

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

Montana Water Court

Request for Formal Oral Arguments with Listed Speakers

Numerous pro se objectors have collaborated to present the issues they want to address at oral arguments. This request is pursuant to the Court’s Order filed on September 24th. The signers of this formal request do not represent the sum of all objectors who want oral arguments presented on their behalf. The objectors in conjunction with their objections still request a formal hearing on both the law and the disputed facts of this case. We have not waived our hearing rights.

Ambiguities in Oral Arguments

Perhaps clarifications will be done at the next status conference; however, objectors present several questions concerning oral arguments that we would like addressed.

1. We believe the Court should list the issues the judge wants addressed prior to the November 14, 15 date.
2. We do not know the specific day when pro se objectors will present their arguments. We desire that attorneys of record present their arguments on November 14 and pro se objectors present theirs on November 15.
3. How many minutes will be allowed in total for each presenter? No matter which day, will there be rebuttal time?
4. Will the Court deny certain issues listed by objectors for oral arguments?
5. Finally, will the Court allow an issue to be argued even though already argued by others. For example, there is the issue of “takings.” One may present a different argument even though the issue is similar.

6. If the Parties do not present oral arguments, we request they have no opportunity to rebut oral arguments presented by the speakers of pro see objectors. We do understand they would have an opportunity to respond to direct questions from the Court.

Introduction

The objectors understand that oral arguments will be done in conjunction with legal arguments presented in Motions before the Court. These arguments will also be in harmony with the “*broad*” standards of review issued by the Court in its *Preliminary Decree* issued on June 9th of 2022. They were as follows:

- (1) The Compact is “*closely analogous to a consent decree.*”
- (2) The Compact is not the **product** of fraud, overreaching, or collusion between negotiating parties.
- (3) The Compact is fair and reasonable to parties and the **public interest** who were not represented in the negotiations.
- (4) That the public could be “*materially injured*” by the operation of the Compact.
- (5) The standard of “quantification” is inferred from the language of the court concerning “Tribal Water Rights *quantified* in the Flathead Compact.”

What is omitted as a standard of review is: “*The constitutionality of the Compact*” either in its provisions or in its entirety. The Parties’ response to this criterion (Their **Answer Brief to Objection and Omission of Standards of Review**, Docket 1894) is that it is so basic that it does not need special attention. Evidently the other criteria for review are not so basic; therefore, they do need special attention! We believe the constitutionality of any action by governments, whether local, state or federal, should always be listed as a criterion even if it is so

basic as not needing special attention. We suspect that Parties' answer reflects their assumption that the Compact is constitutional and therefore no special attention should be given as to its constitutionality. It must be pointed out that the Parties' Response is rather specious. While they take an oath to the U.S. Constitution, the Tribal Council takes no oath to uphold the Montana Constitution. So, yes, special attention must be given.

The Compacting Parties have introduced two standards of review that are not explicitly stated by the Court. They are: (1) Any **illegality** with the Compact (they have no problem using that word although we could say it is so basic as not needing special attention); and (2) Beyond reasonable doubt (see their **Answer to Objection to Standards of Review**, page 4, of Docket No. 1894). We are mystified why a criminal standard of review, "*beyond a reasonable doubt*" is used in this case. On top of page 40 of the Parties' July 10th brief we get another standard of review (which is why we assume the Parties use the term "illegality"). We read that the "*Court need only be satisfied that the Compact represents a reasonable factual and legal determination.*"

The objectors have put emphasis on certain words above to indicate how broad the standards of review are. It takes a lot of research to discover what the terms mean and how they are used since the Court does not define them. For example, what do we mean by "product?" Also, what do the words "fraud, overreaching and collusion" mean? How do we determine what a "fair, consensual agreement" is and what is meant by "public interest?" Finally, what is "reasonable factual determination?" The objectors have stated that there are disputable facts regarding the history of the Flathead Reservation and also within the Compact.

All these questions are not answered in the Notice of Entry. It is up to the objectors to these broad terms and to the broad standards of review.

In the *Supplemental Notice of Entry*, we are introduced to another **broad** term—“*time immemorial*,” used some 180 times in the Compact and Appendices. It, too, is not defined. The objectors have addressed this broad term in their July 10th Brief.

In the *Court’s Findings of Fact and Conclusions of Law* issued on June 9th, we have a document mentioned that the Court has not revealed to the objectors (perhaps it is in the portal). Evidently the Parties filed corrections to the Compact due to the Montana Water Rights Protection Act (also referred to as the Settlement Act) which was signed by the President on December 27th, 2020, and ratified by the Tribes on December 29th, 2020. The Secretary of the Interior issued a letter on September 21, 2021 (See page 94 of the pdf document of *Preliminary Decree*) stating the Settlement Act does not conflict with the Compact and she authorized the amendments to the Compact as stated in the Settlement Act. (The Settlement Act is referred to by the Parties in their July 10th Brief on page 39 under (3) *Parties Ratification of the Compact*, 2nd paragraph and in footnotes 170,171). What the Secretary of Interior did not address in this letter is whether these amendments changed the Tribal Water Rights. Under the Plain Language Doctrine, they most certainly did!

Therefore, we have another Standard of Review in the Compact as per **Article VII, under Finality, A. 1.**, concerning amendments. Here, we read that any amendments to the Compact which do not affect the water rights of the Tribes can be ratified by the Secretary. However, any change to the water rights must be “*ratified in the same manner as the Compact.*” Due to MWRPA, the Compact is not the same as the one ratified by the Legislature in 2015. The State Legislature never ratified the changes proposed by MWRPA! It is assumed (though we don’t know) that the Tribes ratified the Compact and the MWRPA with their Tribal

Resolution 21-123 of December 29, 2020. However, the State never ratified the changes in obedience to the language of “*ratified in the same manner as the Compact.*”

With the above in mind the objectors present the Issues to be argued.

Issues to be Argued

The following issues are listed with subtopics to be covered:

I Purpose of Flathead Indian Reservation per the Hellgate Treaty.

- a. Permanent homes, not a homeland
- b. Assimilation
- c. Ceding of supposed all territorial lands
- d. Flathead Allotment Act
- e. Diminishment of the Reservation
- f. Revisionist history by the Tribes
- g. First in Time, First in Right

II Constructive Fraud, Collusion, Overreach and Informed Consent

- a. Are there fraudulent elements within the Compact?
- b. Is the WMB an example of overreach outside the Reservation
- c. Are off-reservation water rights an overreach and fraudulent and not supported by history?
- d. Was the 2015 Legislative Session uninformed, with conflict of interest, and persuaded by fear tactics?
- e. Is it fraudulent to claim the tribes are considered a “political classification” even though proof of ¼ blood is required to be a member?
- f. Fraudulent use of the “right to fish” without mentioning “in common with citizens of territory.” Yakama nation is not analogous.

III Constitutional Issues

- a. Equal Protection and Equal Before the Law
- b. The jurisdiction of the Water Management Board (WMB)
- c. Court of Competent Jurisdiction
- d. Takings
- e. Separation of powers.

- f. Can the Montana Legislature delegate due process powers to an “instrumentality” and deny state court jurisdiction?

IV Is the Compact a product of good faith and fairness?

- a. Do the tribes have an unfair advantage due to the “*unique obligation*” to the tribes? Have the courts unfairly accepted this?
- b. Was the process leading to the “product” of the Water Compact fair?
- c. Was the supposed “Grand Bargain” fair to the non-tribal members within the Reservation?
- d. Is locality and physical residency justification to remove state authority over non-tribal members who pay taxes and who are legal residents of the State?
- e. Does the Compact unfairly cause material injury to both public and private interests?

V False and Omitted Definitions within the Compact

- a. Time Immemorial
- b. False definitions in Article II of Compact
- c. Tribal Water Rights
- d. Water Right
- e. Ceded
- f. Inalienable right to water to pursue “life’s necessities

VI The Denial of a Jury/Violation of Article II, Section 26

- a. Is the Water Court a court of equity?
- b. Are there disputed facts for a jury or advisory jury to decide?

VII Was the Mediation/Settlement process fair and was it a violation of professionalism and statutory procedures?

Speakers to Present Oral Arguments

1. Rick Jore
2. Kieth Regier
3. Rick Schoening
4. Kate French, to be added by Motion as an objector as she is the wife of objector, Mark French

The objectors request as a topic for the October 17th status conference an extension for more time to add at least two additional speakers and backup speakers in case one of the speakers listed cannot attend due to unforeseen circumstances such as an emergency event, death in the family, etc.

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Certificate of Service

I hereby certify that on October 14, 2024, I sent a true and correct copy of the foregoing document to each party requiring service via email to the water court at watercourt@mt.gov and to the following Parties:

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