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WC-0001-C-2021

October 3, 2024

Montana Water Court

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

CASE NO. WC-0001-C-2021

**REQUEST FOR ORAL ARGUMENT
WITH IDENTIFIED ISSUES
AND REQUEST FOR CLARIFICATION**

Comes now, Mickale Carter, Pro Se Objector, and, pursuant to the Court's September 24, 2024 Order, requests oral argument on the issues raised in her Motion for Summary Judgment, docket no. 1786, and on issues raised in the Compact Parties' Motion to Dismiss and Motion for Summary Judgment, docket no. 1824. Objector Carter requests that the Court inform the parties in a timely manner as to which issues the Court will allow oral argument on and which objectors the Court will allow to present oral argument thereon. Objector Carter also requests clarification on the schedule for arguments of the allowed topics, including when and the time allowed for each.

Objector Carter requests that the Court allow her to orally argue the following issues:

ISSUE 1. The Compact Parties fail to meet their burden. The Flathead Compact violates Montana's Constitution, the law, including the Treaty of Hellgate, and public policy. In addition, the Flathead Compact is not fair, reasonable or equitable.

ISSUE 2. The Compact Parties' claim to off reservation water rights is not supported by the Hellgate Treaty, Winters water rights, or the case law, including cases relied upon by the Compact Parties which either require the State of Washington to protect the salmon fisheries or the State of Alaska to not charge for/license, and to otherwise allow, subsistence fishing by rural Alaskans on certain waters deemed to be "public waters," i.e., federal reserved waters.

ISSUE 3. The Winters water rights priority date for the Flathead Compact is the date the Reservation was created, which was April 18, 1859. Using the wrong priority date for Winters water rights warrants voiding the entire compact.

ISSUE 4. Winters water rights are the on reservation water rights necessary to accomplish the purpose of the Reservation as revealed by the language of the Treaty of Hellgate, interpreted using its meaning when it was approved, i.e., in 1859.

a. A fair reading of the Treaty of Hellgate reveals that the purpose of the Reservation was assimilation which would include the concepts identified, without justification, by the Contract Parties, of a "permanent homeland" and "self sufficiency."

b. The water necessary for assimilation is irrigation of farmlands and water necessary to accomplish the sort of activities described in the Treaty of Hellgate. Not only does the Flathead Compact far exceed this amount, but the Compact Parties make no effort whatsoever to quantify the amount of water necessary to accomplish the purpose of the reservation.

c. As a general rule, the Winters doctrine does not include off reservation water rights. In rare circumstances, i.e., if the purpose of the Reservation would otherwise totally fail, it includes appurtenant waters. The Compact Parties present no evidence that the purpose of the Flathead Reservation would fail without appurtenant waters. Furthermore, the off reservation waters claimed in the Flathead Compact are not "appurtenant" to the Flathead Reservation.

d. Any claimed water rights included in the Flathead Compact for which there is a claim of a priority date as of the date of creation of the Reservation or time immemorial, that are more than what is necessary to accomplish the purpose of the Reservation, are not Winters water rights. Claiming that these water rights are Winters water rights amounts to overreach and consequently is not fair, reasonable or equitable. Similarly, such claims are not within the bounds of the law.

ISSUE 5. The ramification of the Compact Parties' failure to meet the deadlines of MCA 85-2-212 & 221 (3) and MCA 85-2-702 (3) on the water rights claimed in the Flathead Compact.

a. Failure by the Confederated Tribe to meet the deadline of MCA 85-2-212 and MCA 85-2-221 (3), of July 1, 1996, results in the requirement that the Court allow no priority date before July 1, 1973 and that those claimed water rights must go through the same process as all filings, i.e., meet the requirements of Title 85, chapter 2, parts 2 and 7. The Flathead Compact does not meet those requirements.

i. For the Court to hold otherwise amounts to a violation of Section 4 of the Montana Constitution, and the Fourteenth Amendment to the U.S. Constitution, which prohibit discrimination based upon race.

a. The Compact Parties' argument that the tribe is "political" rather than a "racial" group, flies in the face of the fact that in order to be a member of the tribe, a person has to be of at least ¼ Salish and/or Kootenai blood. It also ignores the fact that the members of the tribe are United States citizens and as such should be treated no differently than any other United States citizens, i.e, should enjoy no special privileges.

ii. Abandonment for non-use vs. conclusive presumption of abandonment due to failure to timely file a claim, pursuant to MCA 85-2-226. (Note: Winters water rights, i.e., those water rights necessary to fulfill the purpose of the reservation, cannot be abandoned for non-use.)

b. The Compact Parties admit that they did not meet the July 1, 2013 deadline of MCA 85-2-702 (3). The Compact Parties then aver, without proof, that their claim was filed in June of 2015. Even if they did file their claim in June of 2015, pursuant to MCA 85-2-702, such late filings "must be given treatment similar to that given to all other filings."

i. All other filings must meet the requirements of Title 85, chapter 2, parts 2 and 7. See also, MCA 85-2-228. The Flathead Compact does not meet these requirements.

ISSUE 6. The Flathead Compact violates the prohibition against "depreddations upon the property" of citizens of the United States set forth in Article VIII of the Treaty of Hellgate.

- a. Depredation as defined in 1859, when the Treaty of Hellgate was ratified.
- b. Depredation meaning within the context of the language of Article VIII.
- c. Depredation, includes, inter alia, the taking of water rights, including appurtenant water rights and Walton water rights, as well as the resulting reduction of the value of real property.

ISSUE 7. The impact of Arizona v. Navajo Nation, 599 U.S. ____ (2023).

- a. Treaties are to be interpreted in "light of the treaty's text and history." Id. Slip op. at 2.
- b. Winters water rights include only waters that "arise on, border, cross, underlie, or are encompassed within the reservation." Id. Slip op at 4.
- c. The Court "must adhere to the text of the relevant law---here the treaty." Id. Slip op at 7. "Indian treaties cannot be rewritten or expanded beyond their clear terms." Id. Slip op at 8-9, citing Choctaw Nation v. United States, 318 U.S. 423, 432 (1943).
- d. The Court held that the United States has no duty, pursuant to the treaty, to obtain off reservation water for the use of the Navajo. Id. Slip of at 11. It further held that in order to obtain off reservation water rights, the tribe may assert its claimed interest in off reservation water, including by intervening in cases that affect their claimed interest. Id. Slip op at 12.

ISSUE 8. Interpretation of the Treaty of Hellgate.

- a. Purpose of the Flathead Reservation.
 - i. Article II: "For the use and occupation of said confederated tribes."
 - ii. Article IV: \$120,000 for removal to the reservation, breaking up and fencing farms, building houses and for other necessary objects.
 - iii. Article V: U.S. to provide: free agriculture and industrial schools, including teachers, building, books and supplies; blacksmith shop; tin and gun shop; carpenter's shop; wagon and ploughmaker's shop; employ farmer, blacksmith, tinner, gunsmith, carpenter

wagon and plough maker as instructors for the Indians in the trades; erect a hospital along with providing medicine, furniture and physicians. To be provided for 20 years.

iv. Article VI: Reservation to be surveyed into lots and assigned to families and individuals of said confederated tribes, on the same terms as the sixth article of the treaty with the Omahas.

a. Article 6 of the Treaty with the Omahas.

b. Article I: "Cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them."

c. Article III: "(T)he right of taking fish at all usual and accustomed places, in common with citizens of the territory." (Emphasis added.)

d. Article XIII: Pledge to commit no "depredation upon the property" of United States citizens. And if the pledge is violated, "the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities."

ISSUE 9. Compact Parties' claim that objectors whose water rights are not subject to call are not adversely affected by the Flathead Compact, ignores the fact that the waters of the State of Montana are owned by the state for the beneficial use of **all** the people of Montana. It also ignores the fact that the surface waters impact the availability of ground water.

Respectfully submitted this 3rd day of October, 2024.

OBJECTOR MICKALE CARTER

/s/Mickale Carter
MICKALE CARTER
Bar number 2594

pro se

CERTIFICATE OF SERVICE

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

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/s/ Mickale Carter October 3, 2024