, it leads to suspicion that this is due to confirmation bias and unreasonableness.

The objectors contend the above definition fits the modern reality, and the history of the constant evolution of the land and those living within the Flathead Reservation. The definition supplied by the Compact does not accurately relate the true and legal nature of the Reservation. Rather it is a definition of what the Tribes **want it to be**, rather than what it is. Unfortunately, Legislators have been fraudulently deceived to accept this definition.

The question, why would legislators accept a definition that does not accurately describe the Reservation as it is today? Part of the answer is that many Legislators are not lawyers and therefore are not trained to see the nuances of legal terms. Still, it does not take much effort to empirically see the status of the Reservation. Secondly, other reasons the objectors suggest is that Legislators were motivated by urgency to settle this matter, the fear of future litigation, and politics; therefore, they accepted in good faith the views of lawyers and tribal members who

provided this definition in the Compact. Unfortunately, they were unwitting participants in this constructive fraud of the Compact's definition of the Flathead Indian Reservation.

A proper definition of the Flathead Indian Reservation helps to articulate the material injuries to the objectors and therefore buttresses the constitutional issues raised elsewhere in this brief.

3. **Tribal Sovereignty** – when dealing with the proper definition of the Flathead Indian Reservation, the issue of tribal sovereignty has been a contentious issue. The Confederated Salish and Kootenai Tribes (CSKT) make historically inaccurate claims dealing with this issue and unfortunately, many individuals follow along. In *An Amended Complaint for Declaratory and Injunctive Relief* filed on May 15th, 2014, in the Federal District Court of Missoula (**Case 9:14 –CV-00044-DLC, Document 27**) attorney John Carter, writing for the tribes on page 8, ¶ 26 says the following:

> Prior to July 16, 1855, the Tribes held aboriginal title to much of present-day Montana and all it contained, including what is now called the Flathead Indian Reservation (FIR).

These Tribes held title to "*much of Montana*?" What would the Blackfeet, the Crow, etc., say to that claim? Carter goes on to say in paragraph 27, that "*from time immemorial, the Tribes exercised all aspects of ownership of waters throughout their aboriginal territory*." The Tribes believe they, not the state, "*own*" the water. This flies in the face of the fact that the State of Montana did not historically cede ownership of water to the Tribes. From the Tribal point of view, they would understand that the State of Montana did exactly that.

The tribes in this same Motion do admit that the Flathead Allotment Act (FAA) did allow entry of non-Indian into the Flathead Indian Reservation. The Tribes claim this was a violation of the Hellgate Treaty in a U.S. Court of Claims case in 1971. The U.S. Supreme Court in **Wolf v Hitchcock** in 1903 stated that Congress's plenary powers were not limited to the strict language or "*the strict letter of a treaty with the Indians*" (187 U.S. 533, 565). Here the Court recognized some inconsistency in the government (which has not ended) but stated congressional dispensation of tribal land, even if inconsistent with a treaty's provisions regarding allotment and dispensation, was "a mere change in the form of investment of Indian tribal property." Concerning the consent of the tribes to allotment as proclaimed by the Tribes, the Tribes are selective in quoting the then Secretary of Interior, Ethan Hitchcock. While an earlier draft of the FAA did mention tribal consent, it was later removed. Hitchcock stated the following:

> The bill, if amended, {to remove requirement of tribal consent} will fully safeguard and protect the rights and interests of the Flathead Indians, and there is no occasion for presenting the matter to the Indians for the purpose of procuring their consent thereto. (Quoted in Federal District Court, April 16, 2020, 2020 WL 1891263 in **Confederated Salish and Kootenai Tribes vs. Lake County Board of Commissioners**).

The inconsistency of the courts is a befuddlement to the common citizen. **Rosebud Sioux Tribe vs Kneip** (1977) say diminishment does not occur unless "an intent to change boundaries will be found;" yet in the same Federal District Court quoted above it states:

> The Dawes Act and the practice of allotment served federal assimilationist policy in two ways . . . and second, it opened up tribal lands to non-Indian settlement, diminishing reservations.

Courts are all over the place on the issue of diminishment. Yet in a practical matter the interior boundaries of the Flathead Indian Reservation (FIR) were diminished. The Tribes have never addressed the issue of State jurisdiction over non-tribal lands within the FIR. If non-tribal lands were unlawfully sold to homesteaders as the Tribes claim, then why has the Tribe not challenged jurisdiction by the State of Montana within the Reservation in taxing the non-trust owners living within the Reservation? If the Reservation is not diminished, then the Tribes have jurisdiction, not the State, over the private property owners. Therefore, to the Tribes, the Compact is the **gradual restoration** of jurisdiction within the interior and exterior boundaries of the FIR. Tribal sovereignty demands it.

What we have here is historical fraud committed by the Tribes; they did not own all the land in Montana. Furthermore, the State of Montana exhibits fraud in its decisions that the FIR has not been diminished by way of jurisdiction. To be consistent in this position, the State needs to remove their taxation authority on non-trust lands within the FIR.

Brief Dealing with Constitutional Issues

The objectors must be clear about the consensual agreement of the Compact as we discuss constitutional issues: The Compact is a consent agreement with compacting parties, it is NOT a treaty. Furthermore, notwithstanding others who claim so, tribes are not totally sovereign. It is odd when you realize the oxymoron of the phrase "domestic dependent nations" used by the courts to describe the Tribes; yet the Tribes claim sovereignty. That is the world we currently live in.

In this case, it is clear the Confederated Salish and Kootenai Tribes have no authority over the objectors concerning their private property. They cannot levy taxes on them, cannot enact eminent domain, nor can they issue a water right to them. In fact, any type of authority the tribe has assumed, in many instances, is due to the acquiescence of both federal and state governments. **This Compact would not have come about if the tribes had true sovereignty!** However, as will be explained later in greater detail, it appears the Compact assumes to give some authority to the Tribe over private property owned by non tribal members. For example:

According to the current scenario, the objectors and many others, no longer have a right to drill a new well. Montana law permits drilling of wells if use is less than than 35 gallons per minute. If more than that, the well driller/owner must apply for a "Beneficial Use Permit" from the Department of Natural Resources and Conservation (DNRC). **Ultimately, a Certificate of Water Right** will generally be issued. In the Compact, it is established that the Flathead Reservation Water Management Board has the authority, according to Article II, 34, "*to administer the use of all water rights on the Reservation*."

The Board also has "exclusive jurisdiction to resolve any controversy" over the right to use water on the Reservation. Of course, jurisdictionally, fee patent land owned by objectors is not part of the reservation. However, the Board will claim jurisdiction. They will say that the objectors will not get a permit from the DNRC and that the Montana Water Use Act no longer applies. This denies the objectors the right to go to Montana and one of its agencies according to Article IX, Section 3 (4) which states: "**The Legislature shall provide for the administration, control, and regulation of water rights**. . ." The Legislature authorized the DNRC for this responsibility. The question is: Can the State delegate this power to a Board created by the amalgamation of tribal members and state appointments? That it did so is certain but was it constitutional? The Flathead Board is not republican in its authority. Tribal Council appointees on this board do not represent the objectors but the Tribe and the objectors have no authority to remove the tribal representative.

Having properly defined our terms for the Case, the objectors now move to constitutional issues. Applicable law and common sense indicate that both the U.S. Constitution and the Montana Constitution apply to the Compact. The Preliminary Decree states the Compact directs the Court to "limit" its review to the contents of Appendix 38 and "may extend" to other sections of the Compact dealing with water rights and their administration. The objectors state that the

ratification and the provisions of the Compact are not immune from constitutional errors and violations of constitutional rights.

Since Indians are citizens, they are bound to constitutional restraints in any negotiation. The State of Montana and the Federal Government are similarly bound by constitutional restraints in ratifying this Compact. So is this Water Court.

What are the constitutional issues the objectors will be raising? They are: 1. Equal Protection; 2. Separation of Powers; 3. Oath of office; and finally, 4. Due Process. Material injuries to the objectors' property are listed in the Amended Objections # 1462, #1451, # 1491, and #1453.

Article 2, Section 4 of the Montana Constitution states: "No person shall be denied the equal protection of the laws." Section 4 goes on to say the state cannot discriminate against any person exercising "his civil or political rights on account of race, color, culture, social origin or condition, or political or religious ideas." The U.S. Constitution states in the Fourteenth Amendment: "**No state shall. . . deny to any person within its jurisdiction the equal protection of the laws."** It is particularly important to say in this case the following: **The State of Montana and the Federal Government were bound to the language of the 14th Amendment when considering the ratification of this Compact.** That is Federal Law!

However, to be consistent, the objectors will define how "equal protection" is defined. The overall standard has been under our constitutional form of government that everyone is equal before the law. It should not matter what class, what race, what sex, what political view you hold, or your "social origin;" all citizens are equal before the law. Therefore, to give special treatment due to race, color, etc., is considered a violation of equal protection. Usually, the threshold for equal protection to be triggered is the idea that persons "similarly situated" should be treated equally by the law. Even here the term "similarly situated" does not appear in the Montana Statutes nor in the Constitution. For the state or any governmental entity to treat one person differently than another person in a similar situation is considered unequal and unfair. This is why constitutions and courts sometimes use different categories such as race, color, sex, etc., to help define what we should not discriminate against. According to a 2011 Western New England University School of Law paper on "Similarly Situated" (Giovanna Shay, **gshay@law.wne.edu** and 18 Geo. Mason L. Rev. 581) over 1,000 U.S. Supreme Court opinions and orders mentioned the phrase "similarly situated." The article goes on to say that the phrase

appears in cases involving "tax law," "the Clean Water Act," "the commerce clause" . . . and appears in numerous criminal law contexts. Some courts have gone further to state equal protection guarantees require that laws treat all those similarly situated with respect to the purpose of the law alike.

Similarly Situated must be tied to Purpose of the Compact -The issue of the administration of water rights is statewide. However, equal protection is triggered if the purpose of a law or a Compact treats a citizen differently in a common locality than it does the rest of the state; yet all the citizens are similarly situated by way of the **administration of water rights**. Analytical analysis of the claim the Montana Legislature violated equal protection laws in ratifying the Compact must hinge on whether the ratification process "either on its face or in practice treats persons standing in the same relation to the administration of water rights differently." The objectors grant that they are not similarly situated to a tribal member within the Reservation because they are not part of the Reservation. They own private property; they pay taxes on it. They are not Indians and their water rights (beneficial uses) come from the state, not the Tribe. Other than the commonalities of humanity and citizenship, the objectors have commonalities dealing with taxation and water rights with ALL non-tribal members living outside the Reservation. This fact must be understood when dealing with the concept of similarly situated. Therefore, when it comes to current state law and to the purpose of acquiring and maintaining water rights, they are similarly situated to all other non-Indians throughout the state who do not live within the Reservation. They are even somewhat similarly situated with Tribal members who own non-trust land! The purpose of the Compact is to treat non-Tribal citizens within the locality of the Flathead Reservation differently than non-Tribal citizens statewide. **State law concerning water rights will govern those outside the Reservation, but the Flathead Reservation Water Management Board governs those non-Tribal citizens who live on private property within the Reservation.** Even if one were to accept that tribal members have superior water rights over the objectors does not mean the Tribes have authority delegated by this Compact over the use and future use of the water rights (which are inalienable) of the objectors. In essence, the objectors have a compact with the State- not the Tribes.

The State is totally inconsistent when it comes to the objectors. When dealing with water administration they are currently, without proper authority, under the Flathead Reservation Water Management Board. When it comes to taxation they are under the State. The purpose of the

Compact does treat non-Indians citizens differently and is a violation of both the Montana and U.S. Constitutions. Therefore, the Legislative Branch of Montana violated the equal protection guarantee of the State Constitution and the Federal Government violated the U.S. Constitution in ratifying this Compact.

Unique Obligation Means Ignore or Rationalize the Constitution

Others will argue of the "unique obligation" to Indians; therefore, special treatment is allowed and equal protection arguments do not apply. It is amazing how some will justify violating equal protection. We read that Montana is not free to disregard the Tribe's superior water rights on the reservation. The impact of supposed superior water rights is to be disregarded concerning the water rights of private property owners within the Reservation. This argument leads to the conclusion the Montana Legislature was duty bound to ignore the equal protection guarantee of the Montana Constitution and follow federal law.

Then we have the argument that equal protection guarantee is not violated if the distinction is political (See **State vs Shook**, 2002 MT 351, paragraphs 12 & 13). **Shook** even quoted the earlier case referred to by this objector, **Morton vs Mancari**, which admitted that if we invalidated laws dealing with the tribes due to racial discrimination, then "an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." So here we have an implied admittance that race is a consideration, but we must ignore it due to the calamity it would cause to so many laws.

Inalienable Constitutional Rights Precede Culture

Shook went on to justify this unique obligation by referring to Article X, Section 1(2); this refers to the State recognizing the "cultural heritage of the American Indians." **Never mind that culture has nothing to do with constitutional rights which are, supposedly, inalienable, outside of culture and given by the Creator**. Tribal members as U.S. citizens are bound to obey the Constitution. So, we have the odd distinctions given to tribal members, they are U.S. citizens, so they are politically part of the American culture. However, they are also considered a separate political class as "Tribes." What complex webs political expedience will conceive!!

Concerning culture, exactly **what** are we to recognize! If state class distinctions are based on tribal membership as **Shook** stated, well, Article X, Section 1 (2) does not refer to tribal

membership or to a particular tribe but the culture of American Indians! Which tribe of American Indians are we to recognize concerning cultural heritage? There are 574 federally recognized tribes! As usual the Constitution does not elaborate which leaves all kinds of room for the Courts to do so. Heritage suggests the past. Are we to recognize and restore some of the activities of Tribes which were not punished as "crime" but are in our day and culture? Exactly what is it about Indian culture we are to recognize; is it their clothing; is it their dancing; their singing? The Courts do not say but they imply we are to recognize superior water rights of the Tribes as if that was part of their culture. However, the culture of the tribes never understood particular water rights.

When it comes to Indian rights, parts of the Montana Constitution are ignored or considered null and void. We constantly read that Montana has to obey "federal law". Usually, the meaning of federal law is the interpretation of federal law by the courts. **Shook** states the Tribes can be classified not by race but by a political distinction. Yet **Shook** does not address Article 2, Section 4, which refers to political rights, **social origin** or political ideas. Common sense tells us Tribes do have a social origin (after all, they are tribal according to race, name and history) and are given rights due to their political standing. Therefore, it is understandable that the Court ignored this as it would have shown discrimination. They could have addressed it via *sua sponte*. The objectors are sure, based on past precedent, they would have found a way around this.

Article 2, Section 4 is ignored or rationalized away and Article IX, Section 3, (3) is null and void. Also ignored or rationalized was the Fourteenth Amendment presented earlier. Arguers will further list a plethora of court cases telling us of need for special treatment due to a "unique obligation". Constitutions do not spell out special treatment or "unique obligations." This same argument has been used with different words to justify discriminatory, affirmative actions for blacks.

Despite the plethora of court cases, Courts–as well as Tribes, Compacting Commissions and Legislatures–are bound to the U.S. Constitution. Marshall stated over 200 years ago in **Marbury vs Madison** the following: "A legislative act contrary to the constitution is not law" and "an act of the legislature repugnant to the constitution is void." Still later Marshall stated, "**that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by the instrument."** There you have it, even courts are bound by the

Constitution. So any decision by a court that is not bound by constitutional moorings is repugnant and equally void.

The Specious Use of "Non-Tribal Water Users"

Arguers will use the phrase "**non-Tribal water users**" when referring to non-tribal members within the Reservation (they will also not use "within"; instead, they will use "on"). Why do they do this? They do not want to adequately label the non-Tribal person as the **private property owner** because they consider the Reservation to NOT be **diminished.** Furthermore, the phrase is specious. Those who use this phrase do not understand the distinction between Tribal members who have water rights secured by the state and Tribal members who do not. You have tribal members who do NOT have their land in trust but who are private property owners. Therefore, the phrase "non-Tribal water users" while generally correct, is specious in application. You have three types of water users within the Reservation:

a. Non-Tribal member who owns non-trust land.

b. Tribal Members who own non-trust land.

c. Tribal Members who occupy land held in trust.

It is interesting that Article II of the Compact on Definitions does not define the non-tribal member who owns non-trust land. To do so would interrupt their faulty definition of the Flathead Indian Reservation.

What are arguers saying when they use the phrase "non-Tribal water users"? We know they are not referring to c but what about a and b? So those same tribal members who were under state law concerning water administration will also have to be under the jurisdiction of the Flathead Water Management Board? What about their rights to stay under state administration if they choose? The Compact has taken those rights away from these tribal members. Remember the private property owner has the "inalienable right" to pursue water from "time immemorial" just as much as the Tribes. To suggest the Compact does not cede ownership of state water to tribal members, those within and on the Reservation, is an absurdity. Others have gone so far as to say: "The Compact is a negotiated settlement of water use rights, not water ownership." Then why does the Compact use the term "co-ownership?" At best this is sloppy; at worst it does indicate ownership. We read the Tribes have Co-Ownership of a water right at Milltown Dam with Montana Fish Wildlife and Parks in Basin 76 G. The objectors have already referred in

Part I to the specious term "water right." So, what does "ownership" mean? The Compacting parties technically use terms all over the place such as beneficial use permit, water right, water usage, etc., with sloppy definitions and contradictory applications. Furthermore, if the Tribes have certain water rights since "time immemorial", then as a practical matter, the State does not own the water - for the ownership and right to this water predates any treaty and any Constitution. Let us get real; the State does not actually own water. It would be like saying the state owns air. Logically, it is absurd that the state owns the rainwater that falls on your property. Practically the state controls the use of water, it does not own water despite the language of the Montana Constitution.

Therefore, the Compact, as a practical matter, ceded or gave up the right to control the use of water (or ownership as others would describe it) and gave it to the Tribes despite the semantic arguments to the contrary. In fact, it does cede the administration of water rights and future beneficial water usage to the Tribes under the Flathead Reservation Water Management Board despite what others have said concerning the Tribes working with the DNRC on this matter.

Finally, The Tribes neither own their use of the water nor their Water Rights officially. According to Article IV – Implementation of Compact, we read in A:

> Trust Status of Tribal Water Right. The Tribal Water Right shall be held in trust by the United States for the benefit of the Tribes, their members and Allottees.

So even here we see the specious use of the term "water right" as the United States has the power to dissolve this trust and therefore negate this tribal Water Right. There is, in essence, a beneficial use permit being given by the United States to the Tribes, even though supposedly their water rights go back to "time immemorial" even before the United States was created. What a contradiction!!

Concluding Remarks on Equal Protection

The Reserved Water Rights Compact Commission held a public meeting on August 2, 2012. At that meeting the overall purpose of the Compact in removing the authority of the State over non-tribal members within the Flathead Reservation was extraordinarily stated by the chairman, Chris Tweeten. He referred to the "Grand Bargain" by stating:

> . . . **the response is to remind the tribes about the Grand Bargain, and the fact that we agreed to do this extraordinary thing, frankly, with respect to agreeing to subject or to remove non-Indian rights on the reservation from the jurisdiction and control of the state and place them somewhere else at the tribe's request**. . ." (See the attached Affidavit by Terry Backs as set forth in #1513, #1451, #1462, #1453 and # 1491)

Why would this be extraordinary? Only if the practical effects of the Compact were to deny the constitutional rights of the non-tribal private property owners within the Reservation.

Let us review: The proponents of the Compact propose that it be ratified and decreed due to the following:

a. Unique obligation to the Tribes
b. Cultural heritage of American Indians
c. Federal law and court cases demand it
d. Time Immemorial
e. Hellgate Treaty

The above list does not matter because one issue trumps them all – the equal protection guarantee of the U.S. and Montana Constitution.

The Shifting Sands of Different Rules and Laws

Some, in regard to tribal favoritism and tribal conflicts with private property owners within the Reservation, (again they say ON the Reservation) have stated to the effect the following:

> **"You should have known that living on the Reservation would make you subject to different rules than others throughout the state**."

This is an inane idea or comment if one understands the mindset of homesteaders who purchased "surplus lands". What these different rules are, we are not told, but usually it is about the jurisdictional conflicts of land ownership, hunting and fishing rights, law enforcement and water rights.

Let us look at a similar example. If one is living within Flathead County and does not like the local ordinances, he does have the option to move to a county or city where he does like the local ordinances. However, he has a second option due to our **republican form of government;** he is represented as a taxpayer and a resident of the state of Montana by local officials {**The U.S. Constitution is to guarantee to every state a republican form of government. Both the State and the Federal Government has, with the Compact, violated that**}. He can cooperate with others who similarly do not like the local ordinances, petition and

protest to the local governments, and if they do not listen, solicit candidates to run against them and vote them out. Therefore the individual taxpayer always lives with the hope that these onerous local ordinances can be changed.

In the present situation within the Reservation, the Flathead Reservation Water Management Board governs the administration of water rights within the Reservation. Granted the private property owner could move away as an option, but the second option is removed. He/she is not represented by the Tribes, and cannot vote off the two tribal members on the Board, nor the influence of those two on a third member. Even if one contends the objectors are represented by the Governor's two appointed representatives, the Governor, whoever that might be in the future, is locked in to appointing two representatives from within the Reservation- not statewide.

History of Different Rules

When Joseph Meingassner purchased the original title of the objector Rick Jore's property, what was his mind set? He obviously thought what he was doing was lawful, legal and proper. After all, the Flathead Indian Reservation Allotment Act of 1904 passed by Congress allowed him to purchase "surplus lands." Was he a prophet to know the controversy this would lead? Of course not! Joseph lived until 1948 and is buried in the Ronan Cemetery. He lived to see the Indian Citizenship Act of 1924. He lived to see the Indian Reorganization Act of 1934 which stated his land would not be affected. Did he live to see the shifting sands of court cases? No! While Joseph was alive when the **Winters** case was settled in 1908, likely he had no understanding. The Water Court must view the understanding of the property owner when he first purchased the property as to the far-reaching effects of this decision on the future of his property. Furthermore, if he had read the decision (which he probably did not), he would have reasoned that this decision affected the Fort Belknap Reservation and not the Flathead Reservation.

Peter Ronan, agent of BIA, was the government agent for the Flathead Indian Reservation between 1877 and 1893 and he tried to obey the instructions of the Department of Interior to induce the "Indians to labor in civilized pursuits." Jay William Spehar in his paper (1980) entitled "*The Reformation American Indian Policy and the Flathead Confederation, 1877-1983*", page 52 states that "*Ronan agreed with the reformers' goals of civilization and*

assimilation for the American Indians." (See Montana State University, **scholarworks.montana, edu**)

That this was still the goal accepted by the Tribes is the fact that the Salish and Kootenai Confederation incorporated themselves in 1934. Why would they do this if they were a "sovereign nation?" This act, itself, illustrates that they did not consider themselves a sovereign nation!

So how could any property owner ever think he was living under different rules? Furthermore, the fact that criminal jurisdiction over the non-Indian within tribal land is with both federal and state jurisdictions continually suggests to the private property owner that he does not live by different rules. In conclusion, the mindset of most non-Tribal owners of non-trust land for decades was the **assimilation** of the Tribes.

A Graph Illustrating Violation of Equal Protection and Application of "Time Immemorial"

Authorities for Water	**Tribal Members**	**Tribal Members/ Non-trust land**	**Non-Tribal Non-trust land**
State of Montana	No	No	No
Flathead Water Reservation Board	Yes	Yes	Yes
Time Immemorial "inalienable right to usage of water"	Yes	Yes	Yes

2. Due Process - Objectors have brought this issue up and is on page 7 of objection #1513.

a. What is due process? It would seem odd that after thousands of court cases (including city, state and federal) in America since its founding, the objectors would have to define the terms. Due process is mentioned in both the U.S. and Montana Constitutions. It is considered by Montana as a fundamental right under Article II, Section 17. Due process implies a process by which a person has an official notice, an opportunity to be heard, and an impartial judge, tribunal or jury. It has a fourth and fifth element in many cases, judgment to be meant by one's peers and right to appeal. The U.S. Constitution has **mandated** due process upon the States in the 14th Amendment. The 14th Amendment goes even further in protecting the citizens of a

state. It states a state cannot "*make or enforce any law which shall abridge the privileges. . . . of citizens of the United States*. If the Compacting Parties try to argue that water rights are beneficial use privileges, it does them no good under the 14th Amendment, particularly when we have here the State of Montana involved in depriving the objector of his citizenship rights. Under the Compact, it is not the State of Montana whose authority the objectors are dealing with, but the Flathead Reservation Water Management Board whose members are to be comprised of individuals who represent tribal interests even with the appointments by the Governor.

We have in this case, four issues that deal with material facts: (1) Collusion; (2) Fraud; (3) Overreach; and (4) Material injury to the objector's property. All these issues require adjudication or findings of fact. Normally, a jury would determine in a civil matter the facts depending on the preponderance of the evidence.

Jury Trial

The pillar of due process is the right of a jury trial. Montana has language dealing with this right in Article II, Section 26 where it states the right of jury trial is "**is secured by all and shall remain inviolate**." This includes both civil and criminal. The only exception stated is by agreement by the parties to not have a jury trial. Furthermore, the language of this enumerated fundamental right uses the helping future tense verb "***shall***" not "*may*". So, it must be provided in the future and no one, including the courts, can violate this right in the future.

What does the word "inviolate" mean? As usual, the word is not defined in the Montana Constitution and neither do the statutes of Montana define it. It usually means as follows: "*free from violation, not broken, infringed or impaired*" (Black's Law Dictionary). Under the plain meaning of words principle, the Montana Constitution and the Laws of Montana, the right to a jury trial shall not be taken away unless the person consents to not having one.

The right to a jury trial is stated also in Rule 38 of the Montana Rules of Procedure Title 25, Chapter 20, under VI. Trials, where the right to trial by jury under (a) "is **preserved** to the parties involved." Rule 39 even allows for an advisory jury as follows:

> c) Advisory Jury; Jury Trial by Consent. In an action not triable of right by a jury, the court, on motion or on its own:
> (1) may try any issue with an advisory jury; or
> (2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right

Yet despite all of the above, the objectors read under the Water Court Adjudication Rules Rule 20 the following: "*No Right to Jury Trial*". So obviously, Courts can determine what is inviolate and what is not. A jury trial even in civil matters is not a right preserved or inviolate in the Water Court. It appears that a judicial fiat against a jury trial evolved from 1987 to 1992. You do not find a denial of a jury trial in the Water Court by the Montana Supreme Court Water Right Claim Examination Rules of 1987 (State Law Library). Yet a Water Court decision of July 13, 1992, refers to these same rules of 1992. Clearly the Court is in violation of the constitutional language of Article II, Section 26, and has provided no rational, reasonable reason to deny a jury as a trier of facts in this case either normal or advisory. It will be interesting to see how the Compacting Parties will deny the right to a jury trial in civil matters.

b. Flathead Reservation Water Management Board

The uniqueness of this Board is obvious. No other compact with tribes has such a board, which, itself, is an example of unequal treatment. The arguments against favoritism against the tribes are not new (even the stale, old arguments in favor); however, the creation of this Board reveals even more how Compacting parties view the Tribes in a "most favored light."

In the Compact, in Appendix 1, Article IV, under I, the heading entitled **Administration: Establishments of Flathead Reservation Water Management Board** we read that the Board is the:

> . . . exclusive regulatory body on the Reservation for the Issuance of Appropriation Rights and authorizations for Changes in Use of Appropriation Rights and Existing Uses. The Board shall also have exclusive jurisdiction to resolve any controversy over the meaning and interpretation of the Compact on the Reservation.

The objectors are confused as to what kind of regulatory body this Board is! We read elsewhere that the Board is a "*public agency"* in the context of the right to know laws (See Article IV.1.7.) The Board is an amalgamation of Tribal and State interests. Considering the Separation of Powers concept, what branch of government is this Board under? For example, Administrative Agencies are under the Executive branch of Government. It appears in the future if this Compact is approved by the Water Court, the State as a compacting party can pass no law or amendment concerning this Board without Tribal approval (See objectors arguments later in this brief under Separation of Powers).

This leads to our first Due Process controversy:

(1) **Exclusive Jurisdiction** - If the Board has exclusive jurisdiction, how can any court of competent jurisdiction ever resolve any issue? Does not "*exclusive jurisdiction*" preclude any court involvement in the future concerning any change of appropriation, any use, and in any controversy over the meaning and interpretation of the compact? A person can appeal a Board's decision to a Court of Competent Jurisdiction in Article IV. I. 6. a., where we read the following:

> Decisions by the Board shall be effective immediately, unless stayed by the Board. Persons involved in the proceedings before the Board may appeal any final decision by the Board to a Court of Competent Jurisdiction within thirty days of such decision. An appeal of a final decision of the Board shall be styled as a petition for judicial review of an agency decision pursuant to the rules of procedure of the court from which review is sought. The petition for judicial review shall be filed with the Board and the court and served upon all Persons involved in the proceeding before the Board, as well as the Tribes, the State and the United States. Service shall be accomplished according to the requirements of the court's rules of procedure.

Yet, under the definition below of "*Court of Competent Jurisdiction*" in Article II, # 26, we see that both parties must consent to which court, otherwise the dispute goes to federal court by default:

> **Court of Competent Jurisdiction** means a State or Tribal court that otherwise has jurisdiction over the matter so long as the parties to the dispute to be submitted to that court consent to its exercise of jurisdiction, but if no such court exists, a Federal court.

But even here there is a conflict; for how can one appeal to a court of competent jurisdiction if the Board has **exclusive jurisdiction**?? What the Legislature should have done is left out the term "exclusive"!

{The term "**exclusive**" has been used by the Montana Supreme Court. There is no doubt how the Court uses this term when it comes to interpreting the Constitution. Courts have falsely stated that **Marbury** gives them exclusive authority to determine what the law says, and they have stretched this to include the Constitution. In **Brown vs Gianforte**, OP 21-0125, decided on June 10, 2021, the Court stated this erroneous opinion in ¶ 24 "*Since Marbury, it has been accepted that determining the constitutionality of a statute is the* ***exclusive*** *province of the judicial branch"* (emphasis by objector). You will never find language giving that exclusive authority to the Courts in **Marbury**. In essence, this faulty view contends that officers of all other branches of government take an oath not to the Constitution but to the Supreme Court's interpretation of it.

In **Mclaughlin II vs Montana Legislature**, OP 21-0173, in its July 14, 2021 decision, the Court again used the term **exclusive** to justify its authority in determining constitutional issues and questions of law (the Montana Legislature has questioned its authority due to several issues) by stating: . . . "*under the exclusive constitutional power and authority of this Court under Article III, Section 1, and Article VII, Sections 1-2(1), of the Montana Constitution.*" The Court went further in paragraph ¶ 18 by saying: "*Since the early 1800's the idea that the Supreme Court had the power to pass upon constitutional questions and that its decisions were final and binding upon the other two departments of government has been widely accepted."* There is no confusion or ambiguity as to what the Court means by "***exclusive***" here! It believes and will vigorously defend its exclusive authority - that its decisions are final and binding on the other two branches of government.}

It will be interesting to see how the Compacting parties will swat the issue of the exclusive authority of the Board away.

We suppose if both parties consent to jurisdiction by a state court for judicial review on any dispute, the definition provided in Article II, #26 MIGHT allow that. However, it would be subject to a consensual agreement. The Tribes and the Board have the authority to deny judicial review by a state court. No other regulatory or public body, agency, etc., in Montana denies the possibility of judicial review in the state courts of Montana. This is an extreme violation of due process by removing the jurisdiction of the State of Montana to its citizens within the Reservation.

(2) **Transference of Due Process Rights to the Water Board –** Can Montana negotiate or transfer citizen's due process rights to the Water Board? In Appendix 1, Article IV. I. 5. under Powers and Duties we read that the Board has the following powers:

a. Promulgate procedures
b. Hold hearings
c. Administer oaths
d. Take evidence
e. Issue subpoenas
f. Compel attendance of witnesses
g. Grant declaratory and injunctive relief
h. Temporary orders
i. Impose fines and any kind of equitable relief
j. Issue written decisions and dissenting opinions

Not only is this an incredible transference of due process procedures but it also is a transference of powers normally reserved for the judicial branch of government. A question must be asked, did the Legislature give judicial authority to the Water Board, which does not have this lawful authority, to adjudicate the rights of non-Tribal citizens within the Reservation? That right under the Separation of Powers is only given to our courts. Subpoenas are enforced by courts!

{For example, the agency, Montana Dept. of Revenue, does not have an initial subpoena power; that authority and jurisdiction came from the District Court in Lewis and Clark County according to 15-31-505, MCA. There appear to be at least four exceptions dealing with public bodies: (1) Prosecutors have the authority to request an investigative subpoena (by affidavit) under MCA 46-4-301; (2) Montana has allowed an "investigative subpoena" to the Child Support Enforcement Division (CSED) in establishing a support obligation. (3) The Commissioner of Human Rights in Montana appears to have subpoena powers (according to 49-2-203 (2) this also appears to be an "investigative subpoena"; (4) County Commissioners may issue subpoenas. The powers of the Water Board do not define its subpoena power by saying "investigative subpoena" to conduct investigations. Even in the CSED case, CSED has to go to Court to enforce a non-response to an investigative subpoena. What Court would the Water Board go to enforce its subpoena? What part of an executive branch and can a petitioner go to court to challenge a subpoena before a final decision?. Is the Water Court free to infer this enforcement power or to surmise the intent of the Legislature?}

We must address three other issues: What procedures has/will the Water Board promulgate? And what kind of declaratory and injunctive orders are they giving? What kind of Oath?

Do the procedures promulgated by the Water Board follow constitutional provisions and the Montana Rules of Civil Procedure or possibly Federal Rules of Procedure? Rules of **Procedure** are not defined in the Compact. While judicial review, earlier stated, must comply with "court's rules of procedure," we are not told exactly what model the procedures of the Board follows. Again, these objectors insist on the Due Process Rights given by the Montana Constitution and Court decisions, not the vague process rights promulgated by the Water Board. Does the Water Board in its initial proceedings deny judicial review of any subpoenas, declaratory rulings until a final decision is made?

Declaratory judgments are given by courts. While agencies can give declaratory rulings, they are not declaratory judgments. Furthermore, in Montana a declaratory ruling is subject to judicial review. Did the Legislature give the Water Board authority for Declaratory Judgments or Declaratory Rulings? Again, we are not told. This authority should be denied by this Water Court due to vagueness.

Concerning oaths: Normally, notary publics, clerk of courts, administrative law judges and other judicial officers administer the oath to witnesses. Therefore, does the Board act in a judicial capacity to administer an oath? Will tribal members and others on the Board, due to tribal culture and religious reasons, object to the form of an ordinary oath?

{Perhaps the key issue here is the phrase "*final decision*". The words are used in Article IV. I. 6. Normally these words are the same as "final judgment" and they mean: *"the last decision from a court that resolves ALL issues in dispute and settles the parties' rights with respect to those issues."* The objectors fear the words "*final decision*" will be twisted to mean any initial decision on any preliminary matters during a hearing before the Water Court as a final decision. If those two words are twisted that way, then a subpoena or temporary order could be subject to judicial review, since initial rulings or decisions made in preliminary matters are considered as "final decisions."}

The Montana Legislature did not have the authority to transfer certain Due Process Rights and Judicial Powers to the Water Board. Those belong particularly to the courts of Montana. Surely this is an overreach by the Legislature. The objectors will pursue this issue more fully later in this brief.

2. **Separation of Powers –** There is a branch of science called Hermeneutics. It has very important rules of how one is to interpret texts, no matter what language. Rules include context, the intent of the writer, to whom he or she was writing to, the audience and, of course, the content itself. These are the rules of basic interpretation. Often texts are complicated, and even worse, vague. It is difficult to ascertain the person(s) intent or to understand what is written. Therefore, it is always best to write with clarity and precision so that the reader can understand the intention of the writer. It is often referred to as "plain language". Plain language gives the reader almost immediate understanding of the text they are reading.

The objectors will focus on the Montana Legislature's intent of creating the Flathead Reservation Water Management Board; is the language of the enumerated duties and powers of

the Board understandable; and is the creation of the Board constitutional. There are three questions here: (1) Are the powers and duties of the Board void for vagueness? (2) Exactly what type of entity is the Water Management Board? (3) Is the Board an amalgamation of legislature, executive and judicial powers; powers which are strictly enumerated in the Montana and U.S. Constitution

Vagueness and Confusion

One may ask what the science of hermeneutics or plain language has to do with the Water Compact? Everything! One of the magnifying purposes of hermeneutics is to see if a text is vague. One even looks in vain for other texts to help give the reader understanding. The vagueness doctrine is important in our courts. If a certain text or many texts leave open the constant speculation as to what was the intent or opens the door to all kinds of hypothetical situations, it is void for vagueness. In **Sessions v. Dimaya**, 584 U.S. (April 2018), Justice Gorsuch articulated his view of the stringent void-for-vagueness review:

> Today's vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up. . . Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions. See **Grayned v. City of Rockford,** 408 U. S. 104, 108 –109 (1972) – "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis" . . . Vagueness doctrine represents a procedural, not a substantive, demand. It does not forbid the legislature from acting toward any end it wishes, but only requires it to act with enough clarity that reasonable people can know what is required of them and judges can apply the law consistent with their limited office.

And Gorsuch reminds us of what Hamilton feared in **Federalist No. 78**: "liberty can have nothing to fear from the judiciary alone," it has "everything to fear from" the union of the judicial and legislative powers."

Exactly what is this Water Board? How is it classified? It is labeled a Board. It is a public agency concerning the right to know. It has administrative and regulatory powers. However, the big question is: Is this a "*state created board*" that somehow fulfills the requirements of Art. IX. Sec. 3? The answers to these questions have been varied due to vagueness of the language in the Compact. Under Article II, under Definitions 34, the Board is referred to as an "***entity***". What is an entity? The word does not appear in Title 7 of the Montana Code under General Definitions. In the General Definitions (15) we do have "*Political*

Subdivision" defined. Even the Unity Management Ordinance (UMO) does not fit precisely or comply with how "*Ordinance*" is defined in the General Definitions of Title 7. A Municipality is defined as an entity in (9) of the General Definitions. The Tribes are not considered a municipality. We get some clarity as to what a "governmental entity" is in 2-17-551 (2) MCA where we read: "*Government entity means the state and political subdivisions of the state*". Thus, we have a circular definition – entity is a political subdivision, a political subdivision is an entity! This definition is provided in the context of the "Governmental Internet Information Privacy Act". Later in 2-17-551(8) we are told under "*State*" the following:

> State means the state of Montana or any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

The above definitions **all** refer to entities under the power and authority of the State. It does not fit the jurisdictional powers of this Board for the state has no authority over the Board according to this Compact. It is obvious to these objectors that "*governmental entity*" cannot be the definition of this Board since it is not "democratically operated" nor is it a state entity subject to the executive powers of Montana. The objectors cannot vote out any of the members, particularly the tribally appointed members of the Board.

So, is this Board an "***instrumentality***" of the State? What is an "**instrumentality**"? No one knows. Does this mean the Water Board is an instrument of the state, of the Tribes, of the Federal Government?

"***Instrumentality***" is never used in reference to the Board in the Compact. Even the Board itself is confused on this issue. They paid a Montana Law firm (Browning, Kaleczyc, Berry & Hoven) to define the classification of the Board. The specific question was: "**What is the Flathead Reservation Management Board and how is the Board classified for jurisdiction and authority purposes?"** The law firm issued a Memorandum to the Board and the Office of the Engineer employed by the Board on Nov. 16, 2022. The Memorandum states on page 2:

> The Board is neither a state nor tribal governmental entity; rather it is an amalgamate of both.

The law firm went on to state (page 2,3) the following:

> The Board has been described as a "quasi-governmental" entity. A "quasi-governmental organization is an organization, entity, agency that operates like or has responsibilities

> similar to a unit of government. However quasi-governmental entities also blur the lines of *both public and private sectors*. The Board is a wholly public entity, and while it simplistically resembles a blend of state and tribal government, its functions are unlike any other entity, making its designation difficult.

The law firm said it was a "government instrumentality." The law firm never offered a definition of "instrumentality" from the statutes of Montana. It listed 6 characteristics of an "instrumentality". Where it got those, the law firm did not say. It appears they got it from an IRS document. It must be pointed out that Article II Definitions in the Compact does not list "instrumentality." The compacting parties apparently did not know how to classify the Board except to call it an "entity."

Since the Legislature has not defined "*instrumentality,"* will the Water Court go beyond its boundaries and define the word to confirm the jurisdictional authority of the Board? Even if one were to accept this vague term, it leaves us with an open question: The Board is an instrument of whom, and of which branch of government? Can an instrument created by the Montana Legislature violate the constitutional rights of the citizens who live within (not on) the Reservation? No instrument is allowed to do this, and this supposed "instrumentality" is an example of overreach by the Legislature. Finally, this vagueness of definition opens the door to capricious and arbitrary definitions by the compacting parties.

Even language concerning judicial review of "final decisions" of the Board is vague. Objectors list the following vague items:

(1) **Court of Competent Jurisdiction** – by using the powers of deduction, the objectors believe this will almost always be a Federal District Court. The state courts will likely often be denied to them. While they have the right to vote out or vote in a local district court judge, they do not have that power at the federal level.

(2) **Enforcement powers of the Water Board** – again, this appears to be through the federal district court. According to Article IV. I. 5. b., the Water Board can issue "*subpoenas to compel attendance of witnesses or production of documents or other evidence and to appoint technical experts*."

How would this be enforced? Well, again by a Court of Competent Jurisdiction according to Article IV. I. 6. Again, the objector assumes this would be the Federal District Court.

(3) **Final Decision** – the objectors may appeal "any *final decision* by the Board" in Article IV. I. 6. The procedures would be "*styled as a petition for judicial review of an* ***agency decision***." So

it appears that any initial decision, any temporary order, any **challenge** of a subpoena by a person residing within the Reservation (not on the Reservation) has no recourse to any court until a "*final decision*". No relief can be given to anyone until a final decision is rendered according to Article IV. I. 6. C. Will the court by judicial fiat consider ANY initial decision by the Board as a FINAL decision in order to give some temporary relief? The vagueness of definitions, classifications, powers, and duties concerning this Board is obvious.

Unique Amalgamation of the Water Board

The Montana Constitution recognizes the separation of powers by dividing them into legislative, executive and judicial as per Art III. Section 1. One cannot find the authority for this unique amalgamation in the Montana Constitution. This amalgamation is so unique that one has difficulty defining what this Board is! The Board appears to have similar powers of any administrative agency of Montana. Yet, all administrative agencies in Montana are under the executive branch of government. This Board does not submit to the authority of the Governor of Montana as per 2-15-103 MCA. Therefore, the Water Board as defined, with its additional powers and duties, violates the separation of powers of the Montana Constitution. The Legislature had no authority to create this amalgamation and is an extreme example of overreach.

Oaths of Office for Governmental Entities and Political Subdivisions

All individuals within all branches of government in Montana must take an oath of office to the State and U. S Constitution as per Article III, Section 3. It appears this is not the case for all board members of the Water Board. {Tribal members do not take an oath to uphold the Montana Constitution according to the CSKT Constitution and Bylaws}. This leads us to believe the compacting parties whether wittingly or unwittingly colluded to remove that provision in the compact to further confuse the objectors as to how to classify this Board. All ministerial officers are required to take the oath as prescribed by Article III, Section 3. If an oath is not required, then by implication the Board is not required to obey and follow both the Montana and Federal Constitutions. So, WHERE is ACCOUNTABILITY! This is a serious issue which, by itself, should void the Compact.

The Compact and The Takings Issue

In 2013, the Western Montana Water Users Association sued the Flathead Joint Board of Control saying that the proposed Unitary Water Management Ordinance constituted and "unconstitutional taking of property rights without compensation." This was before District Court Judge C.B. McNeil (DA 13-0154). Judge McNeil agreed it was a taking. The MWRCC (The Montana Reserved Water Rights Compact Commission) incorrectly reported that the Supreme Court overturned this issue of takings.

(**See MWRCC Report at dnrc.mt.gov/rwrcc/Compacts/CSKT/WaterCompactReport.asp on page 10**)

Close examination of the Supreme Court's decision reveals that the constitutionality of a takings was not brought before the Court. McNeil was right. The transfer of ownership of irrigation water rights to the Tribes by giving irrigation districts junior status is a taking without compensation.

The Tribes have basically used this same argument in their claims before the Indian Claims Commission and the Court of Claims. In the Court of Claims (437 F.2d. 458, 1971) CSKT argued land was taken from within the Reservation in 1904 and without compensation. While one might argue, based on morality, the tribes should receive compensation, the legal arguments in this case, again illustrates how Courts pick and choose what they want to read or hear. In this case the Court claimed that the Indians did not give their consent to the selling surplus lands within the Reservation. The Hellgate Treaty says nothing about consent being given by the Tribes before selling the surplus lands. It does say permission must be given before any white settlers settle within the Reservation (there was one exception). Secondly, the Court refers to the selling of surplus lands as a taking and not authorized. Yet, Article 6 of the Treaty refers to the regulations of the Omaha Treaty regarding the surveying of lots for "as a permanent home". The sixth article of the Omaha Treaty specifically refers to the "residue of the land" which may be sold for the benefit of the Tribe. Whether the money received was given to the Tribe is another issue. However, clearly the Treaty authorized the President to sell the "residue" or surplus lands. The Indians were clearly aware of this by 1904. Finally, it was clear that the purpose of the Reservation, which the Court of Claims ignored, was to create permanent homes for individual Indians and not to perpetuate a Tribal Community or permanent homeland in the future.

The United States v. Dann, 470 U.S. 39 (1985) Case

In 1974 Mary and Carrie Dann, of an autonomous band, of the Western Shoshone were sued by the U.S. government concerning their violation of a grazing permit (Taylor Grazing Act) in northwest Nevada. In response to the United States' suit, the Danns claimed that the land has been in the possession of their family from time immemorial, and that their aboriginal title to the land precluded the Government from requiring grazing permits. The local Federal District Court disagreed with the Danns; the Ninth Circuit agreed with the Danns. The District Court stated that aboriginal title had been extinguished when the "*final award of the Indian Claims Commission was certified for payment on December 6, 1979*." Civil No. R-74-60 (Apr. 25, 1980). The Ninth Circuit basically ignored the issue of extinguishment and stated "payment" had not actually occurred.

By way of dictum, the Supreme Court quoted Section 22 (a) of the Indian Commission Act which states as follows:

> When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims. . . . payment of any claim . . . shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

There is no factual dispute that the claims of the CSKT have been resolved before the Indian Claims Commission and the Court of Claims. This includes lands within the reservation (surplus land) and lands outside the reservation. The tribes have been compensated for all lands . In fact, in 1972 Congress gave money to the tribes, in which 85 % of it went to the individual members and 15% went to the tribes. Logically, they should be barred from any further claims on these lands. This would also be true concerning water as water is part of the land. **Dann,** in quoting Section 22, states any payment for any claim discharges the United States of all claims and demands touching any MATTERS involved in the controversy. This would be like a seller who sells his land and is compensated for it, demanding years later the water rights from the new owner. It is a logical absurdity.

Yet, we find here a demand for off-reservation water rights. It is revealing that by omission, the United States has ignored the Dann decision in this matter, as have the tribes.

White Settlers within the Reservation between 1855 and 1895

Concerning the consent of the Tribes to white settlers, as stated earlier, Richard D. Seifried in his paper entitled, "*Early Administration of the Flathead Indian Reservation, 1855-1893*", prepared for his Master of Arts at the University of Montana documents many such violations by both

sides on the Reservation including corruption by special agents (under the authority of the Bureau of Indian Affairs created in 1824) of the Flathead Nation. He also documents numerous incidents of the Tribes engaging in horse stealing from white settlers. Alcohol was sold to the Indians of the Reservation and to the Flathead Indians of the Bitterroot even though agents tried to stop this. No attempt, though complaints were lodged, was made by the Tribes to stop this. In essence they gave their tacit consent. The Tribes even allowed white settlers on the reservation, because many of them were married to Indian wives or half-breeds. Seifried documents that this occurred from 1855 to 1893. So, both sides violated the treaty but Tribes claim that only one side violated the treaty; the U.S. Government.

Fraud, Collusion and Overreach

History and Background

The 1855 Hellgate Treaty which was officially ratified by Congress on March 8, 1859, established the Flathead Indian Reservation. In the Recitals of the Compact (Article I) we read:

> Whereas, pursuant to the Hellgate Treaty of 1855, 12 Stat. 975, the Confederated Salish and Kootenai Tribes reserved the Flathead Indian Reservation.

The above statement is false as the U.S. Government reserved the Reservation from lands ceded by the tribes. Congress then passed the 1889 Enabling Act of February 22, 1889, which permitted the entrance of Montana into the United States. This act states:

> . . . all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States. . . until revoked by the consent of the United States and the people of Montana.

Article VI of the Hellgate Treaty anticipated and authorized "allotment" of parcels of land to individual Indians and, after allotment, sale of the "surplus" land. Congress acted on this provision of the treaty with the passage of the Flathead Indian Reservation Act of 1904 which stated:

> An act for the survey and allotment of lands not embraced within the limits of the Flathead Indian Reservation, in the state of Montana, and the sale and disposal of all surplus lands after allotment.

That Congress could do this under its plenary powers is fully understood. Furthermore, Congress was acting within the purpose of Article VI of the Hellgate Treaty.

In 1934, Congress passed the Indian Reorganization Act. This act changed federal Indian policy when it established "That hereafter no land of any Indian reservation. . . shall be allotted in severalty to any Indian." The Act also restored to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened. . ." However, Sec. 3 of the Act is clear that all lands previously withdrawn from reservation status when it stated that the "valid rights or claims of any persons to any lands so withdrawn. . . shall not be affected by this Act. **The Flathead Indian Reservation Timeline**, previously cited, states that by 1933, 60% of the original tribal allotments were lost to private ownership to non-Indians.

In short, the reservation was legally diminished and title to private land within the boundaries is justified and valid because those lands – under the authority of Congress – withdrew them from the Reservation. Therefore, these lands under private ownership are no longer under "the absolute jurisdiction and control of Congress." Those lands are under the jurisdiction of the State of Montana including the authority to levy taxes on those lands.

The objectors referred in their amended objections to the issues of fraud, collusion and overreach. Also, objectors have alluded to material injury to their private rights and injury to their property. The proof and evidence of fraud, collusion and overreach deal with facts. It must be determined factually if the compacting parties are guilty of the above-mentioned issues. The objectors request a hearing with an advisory jury to determine these facts. In lieu of that, the objectors will briefly articulate why they believe the Compact is the result of collusion, fraud and overreaching. There will also be comments made on material injuries to their rights as citizens.

Intent is an important consideration when showing fraud, collusion and overreaching. The objectors will begin with the intent of the Tribes.

Homeland and Extended Territory/Example of Constructive Fraud

The above heading is an important issue to the Tribes; however, their assertion is full of historical errors and constructive fraud. In June 13, of 2001, the CSKT wrote a letter to Chris Tweeten, then Chairman of the Montana Reserved Water Rights Commission, entitled "*A Proposal for Negotiation of Reserved and Aboriginal Water Rights in Montana*". This proposal had a list of 10 items for the future water administration on the Flathead Indian Reservation.

Many of these items were incorporated into the existing Compact which clearly shows that the Legislature accepted much of the premises and suggestions of the Proposal. There are many false assertions in this Proposal. On page 6, under III, **Framework** the objectors read as follows:

> The Tribes regularly exercise Reservation –wide jurisdiction and authority over Indian and **non-Indian** (emphasis by objectors) on the Flathead Reservation.

This is demonstrably false, which has been shown elsewhere in this brief. Even the tribe's examples do not show this wide jurisdiction. Any authority they have comes from a joint agreement with the State of Montana. The Tribes have little authority over the objectors. At best the quote reflects what the Tribes WANT to have.

In the Appendix of this proposal the tribes give their supporting authorities. In page one of this Appendix, the Tribes state the following: "*The Tribes reserved the Flathead Reservation as their **homeland***" (emphasis by objectors).

Technically, this is incorrect. It was the United States who, by its authority, reserved the Flathead Reservation through the **Hellgate Treaty**. Secondly, the Flathead Nation (Salish) considered the Hellgate Treaty to reserve the Bitterroot Valley. Chief Charlo resisted moving to the Jocko until forced by a proclamation by President Grant. Even then, he and the rest of the tribe did not move until 1892. The Tribes further claim, through this treaty, that they ceded "their claims to vast portions of the Western United States" (See Appendix of *Proposal*, I.A). This is an incredible assertion. As stated earlier in this brief, the Tribes also claimed vast portions of Eastern Montana and in this proposal; they include "vast portions" of the West. Elsewhere the Tribes assert that they have inhabited "*vast aboriginal territory in Montana and elsewhere*" (see III, **FrameWork**, 3. A, page 7, of the *Proposal*). This would cause anger and disbelief to the Crow, the Blackfeet, the Lakota Sioux, the Cheyenne, the Shoshoni, and the Arapaho. Article 5 of the **Fort Laramie Treaty** (Horse Creek Treaty) of 1851 defines the territories of several tribes which included vast lands in central and eastern Montana. It does not describe any territory in eastern or central Montana as the territory of the Salish and Kootenai. Unfortunately, terms like "territory", "inhabited" or "occupy" which did apply to a nomadic lifestyle has now evolved in the present day to "**ownership**". Even the term "*aboriginal*" is a word borrowed by the Tribes from the English language which came into vogue in the 18th century to describe non-white settlers in Australia. No Indian in 1855 would have used the term "**aboriginal title**" even in their language.

Another incredible assertion in the 2001 Proposal is in their **Framework**, 1. C., where they state:

> The State claim to ownership of all waters within the State arises out of Article IX, section 3 of the Montana Constitution, which is subject to the above-cited State and Federal law to the **CONTRARY** (emphasis by objectors) and to the provisions of 2-1-304 (1) Montana Code Annotated, entitled "Jurisdiction on Indian Lands", which expressly disclaims the State's power to alienate or encumber any water rights belonging to any Indian or Tribe that is held in trust by the United States.

The Tribes are as capable as anyone else to see inconsistencies and contradictions. Their quote of 2-1-304 MCA reveals the absurdity of the State of Montana owning ALL the water in Montana (which has been discussed earlier in this brief) but 2-1-304 also indicates the violation of equal protection among the citizens of Montana when it comes to water rights and taxes. Montana says you cannot alienate, encumber or TAX any property of the Indian but we can do so of the non-Indian. In essence, the Tribes state Article IX is void when it comes to Indians. Regrettably, the Legislature and the Federal Government have colluded, with this Compact, to void the provisions of Article IX.

Amalgamation/Conflict of World Views on Property

The Plains Indian did believe in individual property rights for he would claim ownership of his horse, his wife, his lodge, his gun, etc., but when it came to land, the Indian had a different world view which collided with the white man's view of property. Of course, the Tribes did not define "inhabit;" they referred to land as their territory. However, they have learned to use the white man's language to describe their lifestyle of generations past. They believe their nomadic lifestyle of the 19th century should be interpreted by present day concepts of property. However, the Plains Indian of the 1800's did not want the white man ways or to settle down in houses. As Kiowa Chief, White Bear, said in 1867, "I do not want to settle down in a house you would build for us. I love to roam over the wild prairie. There I am free and happy" (See ***Indians***, **Time/Life books**, 1973). Perhaps the demise of the Plains Indians was a combination of hubris from both the Indian and the white man! After all, other Indians in North America did not live a nomadic lifestyle unless driven away by another conquering tribe. Most of the Plains Indians came from the North or the East and therefore developed their nomadic lifestyle due to pressure by warfare with other tribes. The arrival of the horse, probably from the Spaniards, shifted much of their focus from agriculture to hunting and made many of the Indians who occupied the Plains almost totally dependent on the bison (buffalo) for shelter, clothing, tools and food. Therefore, the

Plains Indians constantly were at odds with each other over the "*hunting grounds*" of Eastern Montana and elsewhere. It was territory for hunting but many of them did not live there such as the Salish, the Kootenai and the Nez Pierce. Oddly, the Nez Pierce who hunted in Eastern Montana never claimed it as their territory.

The Tribes had no concept of individual property rights in the 18th century as the white man did. The Indian concept of property was profoundly captured by the Shawnee Chief Tecumseh in 1806:

> The way, the only way to stop this evil is for the red men to unite in claiming a common and equal right in the land, as it was at first, and should be now – for it was never divided, but belongs to all. No tribe has the right to sell, even to each other, much less to strangers. *Sell a country! Why not sell the air, the great sea, as well as the earth?* (See **Indians**, **Ibid**, page 153.)

Tribes in their 2010 Water Rights Settlement Proposal filed on July 27 stated in # 2 of their proposal:

> The Flathead Indian Reservation was reserved by the Tribes as their permanent and exclusive homeland in the Hellgate Treaty of July 16, 1855.

The Hellgate Treaty said nothing of the kind! This is revisionist history. The assertion of vast claims of land by the Tribes and that a permanent homeland was established by the Hellgate Treaty is historically fraudulent.

Was it the intent of the Hellgate Treaty to create a homeland? Facts are stubborn things and unfortunately many courts and legislatures have ignored the plain language of the Treaty. Their myopic eyes see what they want to see - not what is. What is a homeland? Normally, it is the place where one was born, but now it has evolved to mean a place where cultural, national or racial identity has formed. When one becomes a citizen of the United States, a homeland has changed. While one may have been born in a different country, once that person becomes a citizen of the United States, he has a new homeland irrespective of his place of birth.

The Hellgate Treaty of 1855 does not specify a homeland. Regrettably, it uses white man's language to describe cessation of claims by Indians to lands and then, the creation of the Reservation. In Article I of this treaty we have the following language:

> The said confederated tribe of Indians hereby cedes, relinquish and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them. . . .

No Indian at the time understood the concept of "title" or conveyance". These are "white man words." They did understand "occupy" or claimed". So, what we have here is an amalgamation of world views concerning land property: Indian and White Man. The Indian concept of land was communal or communistic. They considered the territory of much of Eastern Montana as "*common hunting ground*." It is this amalgamation that has caused so many to be confused by the conflicting court cases and statutes dealing with the American Indian. The communal concept of land is even admitted in the 2017 Flathead Reservation Timeline where we read concerning the diminishment of the Reservation the following (**opi.mt.gov**; "Indian Education for All Unit").

> **1887 –** The Dawes General Allotment Act was passed, mandating the breaking up of **communal tribal homelands** (emphasis by objectors) and setting a course for catastrophic land loss on the reservation.
>
> **1920 –** A second round of allotments transferred 124,795 acres from **communal Tribal ownership** to individual tribal member ownership.

In Article VI of this treaty, we read the following:

> The President may from time to time, at his discretion, cause the whole, or said portion of such reservation as he may think proper, to be surveyed into lots, and assign the same as such individual families of the said confederated tribes as are willing to avail themselves of the privilege and will locate on the same as a **permanent home**,(emphasis by objector) on the same terms and subject to the same regulations as are provided in the *sixth article of the treaty with the Omahas*,(emphasis by objectors) so far as the same may be applicable.

What was the Purpose and Intent of the Flathead Reservation?

The Hellgate Treaty refers to the Omaha Treaty. When one reads Article 6 of the Omaha Treaty, it is obvious what the intent of a "permanent home" was. It was individual homes on individual lots which were to be surveyed. There is no language in either the Hellgate Treaty or the Omaha Treaty stating explicitly the idea of a "**homeland**". The **INTENT** was to preserve a large piece of land (a large subdivision, so to speak) for future development by which individual homes would be built. In fact, the language in the Omaha treaty warns of the dangers of roaming from their permanent home or refusing to "till" a portion of the lands or refusing to "occupy"; if this happened, the President could cancel the patent. Clearly the intent of the Hellgate Treaty was individual homes and **assimilation**. The purpose of the Treaty was further implemented by the Dawes Act of 1887 which has already been discussed earlier in this brief. The 1904 Flathead

Allotment Act finally caused the Reservation to be surveyed into townships as suggested by Article VI of the Treaty.

Many have ignored the prima facie evidence of Indians, who had allotments, and then sold their land or lost their land eventually to non-Indians. We are told in the Flathead Reservation Timeline (**Ibid**) that from 1911 to 1934, "*most of the Indian allotments were now in non-Indian ownership*. Whatever the pragmatic causes for such loss, it was a blatant violation of the Hellgate Treaty which the Indians were guilty of!! We read the following in Article II of this Treaty the following:

> Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent.

There is no further language as to how the permission or the denial would be done. How could any tribal member ever sell land within the Reservation without permission from the tribes? Yet many tribal members transferred this allotted land to fee patent and sold it to white settlers. Notice that the Treaty does not say "own land" but "reside" but clearly residing would also refer to ownership. So, the idea of **permanent communal** homeland is fraudulent and a legal fiction.

It is unfortunate that the Montana Legislature has accepted the language of the Tribes in negotiating this Compact. It appears that courts and legislatures pick and choose which parts of historical treaties to obey and which part to ignore! It is also true that many provisions of the Hellgate Treaty were ignored or viewed with indifference in the subsequent years after 1855. Both the Tribes and the federal government did this! As stated earlier, Richard D. Seifried in his paper entitled, "*Early Administration of the Flathead Indian Reservation, 1855-1893*" documents many such violations. He records that for several years many of the Flatheads remained in the Bitterroot Valley and would not move to the Jocko Valley (Reservation). This was probably due to a misunderstanding of Article 11 of the Hellgate Treaty. Chief Victor believed that Stevens had promised they could live in the Bitterroot Valley. Perhaps this is so, but Article 11 does not explicitly state this. It states it was up to the "*judgment of the President*" if a special reservation would be created for the Flatheads. It never came! Instead in 1871 President Grant ordered the Flathead Indians to be removed from the Bitterroot Valley. Special Commissioner James A. Garfield was appointed to find a peaceful solution. He met with Charlo (the son of Victor) and two other chiefs. These chiefs told Garfield their understanding of the Treaty was that they had never given up their inherent right to the Bitterroot Valley. Seifried (**Ibid**) records on page 83,

"*They insisted that they had signed the treaty with Stevens with the understanding that they could remain in the valley*."

{The objectors must introduce, here, the concept, issued by some courts, that we must "*understand the Indian point of view"* when analyzing treaties. What the Indians understood in 1855 will always be open for debate, but after several meetings with agents of the Federal Government, they clearly understood by the terms of the Treaty enough to know the government had not kept at least the spirit if not the word of the Treaty in 1890 (by 1891, the Flatheads did finally move from the Bitterroot to the Jocko). Of course, the Tribes never admitted if they violated the Treaty as well. One of the more obvious ones was the settlement of white settlers and half breeds within the Reservation. That white settlers resided within the Reservation from 1855 to 1893 is documented by Siefried (**Ibid**).

Acceptance of the amalgamation of words and phrases from both the 19th and 21st century has resulted in total confusion for the average objector. Nowhere do the Montana statutes provide a definition of "homeland". The objectors request this Court to reject the Tribes' assertions of a permanent homeland for it is factually and historically fraudulent. The intent of the Treaty was permanent settled homes. The assertion of a permanent homeland, if it is not actual fraud, it is constructive fraud as per 28-2-406 (1) MCA.

Fraud in Definitions and Concepts

Earlier in this brief the objectors referred to the specious definition of "Flathead Indian Reservation". This definition was supplied by the Tribes and fraudulently states, "notwithstanding the issuance of any patent". Here "notwithstanding" means "**despite**". So, the Compact defines (Article II, definition 33) the Flathead Indian Reservation as comprising totally Indian land and basically implies the idea that any fee patent land is "occupied land" by non-Indians. Furthermore, the definition does not mention the presence of non-Indians who are property owners within the Reservation. This definition is fraudulent by design.

The Tribes have tried to camouflage the issue of the diminishment of the Reservation through the purchase of surplus and allotted lands by non-Indians by asserting this was "stolen land" or that land within the Reservation was never in the "public domain". In their Amended Complaint filed in May of 2014 (filed in the Federal District Court, Missoula Division, Doc # 27-00044) the tribes assert contradictory statements. First they say on page 9, paragraph 28 the following:

> As a result of expansion of the United States into the North American continent west of the Mississippi River, the United States determined the need to extinguish tribal aboriginal land title throughout the West to allow legally defensible acquisition of land by non-Indians throughout Indian country.

We are told here that the purpose of the United States was to extinguish - which is exactly the purpose of Article VI of the Hellgate Treaty. Its purpose was to extinguish communal Tribal property to individual property owners. **In essence, Tribal land was not initially private ownership land, but rather reserved land held temporarily in trust so that the land could be allotted or sold**!!! From 1909 until 1934, the Flathead Indian Reservation was, in essence, initially diminished and then finally extinguished.

Yet we read later in this same document the following in paragraph 30, "The Treaty caused no break in the chain of Tribal title to Reservation lands. . ." This is false for the intent of the Treaty was to break communal Tribal property. When the Tribes signed this treaty, they agreed to the potentiality of allotment, which was done with the Flathead Allotment Act (FAA) authorized by Art. VI of the treaty.

In paragraph 50, they state there was no entry of non-Indian into the Reservation until after May 22, 1909. This is false as documented by Siefried (**Ibid**).

The Tribes then try to wrangle over the words of "public domain" or "public lands" in paragraphs 55 and 16. They insert the words "Tribal Title" (and Tribal into the language of Section 16 of the FAA) and then say the chain of title analysis suggests no land was ever in the public domains but that Indian land was removed by the fiduciary act of the United States to the non-Indian. They don't want to interpret "surplus land" as "public land". However, how could the "public" ever purchase any land within the Reservation unless it was considered "public land". It is a dispute over words, but the result was the same - land was sold to the public.

The intent of the Tribes was, for many decades, to fraudulently claim lands they did not own, change definitions of words to suit their wants, revise history, and to amalgamate both the white man's words with their concepts of land creating much confusion, and thereby clouding the complex issues of Indian policy. It has worked.

Collusion

Collusion is tough to prove. It does need to be factually determined. The objectors will present certain events which show collusion but will rely on a hearing to factually determine this.

Earlier in this brief, the objectors referred to the Grand Bargain stated by chairman of the Reserved Water Rights Commission, Chris Tweeten. He stated:

> . . . **the response is to remind the tribes about the Grand Bargain, and the fact that we agreed to do this extraordinary thing, frankly, with respect to agreeing to subject or to remove non-Indian rights on the reservation from the jurisdiction and control**

> **of the state and place them somewhere else at the tribe's request**. . ." (See Affidavit of Terry Backs as supplied in # 1491; # 1453; #1513; and #1451)

This collusion of all the Compacting Parties is evident and notice Chris says, "at the tribe's request".

This began as early as May 22, 2014, when the CSKT Tribal Council Minutes reported that State Senator Bruce Tutvedt (SD 3) had thanked them for their $22,000.00 donation to his Political Action Committee: Republicans for Responsible Government. Senator Tutvedt then conveyed to the council that he and Dan Solomon, a State Representative and a seated MRWRCC member, had a plan to "take care of the 60 vote problem in the house". Certain bills required a supermajority in the house. On January 8, 2015 the Rules Committee of the MT House changed its Rules allowing "silver bullets' ' to override a supermajority and " blast" bills out of a committee when those bills failed to pass out of the committee.

Therefore, with some trickery and cleverness, the Tribes and the Minority Party with the cooperation of some Republicans, colluded to devise a plan to overcome the 60-vote margin of the House Rules which is shown by the attached *Affidavit of Art Wittich* (See Affidavit in #1491; #1453; #1451; and #1513)

Finally, that the Compacting parties have colluded in depriving non-Indians within the Reservation of their constitutional rights has been shown on Constitution Issues.

Overreach

This was defined earlier in this brief as follows:

> (*1) Conduct that exceeds established limits (as of authority or due process);*
> *(2) The gaining of an unconscionable advantage over another, especially by unfair or deceptive means*

That deceptive means used to pass the Compact in the House has been shown already by the **Affidavit of Art Wittich.** Overreaching is clearly shown by the actions of the Legislature in making void Article IX of the Montana Constitution, in giving exclusive authority to the Flathead Reservation Water Management Board and in the vague terms of "Flathead Indian Reservation"; "court of competent jurisdiction"; "exclusive jurisdiction" and "final decision." Nor does the Legislature ever recognize the **inalienable right to pursue water** as one of "life's basic necessities". It is confusing to refer to "tribal water rights" by separating it from constitutional water rights. All humans have the inalienable right to pursue water, particularly on land that he or she owns. Once the Reservation was allotted to individual Indians, there were no

more *"tribal water rights*" but rather **constitutional water rights** due to individual land ownership. To stretch or overreach in giving a name such as "*tribal water rights*" confuses the issue and is an extreme example of overreaching by Legislators, by the Federal Government and by the Courts in order to satisfy guilt and the political considerations of Indian policy.

The uniqueness of the creation of the Flathead Reservation Water Management Board is another example of overreaching. No other Compact dealing with the Tribes in Montana has such a Board. The overreaching powers of this Board as enumerated in Article IV.I.5 have been earlier stated. Not only is this Board unconstitutional, it is also an example of overreach by the Montana Legislature.

The exclusiveness of the authority given to this Board also logically assumes no constitutional due process procedures prior to a final decision. The non-Indian is subject to the procedures promulgated by the Water Board. What they will be is totally discretionary. What an overreach!

We are not told if limits are placed by members of the Water Board by an oath to uphold the State and U.S. Constitution. Such an oath limits the members for the oath confirms that all their procedures and decisions are constitutionally limited.

To deny the state courts to the non-Indians within the Reservation is another violation of the Montana Constitution. It is overreaching in that it supersedes the authority and limits given by the Constitution to the state courts which is articulated in Article VII, Sections 4 (1) and (2). District Court jurisdiction extends to "all parts of the state." The definition of "Court of Competent Jurisdiction" as stated in Article II, #26 of the Compact removes the District Court's jurisdiction unless both parties agree. Therefore logically, Article VII (4) is made void with only the Federal Court as an option. No federal law mandates this provision! This was an overreaching agreement by the Compacting Parties.

Finally, we are not sure how to classify the Water Board. The confusing language of "entity," "regulatory body," and "board" does not tell us which branch of government this Board falls under. In desperation, the Board itself consulted a law firm and by a process of elimination suggested it was a "*government instrumentality*." Even the makeup of the Board is an overreach and a violation of constitutional principles. The Board is not republican, and it is not democratic. What an extreme example of overreaching by the Montana Legislature!

Material Injuries to Private Rights

The objectors come now to the last issue: Several amended objections have stated material injuries to their property (# 1491, #1453, #1451 and #1462) One of the main purposes of our courts is to protect individuals from the imposition of injury by majority rule. It is particularly important when the majority takes away or violates a private right from whatever branch of government. When an inalienable or constitutional right is violated or allowed it slowly diminishes the value of such a right.

The cognizable question here is: **Has the Montana Legislature, in ratifying this Compact while representing the citizens within the Flathead Reservation and others outside, materially injured the private rights of those citizens**? Yes, it has. The objectors have listed the constitutional issues in this case. They have stated that equal protection of the law mandated by both State and Federal Constitutions has been violated due to his being similarly situated with citizens outside the Reservation. No longer does the State of Montana have jurisdiction concerning water rights within the Reservation; yet it maintains such jurisdiction with those outside the Reservation. They also have stated that due process procedures have been violated. The Federal Constitution mandates Due Process upon the states through the 14th Amendment. The State of Montana cannot transfer Due Process Rights to the Water Management Board. The Responsibility is the States' alone. So, yes, we do have cognizable violations of private rights!

Even when some Due Process is enumerated in Article IV. I. 5., concerning Powers and Duties of the Water Board, we get mostly **vagueness**, **contradictions**, **many questions** and **absurdities**. Due Process procedures to insure access to a fair and impartial hearing before the Board should not be vague. AND, Due Process Procedures must recognize that rights come from both the State and Federal Constitutions. They do not originate from the Tribes or the Board. How will the Board compel witnesses and enforce subpoenas? It can administer oaths but the Board members themselves do not take an oath!! It says, "The Tribes and State shall enforce the Board's subpoenas." How will this be done? With what Court of Competent Jurisdiction? We are told later in Article IV. I. 6 that judicial review is permitted by a final decision of the Board. What is a final decision? Can a person appeal any initial decision or any temporary order? Can he appeal the issue of a subpoena by asking a court to quash it? How will the state enforce this if both parties disagree on their jurisdiction? Notice it does not say a

Federal Court shall enforce!! No money damages or attorney fees or costs are allowed. To deny the costs to achieve justice is itself an injustice! Who would have thought such a thing would ever be allowed in the United States!

Did the 2015 Montana Legislature give an Informed Consent?

As stated elsewhere, the 2015 Montana Legislature approved the Flathead Water Compact. One of the Standards of Review is whenever there has been a consensual agreement, was it an informed consent? The objectors state the Legislature was not properly informed. Some of this was addressed in the Preface of this Motion/Brief.

Mark Nolan was a representative from Kalispell (HD 10) and attached to this document is a new Exhibit #1 in addition to the exhibits already referred to in this Motion/Brief. He states that on the house floor when the Compact was up for Third Reading, he stood up and asked, "*who of us had read the entire volume of this new proposal of a water compact*." He states that not many hands went up!! It makes sense that many legislators, due to the numerous bills and the time crunch, did not read the bill. They relied on what "experts" had told them about the bill. Obviously, Mark was one of the few who had read the bill. It reminds one of the famous statements by U.S. House Speaker, Nancy Pelosi addressing the ACA (Affordable Care Act). She stated, "We have to pass the bill, so you can find out what is in it."

Tactics used to pass the Compact are somewhat like the tactics used to pass ACA. Art Wittich in his **Affidavit** (which is listed in documents #1513, #1451, #1491, #1453, and# 1462) reveals the tactics used to pass the Compact (SB 262). Objectors have already, earlier in this brief, referred to these tactics. He states SB 262 was given an adverse committee report by the House Judiciary Committee. The bill never did receive the 60-vote margin to overcome the committee action. However, through trickery and overlooking House Rule 40-100 (2) the minority party was able to overturn the rules and pass SB 262 without a supermajority vote. That this was planned even before the session began has already been explained earlier in this brief. Unfortunately, all objectors can do is reveal the collusion and trickery used by supporters of this bill. So yes, collusion was used in passing this Compact. Even here, it was obvious that legislators were confused and were not informed as to what took place. A few did understand, but the uninformed majority prevailed 53-47 in the House.

We must include the persuasive tactics of the Montana Reserved Water Rights Compact Commission (MRWRCC) in its Report, published in January of 2014, for the lack of an informed

consent by the Legislature. While the Report was written to address the questions raised about the Compact during the 2013 legislative session, it does give persuasive factual and legal arguments supporting the Water Compact. However, there is nothing in the Report that addresses the issues of fraud, overreach, and collusion. In fact, there are some misstatements in the Report. We have already shown the Report falsely claims the Montana Supreme Court overturned the takings argument proposed in the local District Court. Additionally, the report conveys the historical fallacy that the Flathead Indian Reservation was reserved by the Tribes. We have already established this is misleading at best and at worst, false. Furthermore, the Report is highly speculative as to the ramifications if the Water Compact is not approved.

Another influence that limited the informed consent of the Legislature was an Attorney General's Opinion. On January 30, 2015, Dale Schowengerdt, State Solicitor, issued an opinion addressing constitutional issues involving the Compact. Schowengerdt tried to divert the issue by stating there is no physical or regulatory takings by the Compact. He ignores the issue of the regulation removing the senior status of irrigators to junior status. He admits this will happen but ignores whether that is a regulatory taking. He also ignores the Compacts demand that irrigators sign a consensual agreement to continue to have water deliveries. He ignores that the Compact limits irrigators not subject to call to 100 gpm. Schowengerdt uses words like "doubtful" and "unique water rights" (which is used to justify violation of equal protection). Finally, Schowengerdt also did not raise the issue of fraud, overreach and collusion. Pertaining to his role in the Attorney General's office, that is incomprehensible.

When you sum up fear tactics, speculative harm, possibility of endless litigations, the approval of a Commission, the approval of an Attorney General and many legislators not reading the Compact, then no wonder you had a Legislature that was not informed enough to give informed consent. This will be shown by testimony from representatives at an evidentiary hearing.

The Walton Water Right

Some objectors, as a successors to an allottee, possess Walton Rights entitling the user to a reserved water right consistent with other Indian Reserved Rights (see # 1451; #1453; #1491, and #1462) and Walton water rights are derived from the *Colville Confederated Tribes v. Walton* (647 F. Ed 42 (9th Circuit, 1981) case. The Compact does not address Walton Water Rights for

objectors who have similar 1855 priority dates as the Tribes. In a recent Montana Supreme Court case, **Scott Ranch v Montana Water Court** (2017 MT 230) the Court reversed the Water Court. The Court stated:

> Non-Indian successor to Indian allotment lands acquire "Walton rights" – a right to share in the reserved waters. . . Scott Ranch possesses a Walton water right as appurtenant to the lands it acquired. . . Scott Ranch claims are recognized under State Law and are not part of the Tribal Water Right.

The Compact does not directly address this issue. Both a Walton Water Right and a Federal Reserved Water Right having the same priority, which has senior status? The Compact does not address this directly, leaving it vague, ambiguous and uncertain.

Arizona v. Navajo Nation (599 U.S. 2023

Recently the Supreme Court addressed the issue of Indian Water Rights in the Navajo Nation. In this decision, the Court finally used the Plain Language Doctrine in interpreting the Treaty of Basque Redondo of 1868. The Navajo Nation had argued that the U. S. Government must take affirmative steps to **secure** water for the Nation. The 9th Circuit agreed but the Supreme Court reversed. It stated the Court ``will not apply common – law trust principles to infer duties not found in the text of a treaty, statute, or regulation." Here nothing in the 1868 treaty establishes a conventional trust relationship with respect to water. Similarly, nothing in the Hellgate Treaty, other than fishing, establishes a trust relationship with the tribes to secure water off-reservation for them. This is exactly what the Compact is trying to do!!

CONCLUSION

In the movie, The Wizard of Oz, we find our characters finally, after many adventures, reaching the Emerald City and meeting the great Wizard. He appears huge, loud, and with lots of fire, smoke and thunder – almost godlike! It takes a little dog to discover the real figure behind the curtain – a bumbling old man. He does not want to reveal who he is and tells the figures before him to ignore the man behind the curtain! There appear to be many metaphors in this story, but what lies behind the curtain is the greatest one. The figure behind the curtain admits to Dorothy that he is a very bad wizard with no real powers at all, although he cleverly hides this.

Similarly, this Water Court case reveals a lot of loud noise, fire, smoke and thunder of the many court cases dealing with the North American Indian. However, when the curtain is pulled back, what we see is revisionist history, fraudulent facts, the evolution of the meaning of words

and the sacred "unique obligation to the Indian." When the curtain is pulled back, we are told: Ignore, Ignore!! We are told to ignore the plain meaning of words. We are told that federal law is court cases and to ignore certain statutes. We are given legal fictions and told to ignore their contradictions. By silence or the lack of response to issues raised, we are told these issues will be ignored. Finally, sadly, we are told that there are no ruby red slippers to send everyone back home. Home is where we treat everyone equally without regard to past wrongs, past discrimination and where our unique obligation is to the Constitution, not to a certain class or race of people. This Water Court case is an opportunity to go back home.

This Motion/Brief has revealed the man behind the curtain. Who is the man today? The historical godlike court cases which have produced a confusing maze of decisions. However, when we go back to the beginning, things become much simpler. Perhaps we can simply things thusly:

1. The Hellgate Treaty and Article 6 of the Omaha Treaty and the Flathead Allotment Act of 1904 clearly tells the common man what the Purpose of the Reservation was: To assimilate the Indian from a nomadic lifestyle; to remove a tribal, collective understanding of land; not to create a permanent homeland but to develop individual land ownership; and to become normal citizens. During this transition period they were allowed their traditional fishing and hunting practices.

2. History shows that by 1933, the Purpose of the Reservation was almost achieved as maps show how much of the Reservation was in private ownership (See the map exhibits of #1453; #1451; #1462, #1491 and # 456).

3. The spurious standards of review which state that we should look at the Indian understanding of any treaty and our "*unique obligation*" should be removed. The Indian is no different than any other man when it comes to understanding legal documents. Today, the times may be different, but it is similar in the sense that we all have difficulty understanding legal documents. While we may not understand the ramifications of a policy or a statute today, in time we do come to understand. So did the Indian.

4. The conflict in the 19th century was two different world views. This was the big elephant in the room as it is today. Collectivism of land vs private ownership (we have that

today), a nomadic lifestyle which was not based on domestic agricultural practices {Yes, there were some tribes in the East who were more agriculturally based, but we are speaking here of the Plains Indians; even some of the Indians of the plains had historically been agriculturally based until driven west by warlike tribes. However, in the west they faced obstacles to farming – the lack of rainfall. Years later, irrigation tried to solve that problem.}. And we must add a religious culture that was not based on Christianity. While many will object to this last one, this was part of the conflict of worldviews.

5. Today, Congress and courts have tried the hybridization method – a blending of Indian culture and the white man. Lincoln said concerning the United States in 1858, it could not survive half free and half slave. Similarly, this country will not survive if we return to tribalism whether Indian tribalism or any other kind of tribalism. It does not work as seen in politics where we try to blend socialism with capitalism. It causes more confusion and puts governments in the position of deciding winners and losers. Our Constitution was written to prevent that. While we should respect the history and culture of the Indian, that does not mean we should admire or adhere to their world view.

6. Finally, remove the concept of federal reserved and aboriginal water rights. The Indian is not different from any other individual. He has the right to pursue water like any other individual on his own piece of land. This trumps any governmental concept of time immemorial or federal reserved water rights.

Keeping it simple is very difficult today. We make the simple complex so often in our lives. Waylon Jennings sang years ago about returning to the "basics of love". So it is, we need to return to the simple truth of what makes America great – the basics of a constitutional republic which is built on certain eternal truths. We do not support tribalism anymore but believe all humanity is equal before God and has the right to pursue life's necessities without harming his neighbor.

In Conclusion, the Compact is not fair or adequate. It has unconstitutional provisions, faulty definitions, and is the product of fraud, collusion and overreaching. It should be nullified and declared void.

Respectfully submitted this 10th day of July, 2024.

DocuSigned by: Rick Jore 9ED3DD89538A4E1... DocuSigned by: Nancy Jore 1424D7D4174D403...

Rick Jore and Nancy, Objectors

DocuSigned by: Frank Marsh and Mary Marsh 295992FB263F4EE...

Frank Marsh and Mary Marsh, Objectors

DocuSigned by: Stephen Dennison AEAA28BBB7284E3...

Stephen Dennison, Objector

TABLE OF AUTHORITIES with Page Numbers within the Brief

1. **Arizona v. Navajo – Page 62**
   599 U.S. (2023)
{Navajos filed suit to compel the U.S. to take affirmative steps to secure needed water for the Tribe. The Court stated: "The Court will not apply *common-law trust principles* to infer duties not found in the text of the treaty, statute or regulation." The Court side with Arizona and reversed the Ninth Circuit decision.}

2. **Johnson & Graham's Lessee v McIntosh – Page 13**
   21 U.S. 543 (1823)
{Chief Justice John Marshall uses the term *Time Immemorial* but does not define it}

3. **United States v Winters & United States v Winans – Page 18**
   207 U.S. ((1908) and U.S. 371 (1905)
{The Winters Doctrine regarding water on Indian Tribal lands is referenced as "reserved water rights"; however, the case was primarily about fishing rights.}

4. **United States v Adair – Page 18**
   723, F.2nd, 1394, 9th Cir. (1983)
{Court refers to "aboriginal" right to water}

5. **Moe v Salish & Kootenai Tribes – Page 20**
   425 U.S. 463 (1976)
{Court basically agreed that if laws designed to help Indian were deemed "*invidious racial discrimination*" an entire Title of U.S. Code (25) would be erased. The Court seems to agree it is an example of racial discrimination but will not make such a decision due to pragmatic considerations. This had been earlier stated in **Morton v Mancari**, 417 U.S. 535 (1974) where preferences given to Indians in hiring practices was due to "unique obligation". As usual,

pragmatic considerations trump obvious equal protection laws. Until recent Supreme Court decisions, the rational was similarly used for affirmative action programs.}

6. **Wolf v Hitchcock – Page 23**
187 U.S. 553 (1903)
{Congress's plenary powers were not limited to the strict language or the "*strict letter of a treaty with the Indians*". This, of course, would allow subsequent acts by Congress such as the Flathead Allotment Act. However, this is another example of the confusing nature of Court decisions. **Arizona v Navajo** while not totally analogous seems to affirm a stricter application of the language of a treaty.}

7. **Rosebud Sioux Tribe v Kneip – Page 25**
430 U.S. 584 (1977)
{Court states Dawes Act & the practice of allotment served up federal assimilationist policy . . . opened up tribal lands to non-Indian settlement diminishing reservations.}

8. **State v Shook – Page 29**
2002 MT 351
{Quotes **Morton v Mancari** which admitted entire title of 25 U.S.C would be erased if racial discrimination would be applied.}

9. **Marbury v Madison – Page 30**
5 U.S. 137
{The Court applied constitutional boundaries to itself as well as the Legislature. Therefore, any court decision is void if "repugnant to the Constitution".}

10. **McLaughlin II v Montana Legislature – Page 39**
OP 21 – 0l73, 493 P.3d 980 (2021)
{The Court uses the term "*exclusive*" in describing their sole authority in determining questions of law and constitutional issues.}

11. **Sessions v Dimaya – Page 40,41**
584 U.S. (2018)
{The Court states: "Vague laws threaten to transfer legislative power. . . . give authorities such as prosecutors and police the power to shape vague statutes through their enforcement decisions. This decision also states:

> The prohibition of vagueness in criminal statutes, "our decision in *Johnson* explained, is an "essential" of due process, required by both "ordinary notions of fair play and the settled rules of law."}

12. **State v Greely v Confederated Salish & Kootenai Tribes – Page 17, 18**
219 MT 76
(Court stated: "Indian reserved water rights are owned by the Indians".}

13. **Colville Confederated Tribe v Walton – Page 61**
647 F.2d 42 (9th Cir. 1981)

{The Court stated that the General Allotment Act represented the shift in federal objectives from segregation of Indians on reservations to assimilation of them in non-Indian culture and society. The Court then went on to conclude that "an Indian allottee may sell his right to reserved water". It further stated as follows:

> The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.

Therefore, we now have what is called Walton Rights. This is due to a lack of guidance from Legislatures concerning what happens to the reserved water right held by the allottee when he or she sells to a non-Indian.}

14. **Scott Ranch v Montana Water Court** 2017 MT 230 **– Page 62**

{Here the Montana Supreme Court reversed a decision by the Water Court (WC – 2016-04). Scott has asked the Water Court to declare it possessed "Walton" rights. Scott stated the Crow Compact did not address "Walton" rights. The Water Court stated – as quoted by the Montana Supreme Court – that the Scott Ranch water rights were appurtenant to an allotment; that the allotee's water rights were part of the Tribal Water Right (Time Immemorial). Scott replied that they were not part of the Tribal Water Right and that they should be subject to the jurisdiction of the State of Montana. The Supreme Court stated:

> Non-Indian successor to Indian allotment lands acquire "Walton" rights – a right to share in the reserved waters. . . Scott Ranch possesses Walter water rights as appurtenances to the lands it acquired. . . Scott Ranch claims are recognized under State law and are not part of the Tribal Water Right.}

15. **Washington vs Washington State Commercial Passenger Fishing Vessel Ass'n – Pages 4, 6 and 19** 443 U.S. 658 (1979)

{Here the U.S. Supreme Court reinterprets the phrase '*in common with*" by stating the following:

> It is true that the words "*in common with"* may be read either as nothing more than a guarantee that individual Indians would have the same right as individual non- Indians or as securing an interest in the fish runs themselves. If we were to continue to construe these words by reference to 19th century property concepts, we might accept the former interpretation, although even "learned lawyers" of the day would probably have offered differing interpretations of the three words.

Here the Court went on to ignore the plain language of the treaty and decided NOT to interpret those words as we all would commonly interpret.}

16**. Governor's Report on the Proposed Water Rights Compact (MWRCC) – Page 46**
dnrc.mt.gov/rwrcc/Compacts/CSKT/WaterCompactReport.asp, January, 2014

{Give purpose of Compact and tries to answer objections}

17. **Holmes vs United States 53 F.2d 960 (10th Cir. 1931) – Page 5**

{Here in a land case involving a Choctaw woman who died interstate concerning land allotted to her. The Court canceled a Warranty Deed in this case given to Holmes as it did not receive the Secretary of Interior's approval. As par of dictum in this case is the following definition of "land":

> The primary meaning of the word "land" at common law is "any ground, soil or earth whatsoever; as arable, meadows, pastures, woods, waters, marshes, furzes and heath." 2 Blackstone, Com. 18. In a more limited sense the term connotes the quantity and character of the interest or estate which the tenant may own in land. Johnson v. Richardson, 33 Miss. 462, 464; Kemp v. Goodnight, 168 Ind. 174, 80 N.E. 160, 161; Bouvier's Law Dictionary, Rawles (3d Revision) vol. 2, p. 1827. We think it was here used in the sense of the entire fee. Notice that the Court defined land as including "waters".}

18. **The United States v. Dann, 470 U.S. 39 (1985) Case – Page 45**

{Here the Court confirmed that a case decided in either an Indian Claim Commission or Court of Claims discharged the U.S. Government of all claims and demands "*touching any of the matters involved in the controversy*".}

19. **70-15-102 MCA Land defined.** Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.

20. **70-15-105. Incident or appurtenance defined.** A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse or of a passage for light, air, or heat from or across the land of another.

21. **28-2-406 MCA** dealing with Constructive Fraud – Page 10

Important Statutes Authorizing the Water Compact

- 85-20-1901 Water rights compact entered into by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the State of Montana, and the United States ratified
- 85-20-1902 Unitary administration and management ordinance

LIST OF EXHIBITS

These exhibits are listed presuming there will be a hearing in which they may be formally entered into evidence. These were listed in many of the objectors Amended Objections.

<u>Affidavits</u>

1. Affidavit of Terry Backs

{Terry was personally present in Helena to hear the Chairman of Reserved Water Rights Commission, Chris Tweeten, refer to the Grand Bargain}

2. Affidavit of Art Wittich

{Art describes the unlawful collusion of the minority party (Democrats) in passing SB 262 (The Compact) in the 2015 Legislative Session.}

(Any Affidavit by the objector showing material injury to his property by this Compact)

Exhibits

1. Flathead Reservation Timeline put out by OPI.

{This Timeline has their definition of Time Immemorial and refers to "*communal tribal homelands*" and that the Dawes Act's purpose as to break up of "communal tribal homelands". It also admits that by 1934 most of the Indian allotments were now in non-Indian ownership}.

2. Map of the Land Status of the Flathead Reservation, 1908 – 1909.

3. Map of Land Status of Flathead Reservation, 1910- 1921.

{Show the great impact of homesteads and allotments – the diminishment of the Reservation}.

4. Map of Land Status of former Flathead Reservation – 1922-1935.

5. Any document referring "*former Flathead Indian Reservation*" such as Department of Interior, Office of Indian Affairs 1939 Map entitled Former Flathead Indian Reservation.

6. Certain pages of the Report on the Proposed Water Rights Compact, prepared by the Montana Reserved Water Rights Compact Commission, January, 2014.

7. Any document referring "*former Flathead Indian Reservation*" such as Department of Interior, Office of Indian Affairs 1939 Map entitled Former Flathead Indian Reservation.

8. Certain pages of the Report on the Proposed Water Rights Compact, prepared by the Montana Reserved Water Rights Compact Commission, January 2014.

9. Flathead Allotment Act of 1904

10. Dawes Act of 1887

11. Memorandum of Browning, Kaleczy, Berry & Hoven (November **16,2022)**

Exhibit #1b (This is a new addition to the exhibits listed in the several objectors joining and signing this Document. Those exhibits will be entered as evidence at an upcoming evidentiary hearing. It is listed as Exhibit 1 in the table of exhibits.)

Mark Noland

From:marknoland50@gmail.com

To:grpvn@aol.com

Sat, Jul 6 at 6:50 PM

During the 2015 legislative session , I was representing the constituents of house district # 10 as Representative Noland. The legislators were given the water compact to vote on. On the house floor I asked who of us had read the entire volume of this new proposal of a water compact. And not very many hands went up. I mentioned If what I have read is correct then we are voting to give away our water rights to another entity instead of keeping it in the hands of the state of Montana.

Respectfully

Senator Mark Noland

Certificate of Compliance

The signed objectors certify that this brief, not counting the Table of Contents, Table of Authorities, List of Exhibits, etc., and Certificate of Service, is less than 30,000 words.

DocuSigned by: Rick Jore 9ED3DD89538A4E1...

DocuSigned by: Nancy Jore 1424D7D4174D403...

Rick and Nancy Jore, Objectors

Certificate of Service

We hereby certify that we have emailed { x } or by regular mail { } a true and accurate copy of the foregoing **Motion Dealing with the Fairness and Adequacy of the Flathead Water Compact** to the following:

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Dated this 10th day of July, 2024.

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DocuSigned by:
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Rick Jore and Nancy Jore, Objectors