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

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CASE NO. WC-0001-C-2021

ORDER ON PENDING MOTIONS REGARDING COMPACT APPROVAL

INTRODUCTION

On July 10, 2024, the State of Montana ("State"), the Confederated Salish and Kootenai Tribes ("Tribes"), and the United States of America on behalf of the Tribes ("United States") (collectively, the "Compact Parties") filed a joint motion with the Water Court to approve the "Flathead Reservation–State of Montana–United States Compact" (the "Compact") as part of Montana's general stream adjudication (Doc.[1] 1823.00). The motion also asks the Court to enter summary judgment dismissing all remaining objections to the Compact. Several parties who previously filed objections ("Objectors") responded opposing the motion. Some Objectors also filed affirmative motions on various issues relating to Compact approval.

This Order addresses the dispositive motions of the parties and identifies the issues remaining for evidentiary hearings.

[1] As used in this Order, the abbreviation "Doc." refers to the document sequence number in the Court's Full Court Enterprise case management system.

I. BACKGROUND

A. Hellgate Treaty and Flathead Reservation.

On July 16, 1855, the United States executed a treaty with the Bitterroot Salish, Pend d'Oreille, and Kootenai Tribes, commonly known as the "Hellgate Treaty." 12 Stat. 975. At that time most of present-day Montana west of the Continental Divide was part of the Territory of Washington. Territorial governor Issac Stevens negotiated and signed the Hellgate Treaty on behalf of the United States. Stevens also negotiated several other treaties with Pacific Northwest tribes during the same time period.

Under the terms of the Hellgate Treaty, the Tribes "relinquished all right, title and interest in and to what is now most of Montana." *Confederated Salish & Kootenai Tribes of Flathead Rsrv., Montana v. Flathead Irr. & Power Project*, 616 F. Supp. 1292, 1293 (D. Mont. 1985). The treaty reserved to the Tribes land that became the Flathead Indian Reservation (the "Flathead Reservation" or "Reservation"). Hellgate Treaty, Art. 2; *W. Mont. Water Users Ass'n, LLC v. Mission Irrigation Dist*., 2013 MT 92, ¶ 6, 369 Mont. 457, 299 P.3d 346. The Treaty also reserved to the Tribes the "exclusive right of taking fish in all the streams running through or bordering said reservation" and "also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Hellgate Treaty, Art. 3.

The Reservation has been modified since the original treaty. In 1904, Congress passed the Flathead Allotment Act, which allotted lands within the Reservation to individual tribal members. Act of Apr. 23, 1904, Ch. 1495, 33 Stat. 302. In 1909, President Taft issued a proclamation opening additional lands within the Reservation to "[a] persons qualified to make a homestead entry." 36 Stat. 2494. These actions led to some of the land within the Reservation being owned by non-tribal persons, but the actions did not terminate the legal status of the Reservation. *Confederated Salish & Kootenai Tribes of Flathead Rsrv. v. Namen*, 665 F.2d 951 (9th Cir. 1982).

B. Physical and Hydrological Setting.

The Flathead Reservation is in northwest Montana, west of the Continental Divide. The Flathead River flows through the Reservation. Several tributary streams on

the Reservation augment flows in the Flathead River, including the Little Bitterroot River, the Jocko River, Mission Creek, and Crow Creek. These streams in turn have numerous upstream tributaries, including several that flow out of the Mission Mountains. Downstream from the Reservation, the Flathead River joins the Clark Fork River, which then flows west into Idaho, ultimately reaching the Columbia River and the Pacific Ocean.

The Flathead River flows out of Flathead Lake near Polson. The southern portion of Flathead Lake lies within the Reservation boundaries. *See Montana Power Co. v. Rochester*, 127 F.2d 189, 190–91 (9th Cir. 1942). Major tributaries flowing into Flathead Lake include the Swan River and the Flathead River and its forks and tributaries that rise in the mountains upstream from the lake. In addition to Flathead Lake, several other natural lakes exist on the Reservation, including high mountain lakes in the Mission Mountains, which form the Reservation's eastern boundary.

For purposes of Montana's water rights adjudication, the Flathead Reservation lies within hydrologic basins designated as basins 76L, the Flathead River Basin below Flathead Lake, and 76LJ, the Flathead River Basin above and including Flathead Lake.[2] Both basins include lands within and outside of the Reservation boundaries.

C. Water Development.

While some water irrigation development occurred in the Reservation's early days, significant irrigation infrastructure development began shortly after the turn of the 20th century. In 1908, Congress amended the Flathead Allotment Act to provide for irrigation of irrigable lands on the Reservation. The amendment authorized the Secretary of the Interior to construct an irrigation project now called the Flathead Indian Irrigation Project ("FIIP") to deliver irrigation water to irrigable lands on the Flathead Reservation. Act of May 29, 1908, Ch. 216, 35 Stat. 444 (1908).

[2] Basin 76LJ includes the North Fork of the Flathead River, but does not include the Middle Fork (Basin 76I), the South Fork (Basin 76J), or the Swan River (Basin 76K) and their respective tributaries. A general depiction of Montana's hydrologic basins is available here: https://dnrc.mt.gov/Water-Resources/Water-Rights/Adjudication.

The Bureau of Indian Affairs ("BIA") operates FIIP. *See Flathead Irrigation Dist. v. Jewell*, 121 F. Supp. 3d 1008 (D. Mont. 2015), *aff'd sub nom. Flathead Irrigation Dist. v. Zinke*, 725 F. App'x 507 (9th Cir. 2018) (dismissing challenge to BIA's authority). FIIP's water supply includes diversions from several water sources in addition to the mainstem of the Flathead River. FIIP conveys water from these sources through an extensive system of canals and reservoirs. This vast water conveyance network allows FIIP to deliver water to at least 134,790 irrigated acres.[3] The irrigated acreage is owned by a variety of persons and entities, including the Tribes, individual tribal members, non-Indian allottees, the State, BIA, and the United States Fish and Wildlife Service ("FWS"). Entities that receive water delivered from FIIP and its system include the Mission Irrigation District and the Jocko Irrigation District.

D. Water Rights Litigation.

1. Reserved Water Rights Litigation.

In 1908, the United States Supreme Court held that the federal government impliedly reserved water for Indian tribes when the United States entered into treaties creating Indian reservations. *Winters v. United States*, 207 U.S. 564 (1908). *Winters* involved water rights associated with the Fort Belknap Reservation in north-central Montana. The reservation was established through a treaty and series of statutes that progressively diminished the amount of land reserved to the Gros Ventre and Assiniboine Tribes. After non-Indian irrigators constructed a diversion works upstream from the reservation, the United States sued to protect the rights of the tribes. Even though the agreements with the United States did not specifically reserve water to the tribes, the

[3] "Staff Report on the Confederated Salish and Kootenai – Montana Compact" (2022) ("Staff Report"), at 38. The actual number of irrigated acres serviced by the FIIP project water differs in various documents. For example, the report titled "The Flathead Project" prepared by Garrit Voggesser for the Bureau of Reclamation, attached as Exhibit A to the Mission-Jocko Motion, lists the irrigated acreage as 127,000 acres, a figure that has been cited in several cases. *E.g., Joint Bd. of Control of Flathead, Mission & Jocko Irr. Districts v. United States*, 862 F.2d 195, 197 (9th Cir. 1988) ("FIPP supplies water to irrigate over 127,000 acres of land, some of which are held in trust by the United States for the Tribes and their members").

Supreme Court held water rights were reserved to the tribes to fulfill the purpose of the reservation.

The *Winters* doctrine has been applied to rights reserved on the Flathead Reservation. In 1939, the Ninth Circuit cited *Winters* in a dispute between a non-tribal party and the United States on behalf of the Tribes. Based on *Winters* the Court ruled the "waters of Mud Creek were impliedly reserved by the [Hellgate] treaty." The Court went on to conclude the "United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians." *United States v. McIntire,* 101 F.2d 650, 653 (9th Cir. 1939); *see also*, *Big Four v. Bisson* (1957), 132 Mont. 87, 89, 314 P.2d 863 (1957) (in a case arising on the Flathead Reservation, the Montana Supreme Court confirmed that "title to the waters was vested in the United States as trustee for the Indians").

2. *Flathead Reservation Water Use Litigation*.

Water use on the Flathead Reservation has been the source of decades of litigation, far more than any other reservation in Montana. Some of the litigation has involved disputes over FIIP control in relation to the irrigation districts. *E.g., Flathead Irrigation Dist. v. Jewell*, 121 F. Supp. 3d 1008. Other litigation addressed the relative priorities of reserved water use on the Reservation. In *Joint Bd. of Control of Flathead, Mission & Jocko Irr. Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987) ("*Joint Bd. of Control I*"), the Ninth Circuit held the Tribes' instream rights are senior to all irrigation rights because they are based on an aboriginal fishing right with a time immemorial priority date.

There also has been litigation between the State of Montana and the Tribes as to the State's authority to authorize permits and change authorizations for non-tribal water use on the Reservation. In a series of cases beginning in the mid-1990s, the Montana Supreme Court concluded the State could not issue new permits or authorize changes until the Tribe's water rights were quantified, either through settlements or through

litigation in an *inter se* proceeding.[4] *See In re Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner,* 278 Mont. 50, 923 P.2d 1073 (1996)("*Ciotti*"); *Confederated Salish & Kootenai Tribes v. Clinch*, 1999 MT 342, 297 Mont. 448, 992 P.2d 244; *Confederated Salish & Kootenai Tribes v. Stults*, 2002 MT 280, 312 Mont. 420, 59 P.3d 1093; *Confederated Salish & Kootenai Tribes v. Clinch*, 2007 MT 63, 336 Mont. 302, 158 P.3d 377. The State also has been adverse to the Tribes in other water-related cases. *E.g., Confederated Salish & Kootenai Tribes of Flathead Rsrv., Montana v. Flathead Irr. & Power Project,* 616 F. Supp. 1292 (D. Mont. 1985) (authorizing the State to intervene on the side of irrigators in injunction proceeding).

3. Prior Adjudication Proceedings.

On April 5, 1979, the United States filed a lawsuit in federal district court seeking to quantify the Tribe's water rights. *United States v. Abell*, CIV-79-33 (D. Mont.).[5] *Abell* was one of several cases filed in Montana federal district court to adjudicate water rights for tribes. The district courts dismissed these cases in favor of Montana's state adjudication proceedings. After the Ninth Circuit reversed, the United States Supreme Court granted Montana's petition for certiorari and ruled the Montana state courts were an adequate forum to adjudicate the reserved rights. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 570 (1983). As part of the *San Carlos Apache Tribe* case, the Supreme Court stated:

> We also emphasize, as we did in *Colorado River,* that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

[4] An "inter sese" or "inter se" proceeding is one where each water rights claim by its "very nature [raises] issues inter se as to all such parties for the determination of one claim necessarily affects the amount available for the other claims." *Nevada v. United States,* 463 U.S. 110, 140 (1983).

[5] The Complaint in *Abell* is attached as an exhibit to Doc. 1919.00 (responses of Elena Ingraham (Motta) and Rick and Nancy Jore to Compact Parties Motion).

San Carlos Apache Tribe of Arizona, 463 U.S. at 571.

After the United States Supreme Court decided *San Carlos Apache Tribe*, the Montana Attorney General petitioned the Montana Supreme Court to address the adequacy of Montana's adjudication for purposes of McCarren Amendment compliance.[6] In *State ex rel. Greely v. Confederated Salish and Kootenai Tribes,* 219 Mont. 76, 712 P.2d 754 (1985) ("*Greely*"), the Montana Supreme Court held that the adjudication provisions of the Montana Water Use Act are adequate to adjudicate Indian water rights as part of a single unified proceeding, and that the Montana Water Court may exercise jurisdiction.

E. Compact Negotiations and Approvals.

1. Montana Compact Commission Negotiations.

In 1979, the Montana Legislature established a reserved water rights compact commission ("Commission" or "Compact Commission") to negotiate "compacts for the equitable division and apportionment of waters" between the State and those tribes and federal agencies claiming federal reserved water rights. Section 85-2-701, MCA. As part of the structure for establishing the Compact Commission, the Legislature modified the deadline for tribes and the federal government to file reserved water rights claims in Montana's general adjudication. The Water Use Act set a June 30, 1983, deadline to file statements of claim for existing water rights. Section 85-2-221(1), MCA. However, in the Compact Commission statute, the Legislature set a July 1, 2009, deadline that later was modified to 24 months after July 1, 2013 (*i.e.* July 1, 2015) for Indian reserved water right claims. Section 85-2-702(3), MCA.

The Compact Commission statute outlined a process the Commission was required to follow for all compact negotiations. This included formal initiation of negotiations by the Commission, provisions for termination of negotiations, regular reports to the Water Court, and a process for legislative ratification if an agreement was reached. The statute provides the Commission acts on behalf of the governor. Section 2-15-212, MCA. If the

[6] The Montana Supreme Court's order with the grounds for accepting original jurisdiction is set out in *State ex rel. Greely v. Water Court*, 214 Mont. 143, 691 P.2d 833 ((1984).

Commission agrees to a compact, the compact becomes "effective and binding upon all parties upon ratification by the legislature of Montana and any affected tribal governing body, and approval by the appropriate federal authority." Section 85-2-702(2), MCA.

The Compact Commission began meeting with the Tribes in 1984.[7] These early meetings terminated in the late 1980s, although technical work continued. (Staff Report, at 19-20). Negotiations resumed in about 2000 and again were suspended in 2005. (Staff Report, at 23). They again resumed in 2007, and culminated with compact legislation introduced in the 2013 Montana Legislature.[8]

2. Montana Legislative Approvals.

The 2013 legislation did not pass. During the interim before the next legislative session, the Water Policy Interim Committee ("WPIC")[9] conducted and directed legal and technical analysis of a compact. (Staff Report, at 31-33). The Compact in its current form then was introduced and ratified by the 2015 Legislature. Ch. 294, L. 2015. Governor Bullock signed the approval legislation on April 24, 2015. The Compact, as ratified by the Montana Legislature, is codified in the Montana Code at § 85-20-1901, MCA.

3. 2015 Claim Filings.

The Compact Commission statute states that for any tribal compact not approved by July 1, 2013, "all Indian claims for reserved water rights that have not been resolved by a compact must be filed with the department within 24 months." Section 85-2-702(3), MCA. Although the Montana Legislature had ratified the Compact by this date, it had not yet been ratified by Congress or the Tribes. In June 2015, the United States filed 7,312 water right claims on behalf of the Tribes. The Tribes filed an additional 2,814 claims.[10] The claims include both on-reservation and off-reservation claims in numerous basins on

[7] This chronology of events is summarized in the Staff Report prepared by DNRC.
[8] A complete chronological ledger of the numerous negotiating sessions from 1979 to 2014 between the Commission, the Tribes, and the United States is set out on pages 34-35 of the Staff Report.
[9] WPIC is a statutorily authorized committee of the Montana Legislature. Section 5-5-231, MCA.
[10] The Compact addresses these claim filings, stating: "the Tribes and United States will file all of their claims to water on and off of the Flathead Indian Reservation on or before July 1, 2015, pursuant to 85-2-702(3), MCA" Compact, Art. VII.D.2.

both sides of the Continental Divide in Montana. On July 27, 2015, the Court stayed all DNRC examination and case proceedings regarding these 10,126 claims in deference to the Compact proceedings. The stay has been extended several times and remains in effect as to Basin 76L.[11]

4. Federal and Tribal Approvals.

In December 2020, the United States Congress passed the "Montana Water Rights Protection Act" ("MWRPA"), Division DD, Pub. L. No. 116-260, 134 Stat. 1182.[12] President Trump signed the legislation that included the MWRPA on December 27, 2020. The Secretary of Interior on behalf of the United States signed the Compact on September 17, 2021.

MWRPA is the act of Congress signifying federal ratification and approval of the Compact. MWRPA ratified and confirmed the Tribal Water Right defined in the Compact as a matter of federal law. MWRPA § 5(b)(1). MWRPA also specifies that the enforceability date of various provisions of the Act is the date of publication in the Federal Register that "the Montana Water Court has approved the Compact, and that decision has become final and no further appeal may be taken." MWRPA § 10(b)(1)(A). Soon after the President signed the MWRPA legislation, the Tribe approved the Compact by Resolution 21-013 on December 29, 2020. (Doc. 8.00, at 2).

F. Compact Provisions.

The Compact essentially is a settlement agreement between the three government entities that make up the Compact Parties. The Compact seeks to resolve reserved water rights the United States holds in trust on behalf of the Tribes with the State's concurrence.

1. *Definition of Tribal Water Right.*

The Compact defines and quantifies a "Tribal Water Right." Compact, Art. II(67). The "Tribal Water Right" is an umbrella term for a set of individual water rights. The

[11] The Water Court docketed the stays in the basin files for Basins 76L and 76LJ. The Court issued the Preliminary Decree for Basin 76LJ on February 21, 2025.
[12] MWRPA is contained within the Consolidated Appropriations Act of 2021.

specific details about the water rights that comprise the Tribal Water Right are set forth in Article III of the Compact. Article III, in turn, refers to appendices that contain numerous water right abstracts. The various abstracts describe the characteristics of each individual right, such as priority date, use, and quantification. Each abstract is assigned a number using nomenclature that tracks Montana's centralized water rights record system.

The Compact designates several priority dates for the various uses of the Tribal Water Right, depending on how water is used. For instream flow protection, the Compact specifies a "time immemorial" priority date. For water designated for irrigation and other uses, the Compact specifies July 16, 1855, as the priority date. This date is based on the date of the Hellgate Treaty. The Compact also designates some junior priority dates for certain uses. For example, for the former Milltown Dam rights co-owned by the Tribes and the Montana Department of Fish, Wildlife and Parks ("FWP"), the Compact specifies a December 11, 1904, priority date. Compact Appx. 30 (abstract nos. 76M 94404-01 and 76M 94404-02).

2. Water Administration.

Article IV describes provisions for implementing the Compact and administering water. Article IV establishes a "Flathead Reservation Water Management Board." ("Board"). Compact, Art. IV.I. For specific water uses, provisions of Article IV are included on abstracts as information remarks. Information remarks provide narrative information about a water right, including administration provisions. Many of these administration provisions limit when and how certain aspects of the Tribal Water Right may be exercised.

3. *Waivers and Releases*.

The Compact conditionally waives any other water right claims, including the claims filed in 2015, by stating that upon "entry of a final order issuing the decree of the Tribal Water Right held in trust by the United States as quantified in this Compact" and certain other events, "the Tribes and the United States as trustee for the Tribes, Tribal members, and Allottees shall waive, release, and relinquish any and all claims to water rights or to the use of water, and shall dismiss any such claims." Compact Art. VII.D.4.

4. Unitary Ordinance.

The Montana legislation approving the Compact consists of two parts. The first part, codified in the various subparts of § 85-20-1901, MCA, sets forth the specific provisions of the Compact including the sections described in the prior paragraphs. The second part is a "Unitary Administration and Management Ordinance" ("UAMO"), which is codified in § 85-20-1902, MCA. In general terms, the UAMO provides for the Tribes and the State of Montana to jointly administer water use, including new permits and change authorizations, within the Reservation's exterior boundaries.

G. Water Court Proceedings.

1. Motion for Compact Approval.

The Compact requires that one of the Compacting Parties move the Water Court for approval of a decree incorporating the terms of the Compact. Compact Art. VII.B.1. The Compact Parties met this obligation on March 15, 2023, by filing their Joint Motion for Incorporation of the Confederated Salish and Kootenai Tribes of the Flathead Reservation—State of Montana—United States Compact into Preliminary and Final Decrees, For Commencement of a Special Proceeding on Such Decrees, and For a Hearing on any Objections to the Preliminary Decree ("Joint Motion"). (Doc. 8.00). The Joint Motion asked the Water Court to incorporate the water rights set out in the Compact into preliminary and final decrees for the nine hydrologic basins addressed in the Compact.[13] These basins include the Kootenai River (Basin 76D), Rock Creek (Basin 76E), the Blackfoot River (Basin 76F), the South Fork of the Flathead River (Basin 76J), the Swan River (Basin 76K), the Flathead River below Flathead Lake (Basin 76L), Flathead Lake and the Flathead River above Flathead Lake (Basin 76LJ), the Clark Fork River between the Blackfoot and Flathead Rivers (Basin 76M), and the Clark Fork River below its confluence with the Flathead River (Basin 76N).

[13] The Montana Water Use Act authorizes the Water Court to adopt procedures to consolidate water right claims from different hydrologic basins into a single judicial unit. Section 85-2-215, MCA.

2. Preliminary Decree Issuance.

On June 9, 2022, the Court issued the Preliminary Decree for the Compact ("Preliminary Decree"). (Doc. 19.00). The Preliminary Decree includes findings of fact, summarizes pertinent provisions of MWRPA, sets forth the full text of the Compact, and makes conclusions of law. The Preliminary Decree contains three appendices. Appendix 1 is the full text of the Compact as ratified by the Montana Legislature, codified in § 85-20-1901, MCA, and approved by the Secretary of Interior. Appendix 2 contains the abstracts that document the elements of the Tribal Water Right. Appendix 3 contains lists and abstracts of the Tribe's water rights co-owned with FWP, including those associated with the former Milltown Dam.

Extensive notice of the Preliminary Decree was provided, including individualized notice to water users and publication notice throughout western Montana in various newspapers. (Doc. 20.00).[14] The United States, through the Bureau of Indian Affairs, provided notice of compliance with the notice procedures on July 6, 2022 (Doc. 23.00), as supplemented on August 9, 2022 (Doc. 27.00).[15]

3. Decree Objection Proceedings.

Under the Water Use Act, Water Court issuance of any preliminary decree commences a statutorily defined 180-day period during which objections may be filed with the Water Court. Section 85-2-233(2), MCA. For this Preliminary Decree, the original objection deadline was December 6, 2022. As authorized by the Act, the Court later extended the deadline to February 9, 2023. (Doc. 240.00).

After the objection period closed, the Court issued a series of case management orders. These orders initially set a settlement track and required that Objectors and the Compact Parties engage in mediation. Numerous Objectors resolved their objections

[14] The Attorney General appeared in this case "for notice purposes" on April 7, 2022. (Doc. 14.00). Since that date, the Attorney General has been included on the service list and has participated in various proceedings.

[15] The Court clarified the notice procedures in a Clarification Order issued on July 8, 2022. (Doc. 24.00).

through consensual agreements which the Court approved in a series of orders. The Court also dismissed Objectors who failed to participate in mediation.[16]

After the settlement track period expired, the Court put the case on a hearing track and set a progressive schedule for several stages of additional proceedings. The hearing track proceedings started with a set period for Objectors to file motions to amend their objections. Numerous Objectors filed motions. The Court addressed these motions in a series of several dozen orders, some granting motions and others denying motions.

The motion to amend period was followed by a deadline for the Compact Parties to file motions to dismiss objections, which they did in a fairly limited *Motion to Dismiss Objections Filed by Unrepresented Artificial Entities* (Apr. 3, 2024; Doc. 1743.00). The Court granted this motion in part on June 5, 2024. (Doc. 1781.00). The Court also set a deadline for substantive motions on Compact fairness and other issues of law, which led to the motions addressed in this Order.[17] After these motions on issues of law were fully briefed the Court held oral arguments on certain motions. The oral arguments took place at the Russell Smith Federal Courthouse in Missoula.[18]

H. Summary of Pending Motions.

This Order addresses the following motions filed by the Compact Parties and various Objectors:

1. *Motion for Approval of the Flathead Reservation – State of Montana – United States Compact and for Summary Judgment Dismissing All Remaining Objections,* filed by the Compact Parties (July 10, 2024; Doc. 1823.00) ("Compact Parties' Motion"). The Compact Parties' Motion asks the Court to find they have met their burden to show the Compact meets the applicable fair and reasonableness standard

[16] *See* Eighth Order Dismissing Objections (Oct. 18, 2023; Doc. 1394.00). Prior to dismissing objections, the Court issued a show cause order allowing non-participants to explain why they failed to participate in mediation. Several did so and were not dismissed.

[17] The various motion deadlines are set out in Case Management Order No. 3 (Oct. 18, 2023; Doc. 1395.00). Some of the deadlines were later extended.

[18] The Federal Court provided use of the Federal Courthouse as a courtesy to the Water Court. The Water Court does not have its own courtroom in the Clark Fork Division, where this case arises. Because the Federal Court rules prohibit recordings of the courtroom, the livestream was not recorded. Mont. U.S. Dist. Court, L.R. 1.3(d)(2). Instead, the oral argument was transcribed by a court reporter.

so as to shift the burden to the Objectors to prove the Compact should not be approved. The motion also asserts the Objectors fail to meet this burden so their objections should be dismissed and the Compact should be approved by the Court. Twenty-nine responses opposing the Compact Parties' Motion were filed by various Objectors. Several other Objectors filed joinders.

2. *Motion and Memorandum in Support of Motion for Summary Judgment*, filed by Mickale Carter (June 19, 2024; Doc. 1786.00) ("Carter Motion"). The Carter Motion cites a variety of legal theories about why the Compact fails to conform to applicable law. The motion asks the Court to reject the Compact and instead adjudicate each of the federal and tribal claims individually.

3. *Motion for Fairness and Adequacy*, filed by Shelley Lustman (July 8, 2024; Doc. 1794.00) ("Lustman Motion"). The Lustman Motion asks the Court to void the Compact as a matter of law because it lacks a proper legal basis, is historically unsupported, takes real property rights, and violates provisions of the Water Use Act.

4. *Objection to Certain Omissions of Standard of Review/Including Violations of Procedural Due Process of These Proceedings*, filed by Stephen D. and Vicki P. Dennison, and several other Objectors (July 9, 2024; Doc. 1799.00) ("Dennison Motion"). The Dennison Motion asks the Court to apply a standard of review that differs from that described in the Compact Parties' Motion.

5. *Motion and Brief*, filed by Mark Holbrook and Cynthia Holbrook (July 9, 2024; Doc. 1802.00) ("Holbrook Motion"). The Holbrook Motion sets forth a number of grounds for objecting to the Compact, and requests as relief that their water rights be "removed from the 'Compact'".

6. *Objection to Claimed Rights to Off-Reservation Water*, filed by Catherine L. Moore and Martin E. Moore (July 9, 2024; Doc. 1808.00) ("Moore Motion"). The Moore Motion asks the Court to reject the Compact based on "fraud and overreach" on the grounds that the Tribes received a settlement from the Indian Claims Commission ("ICC").

7. *Motion and Memorandum in Support of Motion for Summary Judgment*, filed by Vivian Allen (July 9, 2024; Doc. 1809.00) ("Allen Motion"). The Allen Motion cites a variety of alleged legal infirmities with the Compact and asks the Court to reject the Compact and to adjudicate each of the Tribes' and United States' claims separately.

8. *Motion and Memorandum in Support of Motion for Summary Judgment on the Question of Res Judicata/Issue Preclusion*, filed by Elena A. Ingraham (July 10, 2024; Doc. 1813.00) ("Ingraham Motion"). Similar to the Moore Motion, the Ingraham Motion contends the ICC proceeding bars the Compact. The Ingraham Motion also challenges the legality of off-reservation water rights recognized by the Compact.

9. *Motion and Brief to Deny Compact Based on Adequacy and Fairness and Other Issues of Law*, jointly filed by attorneys Walter E. Congdon, Rocky Mountain Law Partners, PC, and Kimberly L. Field as counsel for several Objectors (July 10, 2024; Doc. 1814.00) ("Congdon Motion").[19] The Congdon Motion contends the Compact is inadequate because it purports to reserve water rights that the Compact does not describe – specifically potential water rights associated with water quality. The motion also contends MWRPA amends the Compact to such an extent that the Preliminary Decree does not reflect the Compact ratified by the Montana Legislature. The motion also argues the Compact is inconsistent with the Hellgate Treaty and other treaties.

10. *Motion for Summary Judgment and Brief in Support*, filed by Mission and Jocko Irrigation Districts (July 10, 2024; Doc. 1815.00) ("Mission-Jocko Motion"). The Mission-Jocko Motion contends aspects of the UAMO are improper, including the water administration and judicial review provisions. The Mission-Jocko Motion also raises arguments about historical contracts between it and the United States.

11. *Motion for Entry of Summary Judgment on Legal Issues*, filed by William Sego, Bill & Irene LLC, and Grace Slack (July 10, 2024; Docs. 1820.00 (motion) and 1821.00 (supporting brief[20])) ("Sego-Slack Motion"). The Sego-Slack Motion uses

[19] Exhibits to the Congdon Motion lists 74 Objectors who are parties to the motion.

[20] Unlike other Objectors, the Sego-Slack parties filed a separate motion and brief, as authorized by the Court in Case Management Order No. 4. All references to "Sego-Slack Motion" in this Order pinpoint to pages in their brief.

several lines of argument to support its contention that the Tribal Water Right is not properly quantified. The motion also argues the Compact violates due process and the UAMO provisions are unconstitutional for several reasons.

12. *Motion Regarding Other Issue of Law*, filed by Deborah C. Wickum (July 10, 2024; Doc. 1826.00) ("Wickum Motion"). The Wickum Motion contends federal land patents for several parcels owned by Wickum include appurtenant water rights based on the *Winters* doctrine.

13. *Motion and Brief*, filed by Anna Marie Harrison (July 10, 2024; Doc. 1827.00) ("Harrison Motion"). The Harrison Motion contends the process used to develop the Compact discriminates against other water users and is unfair.

14. *Motion/Brief on the Lack of Fairness and Inadequacy of the Water Compact*, filed by Rick Jore and Nancy Jore (July 10, 2024; Doc. 1832.00) ("Jore Motion"). The Jore Motion argues the Compact violates equal protection; is a product of collusion, fraud and overreach; and will result in material injury. The Jore Motion also challenges the legality of the UAMO.

15. *Omvig Hammer Law P.C.'s Motions for Summary Judgment and Brief in Support for Objectors Ross Middlemist, et al*. (July 10, 2024; Doc. 1836.00) and for Objectors Rodney L. Burns, et al. (July 10, 2024; Doc. 1837.00) ("Omvig Hammer Motions"). Similar to the Congdon Motion, the Omvig Hammer Motions are filed on behalf of numerous Objectors. The motions contend the Compact: (a) violates the *Winters Doctrine*, (b) results in an unconstitutional overreach, (c) results in a taking, and (d) will result in material injury to the Objectors. The motions also challenge the legality and constitutionality of the UAMO.

16. *Brief in Support of Motion for Summary Judgment for Objectors*, filed by Forrest L. Johnsen and several other Objectors (September 13, 2024; Doc. 1921.00) ("Johnsen Motion").[21]

The Compact Parties filed responses to each of the Objector motions.

[21] The Johnsen Motion was filed late without first seeking leave of the Court.

II. STANDARDS AND THRESHOLD ISSUES

A. Water Court Jurisdiction.

The Montana Legislature assigned to the Water Court the authority to adjudicate all "existing rights" in Montana. Section 3-7-223, MCA. Existing rights include "Indian reserved water rights created under federal law." Section 85-2-102(13), MCA. This grant of authority extends jurisdiction to the Water Court to address compacts the State negotiates with the federal government and various tribes. Section 85-2-702(3), MCA.

The Water Court's authority to address the Compact and the federal and tribal participation in these proceedings also is recognized under federal law. In 1955, Congress enacted the McCarran Amendment. 43 U.S.C. § 666. The McCarren Amendment waives the sovereign immunity of the United States, including when it acts in its capacity as trustee for the Tribes.[22] *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The United States Supreme Court interprets the McCarren Amendment to recognize the authority of state courts to adjudicate Indian water rights in a comprehensive adjudication under the McCarran Amendment's sovereign immunity waiver. *San Carlos Apache Tribe*, 463 U.S. at 564. Under the Montana Supreme Court's ruling in *Greely*, these statutory provisions and the case law interpreting them provide the Water Court with authority to address the quantification and administration provisions of the Compact as part of Montana's comprehensive adjudication. 219 Mont. 76.

B. Applicable Standards.

1. Summary Judgment Standard.

These motions come before the Court as cross-motions for summary judgment or the equivalent. Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. When there are cross-motions for summary judgment, the Court evaluates

[22] As Mission-Jocko notes in its response brief, "[t]here is no question that the United States is properly a party to this proceeding." (Doc. 1963.00, at 18).

each party's motion on its own merits. *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 7, 389 Mont. 48, ¶ 7, 403 P.3d 664, ¶ 7.

The Compact Parties argue that under the undisputed facts and the terms of the Compact they are entitled to a ruling as a matter of law that the Court should approve the Compact and dismiss all objections. The Objectors who filed motions – even if not specifically styled as motions for summary judgment – ask the Court to do the opposite and conclude the undisputed facts require the Court to not approve the Compact. Additionally, some of the Objectors argue the Compact Parties are not entitled to summary judgment because issues of disputed material fact exist.

2. Applicable Law.

As noted, when adjudicating water rights, including tribal water rights, the Water Court is a state court with a "solemn obligation to follow federal law." *San Carlos Apache Tribe*, 463 U.S. at 571. Thus, as applied to tribal water rights and the approval of compacts, *Winters* and other federal reserved rights cases apply. *Greely*, 219 Mont. at 89-94; *In re Crow Water Compact*, 2015 MT 217, ¶ 17, 380 Mont. 168, 354 P.3d 1217 *("Crow Compact I"*).

While the Water Court must follow substantive federal law in connection with the substantive standards for reserved water rights, that does not mean the Court is free to ignore Montana law. Unless otherwise preempted – which no one asserts – the Court follows the procedural provisions of the Montana Water Use Act and other applicable Montana laws as necessary to determine whether to approve the Compact as a decree of the Water Court. Title 85, Part 2, MCA.

3. Standard for Compact Approval.

As part of its objective to establish a single unified system of water rights, the Montana Water Use Act requires the Water Court to include in a final decree certain elements for existing rights. The list of required elements differs depending on whether the rights are based on state or federal law. Section 85-2-234(6), (7), MCA. Because tribal water rights are based on federal law, and because the Compact Parties ask the Court to incorporate the Compact into final decrees for various basins within the Clark

Fork Division,[23] the Court follows the Water Use Act final decree provisions for "water rights arising under the laws of the United States" set forth in § 85-2-234(7), MCA. This statute requires the Court to confirm seven specific elements that characterize each reserved water right. In addition to the specific elements, the statute also requires the Court to state in the decree "any other information necessary to fully define the nature and extent of the right, including the terms of any compacts negotiated and ratified under 85-2-702." Section 85-2-234(7)(h), MCA.

The Water Use Act directs the Court to presume each statement of claim of an existing right is "prima facie proof of its content until the issuance of a final decree." Section 85-2-227(1), MCA. Compacts are somewhat different because they arise from the Montana Legislature's directive that the Compact Commission attempt to resolve federally based water rights through a negotiation process. If negotiations succeed and are ratified by the Legislature, negotiated compacts are presented to the Water Court for approval in a decree. If negotiations fail or if the Court does not approve a compact, the Court must then adjudicate claims filed by tribes or federal agencies in a general *inter sese* water rights adjudication. Section 85-2-704, MCA; *Ciotti*, 278 Mont. at 61.

When the elements of tribal or federal water rights are resolved by compact, Montana law requires the Court to include the terms of the compact in a final decree "without alteration" unless the Court sustains an objection to the compact. Section 85-2-702(3), MCA. When the Court incorporates a compact into a final decree, the Act also prohibits the Court from altering or amending the compact "except with the prior written consent of the parties in accordance with applicable law." Section 85-2-234(2), MCA.

Compacts are essentially settlement agreements filed with the Court for approval. In determining whether to approve a compact, the Water Court applies standards developed by courts to approve consent decrees because they are analogous. Under these

[23] The Montana Water Use Act divides the State into four geographic divisions to establish venue for Montana's comprehensive water rights adjudication. Sections 3-7-101 and 85-2-216, MCA. Each division includes several hydrologic basins. All of the hydrologic basins west of the Continental Divide, including all of the basins covered by the Compact, are within the so-called Clark Fork Division. Section 3-7-102(4), MCA.

standards, the Water Court presumes a compact is valid if (a) the compact is "fundamentally fair, adequate and reasonable" and (b) the compact conforms to applicable laws. If the Court makes these determinations and no objections are received, the Court's review ends, and the Court approves the compact. *In re Crow Water Compact*, 2015 MT 353, ¶ 18, 382 Mont. 46, 364 P.3d 584 ("*Crow Compact II*").[24]

If non-parties to a compact file objections – as occurred in this case – the Compact Parties must also prove the Compact "was the product of good faith, arms-length negotiations." *Crow Compact II*, 2015 MT 353, ¶ 18 (internal quotation omitted). If the Compact Parties meet this test, the burden of proof shifts to the Objectors to overcome the presumption of compact validity by proving the compact is "unreasonable" and their "interests are materially injured by operation of the Compact." *Crow Compact II*, 2015 MT 353, ¶ 20.

In large measure, the parties generally do not dispute this standard of review framework. The only objection to it is contained in the Dennison Motion. The parties to that motion contend the Court should apply a different standard that follows an eight-step inquiry. The Dennison Motion provides no legal support for this position and the Court declines to adopt it given its significant deviation from numerous prior compact cases.

4. Scope of Water Court Review.

Montana law sets limits on the scope of the Water Court's review by confining it to determining whether to include a compact in a final decree or to sustain an objection to the Compact. Section 85-2-702(3), MCA. The compact review and approval statutes do not give the Court authority to re-quantify the water rights or otherwise alter compact terms. Additionally, this Compact contains an additional term limiting the scope of the

[24] The tribal compacts previously approved by the Water Court under this standard include the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation Compact (§ 85-20-201, MCA), the Northern Cheyenne Tribe Compact (§ 85-20-301, MCA), the Chippewa-Cree (Rocky Boys) Compact (§ 85-20-601, MCA), the Crow Tribe Compact (§ 85-20-901, MCA), and the Blackfeet Tribe Compact (§ 85-20-1501, MCA). The compact with the Fort Belknap Indian Community has been ratified by the Montana Legislature, but has not been filed with the Water Court for approval. The Court also has approved several federal compacts which are codified in Title 85, Chapter 20, MCA.

Water Court's review by stating the Court's review is "limited to the contents of Appendix 38, and may extend to other sections of the Compact only to the extent that they relate to the determination of water rights and their administration." Compact, Art. VII.B.2. *See Crow Compact I,* 2015 MT 217, ¶ 8 ("the Water Court's review of the Compact [is] 'limited to Article III and Appendix 1' thereof, which contain the specific water rights agreed to"); *In re Blackfeet Tribe Compact*, Case WC-0006-C-2018, 2020 Mont. Water LEXIS 770, *8 ("*Blackfeet Compact Order*") ("the Water Court's review of the Compact is limited to Article III"). Based on this limited scope, this proceeding is not a platform to litigate issues outside what is necessary to determine whether to incorporate the Compact as part of the final decrees for the affected basins.

C. Procedural Objections to Compact Parties' Motion.

Before addressing the merits of the Compact Parties' Motion and the Objectors' responses and cross-motions, the Court addresses three procedural issues raised in Objector motions and responses: (1) whether the Compact Parties' summary judgment motion relies on inadmissible hearsay evidence; (2) whether MWRPA amended the Compact to such an extent that the Preliminary Decree fails to incorporate the version of the Compact ratified by the Montana Legislature; and (3) whether the doctrine of res judicata bars the Compact Parties' Motion.

1. Hearsay Objections to Compact Parties' Supporting Documents.

In their response to the Compact Parties' Motion, the Sego-Slack Objectors argue several reports referenced by the Compact Parties are inadmissible. (Doc. 1970.00, at 5). Sego-Slack asks the Court to deny the Compact Parties' Motion on the grounds that the seven reports cannot be used to establish the undisputed facts necessary to support the motion.

These reports are listed as "Other Authorities" in the Table of Authorities to the Compact Parties' Motion and include: (a) a "Report of Findings: Technical Review of Proposed CSKT Water Rights Settlement for Water Policy Interim Committee" (Sept. 23, 2014) ("WPIC Report") prepared by the CSKT Compact Technical Working Group; (b) the DNRC Staff Report ("Staff Report"); (c) "Report on the Proposed Water Rights

Compact Between the State of Montana and The Confederated Salish and Kootenai Tribes of the Flathead Reservation" (January 2014) ("2014 Commission Report") prepared by the Compact Commission; (d) a written statement from the U.S. Department of Interior to the United States Senate on S. 3019, the Montana Water Rights Protection Act (June 24, 2020) ("Interior Statement"); (e) "The State of Montana's Proposal for the Resolution of the Off-Reservation Water Rights Claims of the Confederated Salish & Kootenai Tribes," (July 20, 2011) ("State Off-Reservation Proposal"); (f) "Instream Flow and Irrigation Diversion Aspects of the FIIP Water Use Agreement: State of Montana Evaluation and Recommendations" (Aug. 4, 2014), prepared by the Compact Commission; and (g) excerpts from the Tenth Annual Report of the Reclamation Service, 1910-1911, H.R. Doc. No. 62-133.[25]

In their reply to Sego-Slack, the Compact Parties include six affidavits and declarations to offer foundation for the reports.[26] (Doc. 2069.00). Sego-Slack did not ask for leave to file surreply briefs or rebuttal affidavits, although they did address the affidavits during oral argument. Sego-Slack also did not ask for leave to move to strike the affidavits. Based on the lack of any response to the Compact Parties' affidavits, the Court assumes the Sego-Slack Objectors do not contest their accuracy.

Sego-Slack focus most of their attention on two of the reports cited by the Compact Parties: (a) the WPIC Report; and (b) the Staff Report. They assert these reports contain advocacy statements made outside the presence of the Court which renders them untrustworthy. The Compact Parties respond that the reports are admissible under the

[25] The Compact Parties did not attach these documents to their motion but instead provide links to them in footnotes. They also are enumerated in the Table of Authorities to the Compact Parties' Motion.

[26] These affidavits and their respective exhibit numbers include: Ex. A – Affidavit of Faye Bergan, who worked as legal counsel for the Compact Commission from 1992 to 2009; Ex B – Affidavit of Arne Wick, the former DNRC Compact Implementation Program Manager; Ex. C – Affidavit of Jeremiah Weiner, the staff attorney for the Compact Commission from 2004 to 2013; Ex. D – Affidavit of Joel Harris, a water conservation specialist with the DNRC Compact Implementation Program from June 2015 to February 2024; Ex. E – Declaration of David Harder, a Senior Attorney for Legal Issues at the United States Department of Justice, Environmental and Natural Resources Division; and Ex. F – Affidavit of Andrew Brummond, a water conservation specialist with the Montana Department of Fish, Wildlife and Parks, and one of the authors of the WPIC Report.

public records and reports exception contained in Montana Rule of Evidence ("MRE") Rule 803(8). (Doc. 2069.00, at 4).

As the Compact Parties explain in their response, the Staff Report memorialized and summarized the Commission's negotiations, the technical data used in the negotiations, much of the background to the Compact, and other background information. The introductory paragraph to the Staff Report states:

> This Staff Report for the [Compact] describes (from the State of Montana's perspective) the history of how the agreement was reached and the legal and technical basis for the [Commission] decisions in negotiating the Compact.

(Staff Report, at 3). As further explained in the Affidavit of Faye Bergan, all information in the Staff Report and other reports rely on public records and cite to public records. Bergan Aff., ¶ 9; *see also*, Harris Aff. (documenting background to Staff Report). Moreover, the Staff Report has been a regular part of Montana's Compact Commission process for other compacts. Harder Decl. at ¶ 3-4 (summarizing prior compacts with similar staff reports). Montana courts have relied on similar staff reports in the past to provide a backdrop when considering whether compacting parties have met their threshold burdens of fairness and adequacy. *Crow Compact II*, 2015 MT 353, ¶ 25 n.1; *Blackfeet Compact Order*, 2020 Mont. Water LEXIS 770; *In re Blackfeet Tribe's Off Reservation Instream Reserved Water Rights*, No. WC-0001-C-1991, 2021 WL 3928907, at *12 (Mont. Water Ct. Aug. 23, 2021) ("*Blackfeet Off-Reservation Order*").

The Commission reports to WPIC are similarly public. WPIC is an interim committee of the Montana Legislature established by statute to perform various functions, including providing recommendations and reports. Sections 5-5-231; 5-5-216, and 85-2-105, MCA. WPIC met extensively about the Compact during the interim between 2013 and 2015 and ultimately recommended the Compact to the full Legislature for ratification. The WPIC Report that Sego-Slack claims to be untrustworthy provided the backdrop for these recommendations. *See* Brummond Aff. (documenting report prepared for WPIC).

Under MRE 803(8), "records, reports, statements, or data compilations in any form of a public office or agency," are admissible so long as they set forth (1) "regularly conducted and regularly recorded activities"; (2) "matters observed pursuant to duty imposed by law and as to which there was a duty to report"; or (3) "factual findings resulting from an investigation made pursuant to authority granted by law."

The reports Sego-Slack ask the Court to ignore, including the WPIC Report, the 2014 Commission Report, and the Staff Report, meet this test. They all are within the scope of reports in connection with the Montana Legislature's decision to create the Commission to negotiate compacts. The reports document the background information of activities that furthered the Commission's mission, as well as WPIC's central role to report to the Legislature. While Sego-Slack may quibble with some of the words chosen in the reports as bordering on advocacy, the important parts of the reports are the technical inquiry undertaken and documentation of the extensive negotiations that preceded the 2015 Legislature's decision to ratify the Compact. The Court declines to deny the Compact Parties' Motion based on the evidentiary status of these reports.

2. Whether MWRPA Impermissibly Amended the Compact.

The Preliminary Decree issued by this Court identifies the Compact as the compact found at § 85-20-1901, MCA. (Doc. 19.00, at 1). The codified version of the Compact is attached as Appendix 1 to the Preliminary Decree. MWRPA also incorporates by reference the codified Montana statute as part of its definition of the term "Compact." MWRPA § 3(a)(3)(A). MWRPA further defines the term "Compact" as including:

> (i) any appendix or exhibit to that compact; and
> (ii) any modifications authorized by that compact;
> and
> (B) any amendment to the compact referred to in subparagraph (A) (including an amendment to an appendix or exhibit) that is—
> (i) executed to ensure that the Compact is consistent with this Act; or
> (ii) otherwise authorized by the Compact and this Act.

MWRPA § 3(a)(3)(A)&(B).

Several Objectors argue MWRPA modified the Compact to such an extent that the Compact incorporated into the Preliminary Decree is not the same Compact the Montana Legislature ratified. These arguments primarily are made by the Congdon Objectors in their affirmative motion (Doc. 1814.00) and by Mission-Jocko in their response to the Compact Parties Motion. (Doc. 1963.00). They also explained their positions during oral argument.

After Congress adopted MWRPA, the Secretary of Interior signed the Compact on behalf of the United States. Compact Appx. 1, at 55. The Secretary's approval includes an "Execution Statement" that identifies two clarifications. First, as part of MWRPA, Congress allocated to the Tribes 90,000 acre-feet per year from Hungry Horse Reservoir under the water right held by the United States and managed by the Bureau of Reclamation. MWRPA § 6(a)(1). This provision was specifically contemplated in the Compact, which states the Hungry Horse water "is subject to the approval of, and any terms and conditions specified by, Congress." Compact Art. III.C.1.c.vii. As outlined in the Secretary's execution statement, this provision aligns this water allocation with the Bureau of Reclamation's water rights for Hungry Horse Reservoir.[27]

Second, MWRPA required the Tribes to relinquish the off-reservation water rights located within the Flathead River basin described in Article III.D.4 of the Compact. MWRPA § 10(a)(4).

No Objector argues these two changes caused the Compact approved by MWRPA to deviate from what the Montana Legislature ratified. The Compact as codified in Montana law contemplates some minor adjustments would be necessary. Instead, Congdon and Mission-Jocko zero in on other provisions they contend resulted in unauthorized Compact amendments.

[27] The Compact does not ask the Court to decree the Hungry Horse Reservoir rights; instead, the Compact contractually obligates the United States to make stored water from Hungry Horse available for uses defined in the Compact. The Water Court decreed the Hungry Horse rights as part of the Basin 76J preliminary decree. *See* Water Court Case 76J-0009-R-2022 (Master's Report, Mar. 14, 2023, adopted April 12, 2023).

The unauthorized Compact amendment arguments asserted by Congdon and Mission-Jocko include that federal ratification expanded the definition of the Tribal Water Right. They argue federal ratification expanded the Compact beyond what was ratified by the Montana Legislature. The Congdon Objectors also point to damages and water quality reservations in MWRPA as purported disguised additional water rights not contemplated in the Compact that could not be the product of good faith negotiations. This argument ignores the structure of this proceeding. The Compact decreed by the Court settles all water right claims of the Tribes. Those claims are specified in the abstracts contained in Decree Appendices 2 and 3. This proceeding is being conducted as part of an adjudication the highest courts of both Montana and the United States have concluded is McCarren-compliant. Even if there were a basis to claim additional reserved water rights, there is no legal mechanism to put them before this Court or any other Court and MWRPA did not provide an opening to do so. Such an effort would be barred by the Compact waivers and releases provisions.

Mission-Jocko follows a somewhat analogous line of argument that seizes upon purported linguistic discrepancies between the Compact ratified by the Montana Legislature and the MWRPA provisions. Specifically, Mission-Jocko cites the language in MWRPA § 4(a)(2) stating that "[a]ny amendment to the Compact is authorized, ratified, and confirmed, to the extent that the amendment is executed to ensure that the Compact is consistent with this Act" indicates that the MWRPA contemplated the ratification of amendments by Montana and the Tribe as part of this process. However, as the foregoing discussion related to the modification of the water rights indicate, any modifications that MWRPA made were contemplated in the Compact, and thus MWRPA did not open a door to uncontemplated amendments.

Mission-Jocko also argues that contrary to the Compact's requirement that the Board be governed only by the Compact and UAMO, MWRPA adds an additional requirement that the administration by the Board be bound by MWRPA, with MWRPA as the final authority. This argument is disposed of in the same manner as the preceding

arguments: no modification of the Compact occurred which was not contemplated by the Compact the Montana Legislature ratified.

In reviewing these arguments, the Court also notes the absence of any objection to the Preliminary Decree from the State of Montana – either through the Attorney General or otherwise. If the State believed the provisions of MWRPA materially amended what the Montana Legislature authorized, the State had the opportunity to file an objection with the Court. The lack of any objection from either the executive or the legislative branches of government, or from the Attorney General, is a strong indication that the State concurs the Compact incorporated in the Preliminary Decree is the Compact the State expects the Court to approve.[28]

3. Res Judicata and Collateral Estoppel.

The third threshold argument is whether the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion) bar the Court from considering the Compact. This argument is made primarily in the Ingraham Motion. (Doc. 1813.00). The Ingraham Motion cites two prior proceedings the motion contends bar the Court from considering the Compact. First, the motion argues that in 1950, the Tribes filed a claim with the Indian Claims Commission ("ICC") that was litigated and resolved. As authority for the first proceeding, Ingraham attaches a copy of a Stipulation for Entry of Final Judgment in the case *The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. The United States of America*, Dkt. No. 61, 17 Ind. Cl. Comm. 297.[29] Second, Ingraham argues the Tribes filed a complaint in the United States Court of Claims in 1951 that also was litigated and resolved. For the second proceeding, the motion cites the case *Confederated Salish and Kootenai Tribes v. United States*, 437 F.2d 458 (Ct. Cl., 1971). Based on these cases, the Ingraham Motion argues the Compact cannot be based on water right claims that extend outside the Reservation's boundaries or

[28] The Court recognizes that the Objectors include several former legislators who contend the process used in the Legislature to ratify the Compact amounted to impermissible overreach. Those arguments are different than the question of whether the Court has been asked to approve a materially-altered compact and are addressed below.

[29] The stipulation filed with the Court is not dated.

that include time immemorial priority dates. The Compact Parties respond that the Tribes' water rights – whether on-reservation or off-reservation, were not addressed in these prior proceedings, so doctrines of res judicata and collateral estoppel do not apply.

It is not entirely clear whether the Ingraham Motion bases its argument on res judicata or collateral estoppel. The motion does not cite any Montana case, but instead relies on an online legal encyclopedia definition of issue preclusion. Under Montana law, issue preclusion requires a moving party (in this case Ingraham) to prove four elements:

> (1) an identical issue raised was previously decided in a prior adjudication; (2) a final judgment on the merits was issued in the prior adjudication; (3) the party against whom collateral estoppel is asserted was a party or in privity with a party in the prior adjudication; and (4) the party against whom issue preclusion is asserted was afforded a full and fair opportunity to litigate any issues that may be barred.

Brishka v. Dep't of Transportation, 2021 MT 129, ¶ 11, 487 P.3d 771, 775.

As to the first element, "the parties must have litigated the "identical issue" or "precise question" in the prior action." *Brishka*, ¶ 12. To make this determination, the Court looks to "the pleadings, evidence, and circumstances surrounding the two actions to determine whether the issues decided in the prior adjudication are identical to those presented in the current matter." *Id.*

Neither of the cases the Ingraham Motion cites meet this element. The stipulation referenced in the Ingraham Motion arose out of claims made under the Indian Claims Commission Act ("ICCA") of August 13, 1946, 60 Stat. 1049 (previously codified as amended at 25 U.S.C. §§ 70-70v, now repealed). The Act directed the Indian Claims Commission to decide certain specific types of claims by tribes against the United States. These include taking of lands without compensation. Nothing in the stipulation, or any other pleading or evidence cited by the Ingraham Motion proves the water rights addressed in the Compact were litigated in the proceeding, certainly not to the "identical issue" element of Montana's collateral estoppel test, especially in light of the principles of construction developed by the federal judiciary that the Water Court is obligated to follow to ensure the McCarren Amendment sovereign immunity waiver remains intact.

Greely, 219 Mont. at 91. The conclusion that Ingraham does not meet the first element of the collateral estoppel test is also consistent with how analogous issues have been addressed in other cases. *See, e.g. United States v. Abousleman,* 695 F. Supp. 3d 1277, 1291 (D.N.M. 2023) ("[t]here is no language in ICCA showing an intent to extinguish or modify the Pueblos' water rights").

The same analysis applies to the second case the Ingraham Motion cites. In *Confederated Salish & Kootenai Tribes of Flathead Rsrv., Mont. v. United States*, 437 F.2d 458, 485 (Ct. Cl. 1971), the Court of Claims determined the amount of compensation due under a petition for compensation filed by the Tribes based on the United States' opening of lands on the Reservation under the 1904 Act. The case does not address reserved water rights, or whether the valuation included the value of water rights. The Ingraham Motion argues some of the lands appraised were irrigated. However, nowhere in the decision does the Court of Claims address what water rights or infrastructure were used to accomplish the irrigation. Without more specificity demonstrating prior litigation of the "precise issue" now before the Water Court, the Ingraham Motion does not prove the first element of collateral estoppel based on the Court of Claims decision in *Confederated Salish & Kootenai Tribes of Flathead Rsrv*.

To the extent the Ingraham Motion also argues the doctrine of res judicata (aka claim preclusion) poses a bar to the Compact, the motion must prove the five elements of res judicata, which differ somewhat from collateral estoppel. They include:

> (1) the parties or their privies are the same in the first and second actions; (2) the subject matter of the actions is the same; (3) the issues are the same in both actions, or are ones that could have been raised in the first action, and they relate to the same subject matter; (4) the capacities of the parties are the same in reference to the subject matter and the issues between them; and (5) a valid final judgment has been entered on the merits in the first action by a court of competent jurisdiction.

Weiner v. St. Peter's Health, 2024 MT 155, ¶ 11, 417 Mont. 265, 553 P.3d 384.

The second and third elements doom use of this theory. The second element, that the subject matter of the action is the same, does not apply. The subject matter before the

Court is whether to approve the Compact as a decree of the Court for purposes of integrating it into Montana's comprehensive water rights adjudication. As mentioned previously, this case is part of a larger *inter sese* proceeding governing the quantification and determination of water rights. It sometimes is referred to as an "*in rem*" proceeding. *Nevada v. United States*, 463 U.S. 110, 144 (1983). This subject matter was not at issue in the two prior proceedings Ingraham cites, which were compensation-based. For similar reasons, the third element, that the issues are the same, could have already been raised, or relate to the same subject matter, also are not met because authority to adjudicate reserved water rights rests with the Montana Water Court, not the Court of Claims. As that court has stated:

> [T]he U.S. Court of Federal Claims should not engage in stream adjudications. Stream adjudication is a creature of state law that enables a state to administer a system of recording property interests in water. States have created intricate processes to determine who exactly owns the right to use water within the state, as well as to determine whether a stream or river has been over-appropriated. This court should thus refrain from entering into the business of stream adjudication.

Hage v. United States, 35 Fed. Cl. 147, 159 (1996).

Because the Ingraham Motion does not prove that either the second or third elements are met in relation to what this case is about, the res judicata argument also is not a basis to reject the Compact.

III. APPLICATION OF COMPACT APPROVAL STANDARDS

The Compact Parties argue the Compact "taken as a whole, is fair, reasonable and adequate to all concerned" because the Compact was negotiated and entered into in a procedurally fair manner, is substantively fair, and conforms to existing law. Various Objectors disagree.

A. Procedural Fairness.

To determine procedural fairness, the Court considers the nature of the negotiations that led to the Compact and whether the Compact was "the product of fraud or overreaching by, or collusion between, the negotiating parties." The procedural

fairness inquiry also implicates the questions as to whether the Compact is the product of "good faith, arms-length negotiations" which the Compact Parties must prove because the Compact received objections.

1. *Fairness of Negotiations.*

Compacts in Montana are somewhat unique in relation to reserved water rights settlements in other western states due to the process designed by the Montana Legislature calling for negotiation by the Compact Commission. The Legislature established and authorized the Commission to represent the State's interests. The legislation also designated the Commission to act on the Governor's behalf. Section 2-15-212(1), MCA. Under this structure, the Commission did not negotiate this Compact or any other previous compact on behalf of any particular water user or interest group, but instead on a "government-to-government" basis. *In re Adjudication of Existing and Reserved Rights of Chippewa Cree Tribe*, 2002 Mont. Water LEXIS 1 ("*Chippewa Cree Order*").

The Compact Parties contend the specific details of the negotiations that led to this Compact demonstrate the requisite fairness. There is no question that the negotiations occurred over many years. Likewise, all parties were represented by teams of sophisticated technical and legal professionals. Opportunities for public comment were provided. Drafts were made available to the public for comment. As negotiations progressed, the Commission was required to provide public reports to the chief water judge about the status of negotiations. Section 85-2-705(2), MCA.

The 2013 Legislature's failure to ratify the Compact ultimately added a layer of procedural review that did not exist in other compacts. The public records for the Water Policy Interim Committee between the 2013 and 2015 legislative sessions indicate the Compact was discussed extensively in a public forum.[30]

The Objectors do not question length and details of the negotiation process, nor do they contend the Commission deviated from its statutory charge in negotiating the

[30] The public records, including minutes and materials, are available online at https://archive.legmt.gov/committees/interim/past-interim-committees/2013-2014/water-policy/.

Compact. From the materials provided, the Court concludes the process for this Compact largely tracks and exceeds processes the Court has found demonstrate fairness when approving other compacts. *See, e.g. Chippewa Cree Order*; *Blackfeet Compact Order*.

2. *Arms-length Nature of Negotiations.*

The "arms-length" standard is closely related to the fairness of negotiation standard. In prior compact cases, the Water Court has found negotiations arms-length based upon the general adversarial nature of negotiations between the three government entities. For example, in evaluating the arms-length nature of a compact, the Montana Supreme Court has held it relevant to look to compromises reflected in a Compact. *Crow Compact II*, 2015 MT 353, ¶ 27 ("the Tribal allocation of water on the Ceded Strip was a result of arms-length negotiations between the Settling Parties").

Though Objectors may disagree, this Compact contains provisions indicating the Tribes and the United States compromised their various positions to reach an agreement acceptable to both. The Compact reflects these compromises. For example, the Compact constrains the use of the Tribes' senior water rights to make calls on several categories of junior water right owners. Compact Art. III.G. The Compact sets limits as to when and how certain on-reservation instream flows may be enforced by requiring a detailed multi-step process that cannot begin until all other state-based water rights on a particular stream have been included in a final decree issued by the Water Court. Compact Art. III.C.1.d.iii. The Compact imposes administration limits on the exercise of off-reservation instream flow rights by tying them to limitations already in place for existing hydropower projects on the Kootenai and Clark Fork Rivers. Compact Art. III, D.1.e and Appx. 25 (76D 30063810); Art. III.D.3.g and Appx. 27 (76N 30063808). The Compact also provides for so-called "shared shortage" provisions to curtail water enforcement during certain periods. Compact Art. IV.E. There are numerous other compromises reflected in the Article III and Article IV provisions.

The arms-length nature of negotiations for this Compact also is reflected in risk to the State if the parties did not reach a negotiated agreement. The litigation history for the State as to water uses relating to the Tribes has been checkered, as reflected in *Namen*,

Joint Bd. of Control I, and the *Ciotti* line of cases. 665 F.2d 951; 832 F.2d 1127; 278 Mont. 50. The State also acknowledges risk as to how – or even if – future permitting of non-tribal members on fee land within the Reservation will occur if the Compact is not approved. Tr. 218: 20-22; Staff Report, at 12.

Conversely, the Compact provides benefits to the State. The Compact lifts the de facto permit closures that have been in place since *Ciotti* and related decisions. Additionally, unlike other compacts, this Compact does not close the Reservation basins (76L and 76LJ) to new permits. *Compare* § 85-20-901, MCA (including closures of various basins on Crow Reservation); § 85-20-1501, MCA, Art. III.J (partial closures on Blackfeet Reservation). The State also benefits from an agreement that tracks the principles confirmed in *Greely*, which helps to ensure the McCarren Act sovereign immunity waiver remains intact. 219 Mont. 76. These factors demonstrate the arms-length nature of the Compact negotiations.

3. Fraud, Overreaching, or Collusion.

The next procedural factor the Compact Parties must prove is that the Compact was not the result of fraud or overreaching by, or collusion between, the negotiating parties. The Compact Parties' Motion argues none of these factors exist, based on the undisputed facts and definitions contained in Montana case law. (Doc. 1823.00, at 69-70).

Numerous Objectors cite one or more of these factors as part of all of their bases to object. For example, the Havens response to the Compact Parties' Motion does not dispute the history of negotiation, but alleges fraud or constructive fraud without describing it with any degree of particularity, as Montana law requires. (Doc. 1916.00, at 17). Other Objectors are more specific, but use the term "fraud" or "constructive fraud" to describe a process where they contend the legislators were misled about the background to the Compact, and the potential for future Water Court litigation if the Compact was not approved. *E.g.*, Jore Motion (Doc. 1832.00, at 23-24).

Even if Objectors could prove legislators during the 2015 Legislative session were pressured or misunderstood the facts surrounding Compact ratification, such facts do not

raise an issue of material fact as to fraud, overreach, or collusion in the legislative process. Objectors raising this concern ask the Court to either inject itself into the legislative process or to exercise a veto over legislation that has been passed and signed by the Governor.

The Court lacks the authority to second guess the Legislature's decision to ratify the Compact. As the United States Supreme Court has held, "[u]nder the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa* (1963), 372 U.S. 726, 729 (1963). Likewise, it is the Governor's role, not this Court's, to decide whether to veto legislation. Mont. Const. art. VI, § 10. The Objectors cite no case authorizing the Water Court or any other court to stray out of its lane to invalidate a legislative act on these grounds. Moreover, the potential for future litigation if the Legislature did not ratify the Compact is not an unrealistic concern because the Water Court will be required to adjudicate the more than 10,000 claims filed in June 2015 if the Compact is not approved.

The Jore Motion and others also reference fraud in connection with how land ownership was fractured and now exists on the Reservation as a result of the Flathead Allotment Act and other statutes. (e.g., Doc. 1832.00, at 55-56). The accuracy of this characterization is not something the Court must parse in determining whether the Compact was entered into fraudulently because it already has been litigated and resolved in numerous prior federal cases and confirmed by the Montana Supreme Court in *Greely*, 219 Mont. 76; *see also.*, *Namen*, 665 F.2d 951.

Several Objectors use the term "overreach" as a basis to challenge various aspects of the Compact. The Omvig Hammer Motions argue the creation of the Water Management Board is an act of constitutional overreach. (Doc. 1837.00, at 32-33). Similarly, other Objectors argue the Compact overreaches by giving the Board "exclusive authority." (Doc. 1832.00, at 57). Objectors cite the inclusion of off-reservation water rights as an example of overreach. (*E.g.*, Doc. 1940.00, at 16). Others simply use this

term somewhat hyperbolically by calling the Compact Parties' arguments in general "overreaching." (*E.g.*, Doc. 1917.00 (Congdon Resp., at 3)).

The Montana Supreme Court discussed the overreach standard in the second Crow Compact case. There the Court looked at whether the allocation of a block of water for fishery maintenance was overreaching as inconsistent with the public interest. The Court denied this challenge, recognizing that the "Compact has been ratified by the Legislature and it is squarely within the authority of the Legislature to reserve water for public and recreational use." *Crow Compact II*, 2015 MT 353, at ¶ 36. The Supreme Court's analysis indicates that legislative approval of a Compact does not constitute impermissible overreach. Given the extensive process that led the Compact being introduced and ratified, the Objectors fail to prove impermissible overreach as a result of the legislative process.

As to alleged "collusion," the Objectors raising this concern essentially argue the federal government, the Montana government, and the Tribes struck a deal that deprives non-tribal members of rights that otherwise exist, again citing the legislative process as one example. (*E.g.*, Doc. 1832.00 (Jore Motion), at 56-57). Montana defines collusion as "some sort of agreement aimed at defrauding another or otherwise breaking the law." *Tidyman's Mgmt. Servs. v. Davis*, 2014 MT 205, ¶ 48, 376 Mont. 80, 330 P.3d 1139.[31] As already explained, the lengthy negotiations, public process, and legislative ratification – both federally and in Montana – support the Compact Parties' position as to a lack of any unreasonable conduct rising to the level of collusion.

The Compact is a government-to-government settlement reached by three sovereign entities in a manner that followed the Commission procedure outlined by the Montana Legislature and that ultimately was ratified by the Montana Legislature. Acts of the Legislature are "presumed to be valid." *State v. Gateway Mortuaries*, 87 Mont. 225, 287 P. 156, 158 (1930); *see also, Clark Fork Coal. v. Montana Dep't of Nat. Res. & Conservation*, 2021 MT 44, ¶ 60, 403 Mont. 225, 272, 481 P.3d 198, 222 ("[t]he

[31] In Tidyman's an insurance company alleged parties to a stipulated settlement colluded in a manner that unreasonably enhanced insurance coverage.

Legislature is presumed to be aware of all of its enactments, as well as all related constitutional duties and limitations"). Under our constitutional system of separation of powers, this is true even though individual members of the public and even individual members of the Legislature might disagree. Such disagreement is a function of democracy, and not a basis for the Court to invalidate legislative ratification, which is what the Objectors raising this issue ask the Court to do.

Additionally, the Montana Supreme Court already has upheld certain aspects of the legislative process in ratifying the Compact. In *Flathead Joint Bd. of Control v. State*, 2017 MT 277, 389 Mont. 270, 405 P.3d 88, the Court held the Compact does not violate Mont. Const. art. II, § 18 by granting new immunities. There are no disputed facts that Compact negotiation and ratification occurred in a manner designed to defraud those who now object. The Objectors have not overcome the Compact Parties' Motion as to the procedural fairness aspect of the Compact process.

B. Substantive Fairness.

The Compact Parties' Motion identifies bases on which to contend the Compact is substantively fair. They include: (1) the Compact properly quantifies the Tribal Water Right, (2) the Compact properly dedicates a portion of the right to FIIP, (3) the Compact accounts for water rights associated with private lands on the Reservation, (4) the Compact recognizes legally cognizable off-reservation instream flow rights, and (5) the Compact includes appropriate call protection measures as to third party private water users.

To evaluate substantive fairness, the Court has not and need not pre-review the more than 10,000 water right claims the Tribes and United States filed in 2015 and measure the settlement embodied in the Compact against them. Because this case comes to the Court in the form of a legislatively-ratified settlement agreement, the Court "need only be satisfied that the Compact represents a reasonable factual and legal determination." *Blackfeet Compact Order,* 2020 Mont. Water LEXIS 770, at *21 (quotations omitted). To make this determination, the Court is not required to formally rule on the merits of each substantive standard. Rather, to evaluate substantive adequacy,

the Court's analysis is limited to "an amalgam of delicate balancing, gross approximations and rough justice." *In re Chippewa Cree Tribe*, *8, *citing Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1983).

1. Quantification.

Article III sets out the Compact's quantification provisions. It does so by dividing the water rights covered by the Compact into two categories. The first falls under the umbrella of rights the Compact defines as the "Tribal Water Right." Compact Art. II(67). The Compact describes all water rights in the first category as federal reserved water rights. The second category are Water Rights Arising Under State Law. This also is a defined term under the Compact. Compact Art. II(70).[32]

Article III of the Compact describes each water right category. Within each category, the details of the specific characteristics of the rights are set out on several abstracts. The abstracts identify specific amounts, sources, other elements, and administration provisions. The abstracts for various components of the Tribal Water Right are contained in Decree Appendix 2. The abstracts for various components of the state-based water rights are contained in Decree Appendix 3. The Compact states the abstracts are a "substantive element of this Compact" and "shall control in the event of any inconsistency between Compact and the abstracts." Compact, Art. III.B.[33]

Several Objectors argue the Court cannot approve the Compact because it does not properly quantify the claimed reserved water rights. Their arguments fall into several general categories: (a) whether the Compact quantifies water rights at all; (b) whether the specific quantification elements were available to the Legislature when it approved the

[32] The Compact defines this term as: "those valid water rights Arising Under State Law existing as of the Effective Date and not subsequently relinquished or abandoned, as those rights are: decreed or to be decreed by the Montana Water Court pursuant to 85-2-234, MCA; permitted by the DNRC; exempted from filing in the Montana general stream adjudication pursuant to 85-2-222, MCA; or excepted from the permitting process pursuant to 85-2-306, MCA."

[33] While the Compact refers to the various components of the Tribal Water Right by Compact section number, the abstracts themselves use the nomenclature used for all other abstracts addressed in Montana's statewide adjudication. For example, the Compact describes the FIIP quantification by reference to the "abstracts of water right attached hereto as Appendix 5." Compact, Art. III.C.1.a. Appendix 5 contains three abstracts with the numbers 76L 30052930, 76L 30052931, and 76L 30052932.

Compact in 2015; and (c) whether the Compact uses a proper methodology to quantify the rights.

a. Whether the Compact quantifies water rights.

Several Objectors argue the Court should deny the Compact Parties' Motion and reject the Compact because it does not quantify the Tribal Water Right at all. For example, the Sego-Slack Motion contends the way the Compact is structured leaves it "impossible to know the amount of water the CSKT is entitled to under the Compact." (Doc. 1821.00, at 7). Other Objectors make similar lack of quantification arguments. For example, the Omvig Hammer Motions state, "the CSKT Compact does NOT actually quantify the Tribes' water rights." (Doc. 1837.00, at 18).

Quantifying a water right is the process of describing the amount of water associated with the type of water use identified for the right. Depending on the purpose of the right, water quantity may be expressed as a flow rate, a volume, or both. To quantify state-based water rights, Montana's Water Use Act requires the Court to define the amount of water associated with the right in units of flow rate or volume or both depending on the purpose of the right. Section 85-2-234(6)(b), MCA. For tribal rights and other rights "arising under the laws of the United States," the Act is less specific, requiring only that the Court adjudicate "the quantity of water included in the right." Section 85-2-234(7)(c).

Objectors' argument that there was no quantification does not reflect what the Compact says, nor is it consistent with what the Water Use Act requires in terms of quantification detail. Article III of the Compact contains detailed narrative descriptions of various components of the rights that refer to Compact appendices. Appendices 2 and 3 of the of the Compact contain detailed abstracts that provide the detail necessary to describe these provisions.[34] The abstracts addressing the specific elements of the Tribal

[34] The Preliminary Decree contains three appendices. Within Decree Appendix 2 are a series of numerically described additional Compact appendices. For example, Decree Appendix 2 includes Compact Appendix 5, which are the abstracts for the FIIP water diversions. To distinguish the two sets of appendices, this Order will use the terminology "Decree Appendix" and "Compact Appendix."

Water Right describe the amount of water differently depending on the use and source of water. The abstracts for on-reservation and off-reservation instream flow rights specify a quantity of water by flow rate but not volume. For example, the abstract for the Middle Fork of the Jocko River includes a maximum 96.00 cfs flow rate for instream flow (subject to conditions) but no volume. Compact Appx. 11 (abstract 76L 30052776). The abstract associated with the Flathead System Compact Water Right[35] quantifies a diverted volume of 229,383 acre-feet from various sources, and a maximum consumed volume of 128,158 acre feet per year, but does not contain a flow rate. Compact Appx. 9 (abstract 76LJ 30063812). The abstracts also quantify the acre feet volume of various on-reservation reservoir storage projects. Compact Appx. 15. The abstracts describe the water quantity for various natural lakes and wetlands using the narrative description "naturally occurring." Compact Appx. 16 and 17. The abstract for the natural pool level of Flathead Lake describes it as "the shoreline elevation of 2,883." Compact Appx. 18 (abstract 76LJ 30052867). As these examples illustrate, the Compact and the incorporated appendices contain numerical values for the various aspects of the Tribal Water Right broken down by sources and purposes.

The Omvig Hammer Motions argue that if an instream flow right contains a flow rate but not a volume, the right has not been quantified. Omvig Hammer Motions, at 19. They cite no law, rule, guidance document, or expert opinion to support this contention. The argument also is inconsistent with how the Water Court has quantified water in prior compacts. For example, the National Park Service Compact quantifies the instream flow rights in Glacier National Park as "the entire flow of the stream" other than any consumptive use rights. Section 85-20-401, MCA, Art. III.[36] Similarly, the abstracts

[35] The Compact defines this term as "that portion of the Tribal Water Right consisting of 229,383 Acre-feet per year that the Tribes may withdraw from the Flathead River or Flathead Lake, which includes up to 90,000 acre-feet per year stored in Hungry Horse Reservoir." Compact, Art. II.35.

[36] *See, e.g.* abstract for water right no. 76LJ 30068173, quantifying the flow rate for the North Fork of the Flathead River in relevant part as the "entire flow rate of source in excess of amount diverted within this basin by rights described in Article III.c.2 of the compact between the United States of America and the State of Montana, codified at Section 85-20-401 M.C.A. (1995)." The Water Court decreed the National Park Service Compact in Case WC-94-1, 2005 WL 6965507 (Apr. 11, 2005).

included with the *Blackfeet Off-Reservation Order* quantify instream flow rights as all the natural flow of the enumerated sources and their tributaries, minus water needed to satisfy other legal entitlements. The Court upheld this quantification method by approving a settlement culminating a decades-long litigation history. Case WC-0001-C-1991, 2021 WL 3928907.

Objectors' lack of quantification argument also ignores the practical reality of administering instream flows, which is the primary reason to include numeric quantification values on the abstracts. Instream flow rights are non-consumptive, as the Montana Supreme Court recognized in *Greely*. 219 Mont. at 93. The rights recognize the flow necessary in a stream to protect the purpose of the right, which generally are biologically based. If the flows fall below the decreed flow rate level, the holder of the right may seek to curtail junior users as necessary to maintain flows "below a protected level in any area where the non-consumptive right applies." *United States v. Adair,* 723 F.2d 1394, 1411 (9th Cir. 1983). In contrast to municipal, industrial, or domestic uses, an instream flow right does not divert a block of water from the stream for consumptive use such that when the volume cap is reached, diversions must end. In light of how the Court has decreed instream flow rights for similar uses in other compacts, the information on the abstracts is sufficient to rebut the argument that aspects of the Tribal Water Right lack quantification.

In their response to the Compact Parties' Motion, and the reply to their own motion, the Sego-Slack Objectors argue the Compact does not quantify rights because it "defers actual quantification until an enforceable flow schedule has been established under the law of administration." (Doc. 1970.00, at 11 and Doc. 2066.00, at 4). To explain this argument, Sego-Slack cite the Compact Appendix 12 instream flow rights for Ashley Creek and Post Creek, "the source of Sego/Slack's non-FIIP water rights." (Doc. 2066.00, at 4).

Sego-Slack's deferred quantification argument conflates water right quantification with water right administration. For example, the instream flow right for Ashley Creek, one of the streams Sego-Slack references, is quantified in the abstract for 76L 30052834.

This abstract states maximum flow rates that vary by month, presumably to mimic natural streamflow variation. This abstract is contained in Compact Appendix 12, which includes abstracts for several streams. The Compact states the rights described in Appendix 12, "only become enforceable on the date that an enforceable flow schedule for that right has been established pursuant to the process set forth in the Law of Administration, Section 2-1-115." Compact Art. III.C.1.d.iii.

UAMO § 2-1-115[37] sets out the process to establish enforceable flow schedules for this category of rights. For water rights on sources like Ashley Creek that fall within Basin 76L, this process cannot begin until if and when the Water Court issues both final approval of the Compact and a final decree for Basin 76L, and all appeal periods have run. UAMO § 2-1-115(1). At that point, the Tribes can initiate an "enforceable schedule process for any given stream reach." UAMO § 2-1-115(2). This process is extensively detailed in the UAMO, and includes the opportunity for objections and the recognition of "a water budget that allows valid water rights to be exercised." UAMO § 2-1-115(3).

The Compact and UAMO's inclusion of this detailed process to set enforceable flows undermines Sego-Slack's lack of quantification argument. The water sources in the Appendix 12 abstracts – including Ashley Creek and other streams – are currently quantified. The extent to which the quantified limits can be enforced is a matter for another day, and one in which Sego-Slack or any other holder of a water right are provided a statutory right of full participation. But for purposes of Compact approval, this line of argument is not a basis on which to attack the quantification.

Although not specifically a lack of quantification argument, Mission-Jocko tries a different quantification argument in response to the Compact Parties' Motion. Mission-Jocko argues the quantification provisions of some abstracts are too vague or complicated for a water commissioner to administer, which may lead to additional litigation. (Doc. 1963.00, at 20-23). The Court recognizes Mission-Jocko's concern, but for purposes of

[37] As previously noted, the UAMO is codified several chapters within Section 85-20-1902, MCA. For ease of reference, this Order uses the prefix "UAMO" followed by the section being cited. For example, the initial section is cited "UAMO § 1-1-101."

what is before the Court – approval of a settlement agreement – the perceived complexity of administration is not a valid basis to refuse to approve the Compact. No doubt this Compact contains one of the most complex suite of administrative provisions found in any decreed set of abstracts that tabulate water rights in Montana. But these details ultimately provide the standards and specificity necessary to avoid ad hoc water administration.

The complexity also reflects the substantive differences between reserved rights and state-based rights. For state-based rights, beneficial use operates as a limit to the exercise of a water right even if the limit to beneficial use is less than what an abstract states. *McDonald v. State*, 220 Mont. 519, 530, 722 P.2d 598 (1986); *Greely*, 219 Mont. at 89 ("[a]n appropriator is generally entitled to a specified quantity of water so long as actual, beneficial use is made of the water"). Unlike state-based water rights, tribal reserved water rights are not limited by beneficial use. Rather, they are based on the amount of water necessary to fulfill the purpose of the reservation and cannot be abandoned. *Greely*, 219 at 90 & 99; *see also*, *Confederated Salish & Kootenai Tribes v. Clinch*, 1999 MT 342, 297 Mont. 448, 992 P.2d 244. The Compact's detailed administrative provisions reflect a reasonable negotiated compromise that sets conditions on the exercise of the reserved rights quantified in the Compact that likely would not exist outside a negotiated settlement. These administrative provisions protect junior users, which was a concern of the State when it negotiated the Compact.

The administrative complexity referenced by Mission-Jocko also reflects the political reality of the Compact negotiations. As described in some detail in the 2014 Commission Report, prior versions of the Compact included a Water Use Agreement between the Tribes, the United States, and the Flathead Joint Board of Control ("FJBC"). 2014 Commission Report, at 19-20. After FJBC disbanded, the Compact Parties negotiated the provisions of the Water Use Agreement into the Compact with the assistance of technical staff. This added a measure of administrative detail to the Compact, but did so for the benefit of ensuring FIIP irrigators "did not lose the irrigation

deliveries to meet historic crop consumptive use as previously negotiated." Compact Parties' Motion, at 37 (explaining, and providing evidentiary support, for modifications).

b. Whether the quantification elements were available to the 2015 Legislature.

The next quantification argument is made by the Omvig Hammer Objectors asserting the elements described in the various abstract appendices were not available to the Montana Legislature when it ratified the Compact in 2015, so the quantities of water described in the abstracts never were "reviewed and approved by the Montana Legislature." (Doc. 1837.00, at 18). The argument cites no authority for the alleged lack of review and it is contrary to the official reports. For example, the detailed 2014 Commission Report makes numerous references to appendices. The report includes a response to questions, one of which answers the question of whether the Compact quantifies the rights as follows:

> Yes. The Compact quantifies the Tribes' water rights in great detail in Article III of the Compact and the appendices.

2014 Commission Report, at 33. The report goes on to enumerate the appendices and then describes the various components of the Tribal Water Right they quantify.

The Omvig Hammer Objectors' argument also assumes, without citing authority, that legislation in the form of a ratified agreement never can incorporate material by reference. This is unsupported argument is contrary to the structure of most other tribal compacts in Montana that the Legislature previously ratified with references to appendices. *See,* § 85-20-201, MCA (Fort Peck); § 85-20-601, MCA (Chippewa Cree); § 85-20-901, MCA (Crow); § 85-20-1001, MCA (Fort Belknap); and § 85-20-1501, MCA (Blackfeet).

c. Whether the Compact properly quantifies water rights.

The process of quantifying reserved rights is complex. As the Water Court previously has noted, "[t]here is no more contentious issue in Indian water law than the quantification of Indian reserved water rights." *Fort Peck*, 2001 WL 36525512, at *9. That statement is perhaps even more true here in a hydrologically diverse basin with

demographically diverse land ownership and several treaty-based foundations for reserved and aboriginal water rights claims. The substantive fairness of the Compact's quantification provisions also rest on a foundation of settled law that includes the acceptance of tribal reserved water rights based on *Winters* and its progeny, the standards articulated in *Greely* to ensure a proper McCarren-compliant adjudication, and the Ninth Circuit's holdings in *Namen* and *Joint Board of Control I*. Additionally, because the Compact is a settlement, the Court need not engage in a full-scale precise quantification of the Tribes' reserved rights. Rather, the quantification standards meets the threshold for approval so long as they are "based on legally sufficient standards." *Blackfeet Compact Order*, at *9.

Several Objectors address the quantification standard by arguing the terms of the Hellgate Treaty cap the amount of water that can be included in the Tribal Water Right. Objectors Carter and Allen contend the reserved rights are limited to uses expressly mentioned in the Treaty, as those uses existed as of the time the treaty was entered into. (Doc. 1786.00, at 8-9; Doc. 1809.00, at 8-9).

These arguments are inconsistent with accepted legal standard for quantifying a water right. In *Greely*, the Montana Supreme Court held proper focus is on the permanent homeland purpose of the Reservation, a purpose courts must construe broadly to further the recognized "goal of Indian self-sufficiency." *Greely*, 219 Mont. at 98. In *Arizona v. California*, the United States Supreme Court ruled reserved rights must account for both the present and the future needs of tribes. *Arizona v. California*, 373 U.S. 546, 600 (1963); *see also, Greely*, 219 Mont. at 90 ("Reserved water rights are established by reference to the purposes of the reservation rather than to actual, present use of the water.") Settled case law also recognizes that some reservations – including the Flathead Reservation – may have multiple primary purposes. *Joint Bd. Of Control I*, 832 F.2d 1127 (recognizing time immemorial fishing rights and treaty date farming rights); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) ("[p]roviding for a land-based agrarian society, however, was not the only purpose for creating the reservation").

Other cases indicate courts consider a variety of approaches and factors to quantify on-reservation water rights consistent with these permanent homeland and multiple-purpose reservation guidelines. In *Arizona v. California*, the United States Supreme Court upheld as reasonable a special master's determination of a reserved amount of water as necessary "to irrigate all the practicably irrigable acreage on the reservation." *Arizona v. California*, 373 U.S. at 600. In the Gila River adjudication, the Arizona Supreme Court held "practicably irrigable acreage" is not the only method to quantify reserved rights. There, the Court applied a multi-factor balancing test that included the importance of water to the tribe's culture, historic water use patterns, the reservation's geography and topography, tribal economic development plans and needs, the practicality and feasibility of planned water uses, and other factors. *In re Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source*, 201 Ariz. 307, ¶¶ 38-49, 35 P.3d 68 (2001).

The on-reservation rights quantified in the Compact are consistent with these standards. The so-called Flathead System Compact Water is available from several sources to meet the Tribes' current and future needs. Compact Art. III.C.1.c. & Compact Appx. 9 (76LJ 30063812). It contains provisions protecting other water users more than could be accomplished in a litigated adjudication proceeding. It also recognizes any valid purpose, which could include irrigation, but also may include stock water use, domestic, commercial, municipal, industrial, and other uses. It also supports water quality by protecting wetlands and high mountain lakes, as well as water for hunting and fishing uses. These broad purposes justify quantification provisions in this Compact based on more than only practical irrigated acreage.

Objectors' responses consist of rather hyperbolic statements that lack connection to the amounts quantified in the Compact and detailed in the abstracts. For example, Sego-Slack argue that by including the terminology "enhancement of fish habitat," in the Compact allows the Tribes "to lay claim to whatever water it might decide it needs to enhance its fisheries in whatever amount it desires." (Doc. 1821.00, at 10 (internal quotation omitted)). This statement fails to acknowledge the very specific measures put in place for on-reservation instream flows. For example, the instream flow natural site

abstracts in Compact Appx. 10 contain flow rates that vary over the course of the year rather than setting a single high-flow maximum applicable throughout the year. The abstracts also set upstream measurement points that accommodate downstream uses. Additionally, the Staff Report and the materials it references indicate the flow rates for various on-reservation stream segments were set using scientific facts rather than untethered "desires." Staff Report, at 41-42.

Objector Carter makes several additional arguments that are inconsistent with settled case law. Carter argues the Flathead Reservation *Winters* rights are abandoned, but fails to distinguish the Montana Supreme Court's acceptance of the principle that reserved rights are not subject to abandonment. *Greely*, 219 Mont. at 99 ("reserved water rights cannot be decreed to be abandoned by reason of nonuse"). Additionally, Carter argues actual use as of the 1889 date of Montana statehood puts a cap on the reserved right. Carter's date of statehood argument is inconsistent with *Winters* itself, which rejected a similar argument. *Winters*, 207 U.S. at 577.

Even though the Omvig Hammer Motions claim the Compact does not quantify water rights at all, they devote a significant portion of their motion to criticizing the volume of water necessary to keep Flathead Lake at its natural pool level, as authorized by Article III.C.1.h. & Compact Appx. 18. Other Objectors raise similar arguments. *E.g.* Holbrook Objection, ¶ 8.e. (Doc. 1802.00) (contending the Compact "[c]onveys ownership and control of Flathead Lake to the Tribe without an undefined Maximum Flow Rate"). These arguments are not accurate. The Compact does not convey ownership of Flathead Lake to the Tribes. The Compact also does not convey control of the reservoir storage portion of the lake to the Tribes. Rather the Compact only recognizes a right to maintain Flathead Lake at a natural level of 2,883 feet. Compact Art. III.C.1,h & Compact Appx. 18 (76LJ 30052867). The Flathead Lake water right does not authorize any diversions from the lake nor does it include a reservoir storage component. The abstract for the Flathead Lake natural level right confirms this limitation with a remark stating:

> THIS WATER RIGHT HAS NO ARTIFICIAL MEANS OF DIVERSION OR CONTROL OF WATER THAT CAN BE USED TO CONTROL, MANIPULATE OR OTHERWISE AFFECT THE QUANTITY OF WATER AVAILABLE TO SATISFY THIS RIGHT.

As the 2014 Commission Report indicates, this limitation was disclosed to WPIC prior to the 2015 Legislature:

> This right is not a consumptive right, meaning the Tribes would not have the right to drain the water out of the lake, or lower the lake to this minimum level.

2014 Commission Report, at 33. Any argument that the Compact authorizes control of the lake above the natural pool level is not supported by the language of the Compact.[38] None of these arguments overcome the reasonable manner in which the Compact quantifies the Tribal Water Right.

d. Whether the Compact fails to quantify water quality claims.

In their motion and their response to the Compact Parties' Motion, the Congdon Objectors contend the Compact is flawed for failing to "quantify the water quality claims of the Tribe provided by MWRPA." (Doc. 1917.00, at 7). This argument suggests the Compact reasonably could quantify more water for water quality purposes. Even if that suggestion were true, the Compact does not allow the Tribes to return to the Water Court or any other Court (or, as discussed below, the UAMO Board) to seek an existing right for an additional measure of water for water quality protection beyond what already is quantified in Article III and the abstract appendices. This is the only adjudication of the Tribes' reserved water rights. The Congdon Objectors cite no basis for a risk that any rights exist based on the Hellgate Treaty that are not covered by the Compact.[39]

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[38] The Omvig Hammer Motions attaches as support for their Flathead Lake argument the abstract for water right claims 76L 94408-00 and 76L 94409-00, which are abstracts associated with the use of Flathead Lake for storage and hydropower generation. (Doc. 1836.00, Ex. F & G). These exhibits are not before the Court in this case and serve to illustrate why the Compact does not address lake fluctuations associated with hydropower generation and any licensing conditions that may apply to such use.

[39] If the Tribes ever seek a new appropriation for a water quality beneficial use, it will have to go through the new permit process. Even this has limits because the UAMO prohibits new permits to use water to dilute water quality. UAMO § 1-1-107(k) ("No Appropriation Rights issued pursuant to this subsection may be used for dilution").

2. FIIP and the FIIP Water Use Right.

The Compact defines the "FIIP Water Use Right" as the water right dedicated to use by FIIP and FIIP irrigators, primarily for irrigation. Compact, Art. II.32.[40] The elements of the right are described on the abstracts for water rights 76L 30052930, 76L 30052931, and 76L 30052932, each of which describes water use within different geographic areas, mostly within the Reservation. Under the terms of the Compact, ownership of the portion of the Tribal Water Right remains with the United States in trust for the Tribes. The Compact Parties' Motion argues this demonstrates substantive fairness because ownership and the structure of this right are consistent with the federal statutes establishing the Reservation and implementation of the irrigation infrastructure and distribution systems currently in place, as well as subsequent case law.

The FIIP Water Use Right incorporates the concept of a "river diversion allowance." Sego-Slack argue the RDA provisions have the effect of leaving aspects of quantification open for later determination. (Doc. 1970.00, at 10-11). As with their on-reservation instream flow argument, this argument misses the distinction between quantification and administration. The RDA provisions of the FIIP right recognize that depending on the type of year, the amount of water being diverted may fluctuate up or down. But these fluctuations occur within the overall quantification of the right.

The Omvig Hammer Objectors dispute the FIIP provisions by arguing FIIP was a "Bureau of Reclamation Project ("BOR") administered and operated by the BOR for the first 30 years plus." (Doc. 1940.00, at 7). Omvig Hammer argues the Compact causes those contracts between BOR and the districts to be breached. Mission-Jocko makes a similar argument. (Doc. 1815.00, at 23).

As part of their summary judgment motion, Mission-Jocko argue the Compact extinguishes entitlements they hold by subsuming them into FIIP provisions of the Tribal

[40] The full text of the definition is: "the water right set forth in Article III.C.1.a that is dedicated to use by the FIIP and FIIP irrigators and includes uses of water for irrigation and Incidental Purposes allowed by the FIIP through water service contracts. This water right is the source for the entitlement to delivery of available irrigation water for assessed parcels as provided by Article IV.D.2." Compact, Art. II.32

Water Right. (Doc. 1815.00, at 22-28). Much of this argument seems to be wrapped up in opinions as to whether FIIP is a project developed under the Reclamation Act or through Reservation-specific statutes. For purposes of determining fairness, whether the FIIP is under the Reclamation Act or formed through statute is not relevant here. To the extent the districts claim water through FIIP, that is outside what the Compact covers and the scope of the Court's jurisdiction for this case. Whether FIIP is administered by the United State through the BOR or through the Bureau of Indian Affairs ("BIA") is not a necessary question for purposes of the Court's narrow role in evaluating the Compact for purposes of incorporating it into final decrees. These arguments seem to be efforts to rekindle the many decades of dispute between FBJC and its successors and the United States. *See Joint Board of Control I*, 832 F.2d 1127; *Joint Bd. of Control v. United States*, 862 F.2d 195 (9th Cir. 1988) (describing administrative remedies and upholding dismissal for failure to exhaust); *Flathead Joint Bd. of Control of the Flathead, Mission & Jocko Irrigation Dists. v. United States*, 30 Fed. Cl. 287 (1993), *aff'd*, 59 F.3d 180 (Fed. Cir. 1995) (dismissing alleged breach of statutory, contractual and constitutional obligations related to project); *Flathead Irrigation Dist. v. Jewell*, 121 F. Supp. 3d 1008 (D. Mont. 2015) (dismissing action seeking to compel United States to turn over operation and control of an irrigation project); *Flathead Joint Bd. of Control v. State*, 2017 MT 277, 389 Mont. 270, 405 P.3d 88 (upholding Compact constitutionality). Moreover, to the extent any Objector has a dispute with the way FIIP is administering water to persons within its service area, those disputes may be addressed through the FIIP dispute resolution process, which the Compact does not modify. *See generally*, 25 C.F.R. Part 171 (BIA regulations governing Indian irrigation projects); *see also*, Doc. 1949.00, Ex. A (Compact Parties' Response to Sego-Slack, citing Bureau of Indian Affs., U.S. Dep't of Interior, Operation and Maintenance Guidelines: Flathead Indian Irrigation Project (2008)). The narrow issue before the Court does not require entering this thicket of historical litigation.

3. Individual Water Rights.

The Compact recognizes that different categories of land ownership exist within the Reservation's boundaries which lead to "varied water rights and entitlements." (Doc. 1823.00, at 45). The Compact Parties' Motion describes this category of rights as including state-based water rights on private fee lands that originated from homestead patents and so-called "Walton rights." *Id.* Walton rights are "private water rights held by a non-Indian successor to allotment lands that are derived from the allottee's share of the federally reserved water right for the reservation." *In re Scott Ranch, LLC*, 2017 MT 230, ¶4, 388 Mont. 509, 402 P.3d 1207, (describing rule from *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981)).

Several Objectors contend the Compact categorically extinguishes their ability to claim Walton rights. *E.g.*, Doc. 1970.00, at 24 (Sego-Slack Response, contending "the Compact and Decree work to extinguish those Walton rights and eliminate the individual nature of them"); Doc. 1940.00, at 7 (Omvig Hammer Response, contending the Compact "destroys Irrigators' rights (*i.e.* Walton, Stock Water and Secretarial"); Doc. 1884.00, at 4 (Carter Response, arguing "the Flathead Compact does not provide for the recognition or protection of these Walton water rights").

These arguments are contrary to the express terms of the Compact and general adjudication principles applicable to Walton rights. The Compact does not define or otherwise limit the ability of any Objector to claim Walton or other rights and have them adjudicated during the proceedings for Basin 76L or 76LJ. Rather, the Compact preserves the ability of Objectors and others to pursue these rights in the basin-specific adjudication proceedings before the Water Court. Compact Art. V.B.6 & 7 (preserving rights of parties to litigate issues not resolved by the Compact and prohibiting taking of such rights). The Compact Parties acknowledged this in their briefing and also during oral argument. (Doc. 1949.00 at 26-27, & n.33; Tr. 59:9-60:3). The Compact's tacit preservation of the right to pursue Walton and other private rights in Water Court adjudication proceedings also is consistent with how the Water Court has treated Walton and state-based rights in other decrees. *E.g.*, *In re Neal*, Case 43O-8, 2015 Mont. Water

LEXIS 15 (confirming certain Walton rights related to Crow Reservation). It also is consistent with how the Montana Supreme Court has interpreted Walton rights. *In re Scott Ranch, LLC*, ¶ 4 (non-tribal member Walton rights must be filed under the claim filing procedures and deadlines set in the Water Use Act for state-based rights).

The Compact Parties have met this aspect of substantive fairness because the Compact does not terminate any Walton right or any water right claim of any Objector, nor could it because no proceeding has been instituted to terminate or otherwise modify the water right claims of any Objector. The validity of any existing water right claims of any Objector involving on-reservation water use will be a matter of a separate proceeding in Basins 76L and 76LJ. *See generally, In re Jocko River Hydrological Sub-basin (Basin 76L)*, 2015 Mont. Water LEXIS 10 (staying adjudication proceedings in Basins 76L and 76LJ).[41] To the extent any Objector requests their water rights be "removed from the Compact," there is nothing to remove because no Objector water rights are included in the Compact. *E.g.* Holbrook Motion (Doc. 1802.00, at 9).

4. Off-Reservation Water Rights.

The Compact includes instream flow water rights for several stream segments outside the Reservation boundaries. These include the Kootenai River (76D 30036810), the Swan River (76K 30063809), the lower Clark Fork River (76N 30063808), and several other smaller streams. The Compact Parties' Motion argues the Compact is substantively fair to include off-reservation rights because they are based on "well supported by applicable law and fair." (Doc. 1823.00, at 53).

The Objectors raise two categories of arguments in response to the inclusion of off-reservation water rights in the Compact. The first is whether a legal basis exists to include off-reservation water rights in this Compact. The second is whether the Compact impermissibly exceeds the bounds of the law as to the scope of the right – both in terms of geographic extent and quantification.

[41] As noted previously, the stay on adjudication of claims for Basin 76LJ has been lifted since the date substantive briefing closed in this case.

a. Whether the Compact may include off-reservation rights.

The off-reservation rights recognized and quantified in the Compact are based on the Hellgate Treaty's express acknowledgement that the Tribes reserved the right to take fish "at all usual and accustomed places, in common with the citizens of the Territory." Hellgate Treaty, Art. 3. The Compact Parties' Motion cites the Treaty-based off-reservation fishing rights as the basis for the Compact to include water rights necessary to support the fishery. (Doc. 1823.00, at 50).

This express reservation of rights appears in treaties Governor Stevens negotiated with other tribes in the Pacific Northwest during the same era and is not unique to the Hellgate Treaty. Its interpretation as a reservation of rights arises from the United State Supreme Court's decision in *United States v. Winans*, 198 U.S. 371 (1905). In *Winans*, the Court upheld enforcement of another 1855 Stevens Treaty that – like the Hellgate Treaty – recognized rights to fish at "usual and accustomed places." The Court concluded this language protected off-reservation fishing rights because the treaty "was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted." 198 U.S. at 381.

Although *Winans* is a fishing access case, it forms the basis for cases recognizing instream flow rights with time immemorial priority dates to protect a fishery. In *Adair*, the Ninth Circuit recognized a tribal right to a quantity of water necessary to support the hunting and fishing rights. The Court confirmed the principle that the treaty language did not create the rights, but instead "confirmed the continued existence of these rights." *Adair*, at 1414. This recognition of existing aboriginal rights also is the basis for their time immemorial priority dates. *Adair*, at 1414. Similarly, as applied to the Hellgate Treaty and the Flathead Reservation, the Ninth Circuit confirmed that the Tribes had a "colorable" claim to aboriginal fishing rights, which form the basis to recognize "a reserved water right in the Tribe." *Joint Bd. of Control I*, 832 F.2d at 1131.

When read together, the *Winans* recognition of reserved off-reservation rights to fish at usual and accustomed places, and the *Adair* and *Joint Bd. of Control I* line of cases recognition of aboriginal water rights necessary to preserve a fishery, form a reasonable

basis to include off-reservation instream flow rights in the Compact. The Ninth Circuit followed this logic in *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1033-35 (9th Cir. 1985) by upholding a federal district court order requiring that water be released from a federally-owned and operated reservoir to protect spawning flows needed to support the Yakama Nation's off-reservation fishing rights.

Ultimately, this Court's role in reviewing the Compact is to determine whether confirming the existence of off-reservation instream flows "represents a reasonable factual and legal determination." *Blackfeet Compact Order*, 2020 Mont. Water LEXIS 770, at *21. The applicable case law supports the Compact on this issue. In reaching this conclusion, the Court notes the State considered its litigation risks on this issue before approving the Compact. 2014 Commission Report, at 15 ("[b]ased on the strength of these [off-reservation] claims and in light of existing legal precedent, the State agreed to recognize a limited number of off-reservation instream flow rights with a priority date of 'time immemorial'").

Notwithstanding this precedent, Objectors raise several arguments disputing the validity of the off-reservation rights. Objector Carter argues the Compact fails to provide specific support for off-reservation rights by identifying any usual and accustomed places where fish are taken outside the Reservation. (Doc. 1884.00, at 12-13). These arguments fail to recognize the applicable standards to approve the Compact. The Tribes are not required to prove current active use of off-reservation usual and accustomed places. *See United States v. Baley*, 943 F.3d 1312, 1336 (2019). Rather, the Compact can be approved based on a reasonable basis to do so in the future if a viable fishery exists, which is the ultimate basis for the off-reservation instream flow provisions.

b. Scope and quantification of off-reservation right.

As to scope and quantification, Sego-Slack cite the language of the Hellgate Treaty to argue the geographic extent of instream flow rights is limited only to streams bordering the Reservation. Sego-Slack reaches this conclusion by selectively citing segments of the Hellgate Treaty in light of *Winans* as providing a "right of taking fish in all the streams *running through or bordering* said reservation [and] also the right of

taking fish *at all usual and accustomed places*." (Doc. 1821.00, at 9 (emphasis added in Sego-Slack brief)). The full language of the referenced section of the Treaty actually states:

> The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory

Hellgate Treaty, Art. 3 (underlining added).

The underlined language is omitted from the quote in the Sego-Slack Motion. When included, the plain language indicates a two-part right: an "exclusive" right on the Reservation, and an "in common" right off the Reservation. The language does not support Sego-Slack's suggestion that the Reservation boundaries form the geographic boundary of instream flow rights.

As to the quantity of the instream flows, *Adair* supports an entitlement sufficient "to prevent other appropriators from depleting the streams waters below a protectable level in any area where the non-consumptive right applies." 723 F.2d at 1411. The documents referenced in the Compact Parties' Motion indicates the Commission "worked closely with Montana Fish, Wildlife & Parks (FWP) and the Department of Natural Resources and Conservation (DNRC) to identify mechanisms to provide meaningful instream flow protections." State Off-Reservation Proposal, at 2. To that end the State proposed instream flows as levels "appropriate to providing the biological benefits, protections to existing users and management flexibility." *Id.* The off-reservation instream flow levels were based on the State's proposal. The State's participation in developing instream flows that balance biology with protective measures for existing uses also adds a measure of public interest support for this provision. In the second Crow Compact appeal the Montana Supreme Court recognized the State's public interest in compact provisions protecting instream flows:

> The Objectors argue that the State negotiated contrary to public interest. The Objectors also claim that the Compact is overreaching because the Tribe was given 250,000 extra AFY for the maintenance of the Blue

> Ribbon Fishery. The Objectors suggest that the Montana Constitution declares that the water is for the benefit of the people (in this case for private appropriation) and reserving that water for the maintenance of the fishery is inappropriate. However, this argument does not stand up to scrutiny. Allocation of water for public recreation and maintenance of aquatic life is not inconsistent with the public interest. Pursuant to the Montana Constitution, "waters within the boundaries of the state [are] the property of the state for the use of its people." Mont. Const. art. IX, § 3(3). The Compact has been ratified by the Legislature and it is squarely within the authority of the Legislature to reserve water for public and recreational use. Reserving water for "public recreational purposes and for the conservation of wildlife and aquatic life" is for the benefit of the public.

Crow Compact II, ¶ 36.

In addition to geographic extent, several Objectors also question the quantification of the off-reservation instream flow rights. For example, the Sego-Slack Objectors argue the Compact is deficient because it does not disclose either the volume of fish or the volume of water to support the fishery. Objector Carter makes a similar argument. These arguments fail to reflect the nature of reserved water rights to protect the fishery – not a specific quantity of fish. In other words, Objectors seem to suggest the quantification is unreasonable without some numerical relationship between fish numbers and flow quantity, but they provide no legal or technical support for such a theory. As already explained, an instream flow right is a right that may be exercised during certain time frames to seek curtailment of junior uses that cause senior instream flows to fall below biologically-based target flow levels.

The Omvig Hammer Objectors argue impermissible overreach exists because the Board's jurisdictional reach extends to off-reservation waters such as Hungry Horse Reservoir and the South Fork of the Flathead River. (Doc. 1836.00, at 34, citing Art. II(C)(1)(c); Art.IV(B)(6)). Even if they are addressing the Compact generally rather than just the Board, this argument misinterprets these provisions of the Compact. The Compact does not decree any water right on the South Fork of the Flathead River or Hungry Horse Reservoir. Rather, as part of settlement, the United States dedicated a portion of its water rights for stored water in the reservoir (90,000 acre feet) to be used to

mitigate downstream impacts. Compact Art. III. C.1.c.i. Moreover, the use of off-reservation water stored in federal projects to supplement the Tribal Water Right is not unique to the Compact, but has been a central feature in other Montana compacts. *E.g.* § 85-20-1501, Art. III.H.1 (rights to Lake Elwell water in Blackfeet Compact).

Objectors' arguments about off-reservation instream flows also ignore the potential benefits to water users downstream from the Reservation as a result of the Hungry Horse mitigation water. The Compact provides for the lease of up to 11,000 acre-feet per year of the Hungry Horse allocation for "Off-Reservation Mitigation," which can be used to provide mitigation water for domestic, commercial, municipal, or industrial uses "at any point in the Flathead or Clark Fork Basins in Montana." Compact Art. IV.B.7.b. As explained in the 2014 Commission Report, this addresses existing legal demand limitations associated with large hydropower rights that impede development of new water users in these basins. 2014 Commission Report, at 14.

5. Other Water Rights.

The fifth basis for substantive fairness cited by the Compact Parties' Motion is the Compact's provisions that protect certain junior priority water rights from calls. (Doc. 1823.00, at 53-55). Though the Compact Parties noted these protections in responses to various Objectors, the Objectors fail to explain in their briefing how the presence of these protections leads to any substantive deficiency with the Compact.

C. Conformity with Existing Law.

The conformity portion of the Compact approval standards calls for the Compact Parties to make a threshold showing that the Compact does not violate any applicable law. The Compact Parties' Motion argues the Compact conforms to applicable existing law because: (1) it does not violate either the Montana or federal constitutions; (2) it does not violate any applicable Montana statute; and (3) it does not violate any applicable federal statute. (Doc. 1823.00, at 57-69). The motion identifies several subsets of laws within these three categories.

1. Federal and State Constitutions.

To demonstrate lack of violation of either the Montana or United States' Constitutions, the Compact Parties' Motion breaks down its analysis into several subparts, including: (a) the takings clauses of the federal and state constitutions; (b) the constitutional equal protection clauses; and (c) the constitutional due process clauses. For the most part, the Objectors' responses and affirmative motions fit within the constitutional categories identified by the Compact Parties. Additionally, the Sego-Slack Objectors identify several other alleged violations of the Montana constitution specific to the UAMO, which are discussed in the UAMO section below.

a. Takings clauses.

The Compact Parties' Motion maintains the Compact does not violate the takings clauses of either the Montana or the federal constitutions because the Compact does not "give new rights to CSKT or transfer title from private parties." (Doc. 1823.00, at 59). The terms of the Compact reflect this position by stating nothing in the Compact "shall be interpreted *** [t]o authoring the taking of any water right that is vested under State, Tribal or Federal law." Compact Art. V.B.7. The Compact Parties argue that the Compact's recognition and quantification of rights senior to those held by Objectors – and the risk of junior water rights being curtailed by calls for water – is a function of the prior appropriation doctrine, which governs water allocation in Montana. *See* § 85-2-401(1), MCA ("[a]s between appropriators, the first in time is the first in right"); *Greely*, 219 Mont. at 89.

Several Objectors dispute the Compact Parties' takings position. Sego-Slack argue the Compact has the effect of transforming individual Walton rights they hold into part of the FIIP water right recognized under the Compact. They go on to argue the Compact provides them "no process to protect or recognize those rights." (Doc. 1970.00, at 25). They make a similar argument with respect to their claimed Secretarial water rights. The Sego-Slack Objectors also argue that the *Baley* case does not control because their Walton rights have the same 1855 priority date as the FIIP irrigation rights. Sego-Slack further argue the Compact Parties' Motion does not overcome takings arguments Sego-

Slack made in their motions to amend their objections. Somewhat similarly, the Omvig Hammer Motions argue "the overwhelming result of the CSKT Compact is the indirect adjudication of State based water rights resulting in a taking." (Doc. 1837.00, at 53).

The takings clause of the Fifth Amendment to the federal constitution states: "[n]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Montana Constitution states "[p]rivate property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner." Mont. Const. art. II, § 29.

To assert a constitutional takings claim under the federal constitution provision, Objectors must prove they have a cognizable property interest, and then prove the Compact operates as a compensable taking of that interest. *Baley*, 942 F.3d at 1330.[42] Montana law is similar. *Egan Slough Cmty. v. Flathead Cnty. Bd. of Cnty. Commissioners*, 2022 MT 57, ¶ 73, 408 Mont. 81, 506 P.3d 996.

As already explained, the Compact does not extinguish Walton rights, so-called Secretarial rights, or any other state-based water rights held by any person who is not a party to the Compact. Whether the Court approves the Compact or not, each Objector with water right claims in Basins 76L, 76LJ, or any other basin in Montana are entitled to have properly claimed rights adjudicated by the Water Court in basin-specific proceedings where their claims are entitled to prima facie evidentiary status. Section 85-2-227(1), MCA. The Compact does not extinguish that right. To the extent the Compact Parties or anyone else files objections in basin proceedings, the Court will evaluate those objections at that time under the usual adjudication procedures. For example, if, as the Sego-Slack Objectors contend, the Compact Parties object to a water right claim within the FIIP service area, the Court will address the objection at that time. The preservation of the right to assert these claims indicates the Compact does not take any property interest.

[42] Even if there was a viable basis for a taking claim against the United States, neither the Compact Parties nor any Objector has provided a viable argument as to how this Court has jurisdiction to hear such a claim. *See* 28 U.S.C. § 1491.

b. Equal protection clauses.

The Compact Parties' Motion states the provisions of the Compact confirming the reserved water rights does not violate equal protection because the Tribes' reserved rights are based on historically recognized political classifications and are rationally related to legitimate federal and state law purposes. (Doc. 1823.00, at 59-63).

The primary equal protection argument from the Objectors is set forth in the Jore Motion. (Doc. 1832.00, at 27-35). The motion contends the Compact treats non-tribal private property owners within the Reservation differently than tribal interests. This argument is inconsistent with settled legal doctrine. The Montana Supreme Court held in *Greely* that courts must follow federal law when adjudicating reserved water rights. As explained in this Order, this "solemn obligation to follow federal law" is necessary to maintain the McCarren Amendment sovereign immunity waiver, as applied by the United States Supreme Court in *San Carlos Apache Tribe.* As a matter of federal law, reserved rights have some characteristics that differ from state-based water rights – most prominently quantification based on the purpose of the reservation rather than beneficial use, and lack of abandonment. These distinctions flow from the foundational bases for the rights, which never have been successfully challenged on equal protection grounds. The Water Court is bound to recognize and apply this precedent in evaluating the fairness of the Compact.

The Omvig Hammer Response and the Jore Motion also make the equal protection-based argument that the structure of the Board results in tribal interests being disproportionately represented in Board proceedings. (Doc. 1940.00, at 17-18). As discussed in more detail below, this assertion is an incorrect reading of the Compact. The UAMO does not give the Tribe a majority interest on the Board. Compact Art. IV.I.2.a (providing the Tribal Council with authority to select two of the five Board members).

c. Due process.

The Compact Parties' final ground for constitutional conformity is based on due process. Their motion maintains that the path followed to reach the agreements embodied in the Compact satisfies applicable due process requirements. Specifically, they point to

notice provided to the public along the way, the public nature of the process that resulted in the Compact's ratification by Congress and the Montana Legislature, and the Water Court objection process. The Compact Parties also compare the process in this case with the process used in prior compact cases – including the Crow Compact, which the Montana Supreme Court upheld as satisfying procedural due process. *Crow Compact II*, ¶ 39.

Objectors respond with two lines of argument based on due process. Some criticize the process followed to negotiate the Compact and this litigation to date. *E.g.* Wickum Motion (Doc. 1826.00). As part of this argument, numerous Objectors argue the Compact Parties' Motion trample on their due process rights to have their grievances aired at a hearing. *E.g.* Hartzell Response (Doc. 1852.00). Others argue the structure of the UAMO and the Board violate due process.

Due process has two aspects: procedural due process and substantive due process. Procedural due process requires notice and an opportunity to be heard "at a meaningful time and in a meaningful manner" if a liberty or property interest is at stake. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The procedures required depend on what "the particular situation demands." *Id.* at 334; *State v. Pyette*, 2007 MT 119, ¶¶ 13-14, 337 Mont. 265, 159 P.3d 232 (procedures required to satisfy due process are adapted to "the specific situation").

"Substantive due process prevents the federal government from engaging in conduct that shock the conscience . . . or interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987). Under Montana law, "[s]ubstantive due process bars arbitrary governmental actions regardless of the procedures used to implement them and serves as a check on oppressive governmental action." *Englin v. Bd. of Cty. Comm'rs*, 2002 MT 115, ¶ 14, 310 Mont. 1, 48 P.3d 39. Courts look to whether the challenged governmental act is "reasonably related to a legitimate governmental objective" to determine whether a person's substantive process rights are violated. *Id.*

As takings analysis shows, the Compact does not deprive any Objector of any water rights they hold. The Compact only quantifies the Tribal Water Right. Even to the extent the Compact may affect how an Objector's water right is tabulated and enforced in relation to the various reserved water rights, the Objectors have been provided with significant due process – both directly and through representation by public officials. The Compact Commission was established by the Montana Legislature to negotiate the Compact and did so in a public setting with dozens of public meetings. The legislative process also was quite public, with significant involvement from WPIC – the legislative committee specifically tasked with evaluating water-quantity related issues. Section 5-5-231, MCA. Ultimately the Legislature ratified the Compact with the Governor's approval, as did Congress (with Presidential and Department of Interior approval) and the Tribes. Objectors do not identify anything in the process of negotiation and ratification of this Compact that deviates from the ratification process in the Crow Compact, which the Montana Supreme Court concluded satisfied due process. *Crow Compact II*, ¶ 39 (concluding the compact satisfied process when objectors had "opportunities to be heard and to comment on the Compact" before and during the legislative ratification process).

Additionally, the Legislature provided more process by providing in the Water Use Act notice and the opportunity to file objections and to have those objections heard by the Water Court. Section 85-2-233, MCA. The Court provided this opportunity by giving extensive notice of the Preliminary Decree, opening the decree to objections, extending the objection period, allowing Objectors the opportunity to amend their objections, providing the opportunity to resolve objections through mediation, authorizing extensive motion practice, holding regular status conferences with Objectors, drafting case management orders specifically tailored to this case, creating a publicly accessible website specific to the case, and giving an opportunity for a hearing on material facts issues. While this process has been detailed and lengthy, no Objector has identified any actual due process issue with it. The Compact Parties are correct that procedural due process has been provided that comports with federal and Montana law.

Likewise, the Compact Parties demonstrate the Compact does not violate substantive due process because no Objector has been deprived of a property interest, and the Compact negotiated and ratified by government sovereigns in a manner that does not deviate from other compacts previously approved by the Court.

In addition to the procedural due process-type arguments raised above, several Objectors argue the Compact provisions regarding the UAMO also violate due process. This second line of argument is more future-focused and is addressed in the UAMO section below.

d. *Montana Constitution, Art. IX.*

Several Objectors argue the Compact violates the Montana Constitution by failing to recognize that all water in Montana is "the property of the state for the use of its people." Mont. Const. art. IX, § 3(3). *E.g.* Holbrook Motion, ¶ 12 (Doc. 1802.00). The Commission reports indicate this issue was discussed and resolved in the Compact negotiations. 2014 Commission Report, at 26. Apparently, the Tribes initially took the position that the Compact must recognize tribal ownership of all water on the Reservation. The version of the Compact presented to the Court shows this position was compromised. As drafted, the Compact recognizes rights to the *use*, not ownership, of water on the Reservation (including Flathead Lake). To that end, the Compact does not conflict with Montana's Constitution.

2. Applicable Montana Statutes.

Objector Carter contends the Tribes missed the Water Use Act deadline to file claims of existing rights, resulting in a conclusive presumption of abandonment. (Doc. 1884.00, at 13-14). This argument is incorrect because the Legislature set July 1, 2015 as the deadline to file tribal reserved rights. Section 85-2-702(3), MCA. Carter does not present any evidence the Tribes' reserved rights missed this deadline. Other than this argument and as otherwise addressed in this Order, the Objector motions and responses generally do not dispute the Compact Parties' position that the Compact does not violate the Water Use Act.

3. Applicable Federal Statutes.

The Compact Parties' final basis for Compact legal conformity cites to several federal statutes they argue the Compact does not violate. These include the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, The Compact Parties Motion addresses federal statutes both as to the Compact itself and as to how it will be implemented. None of the Objectors provide an analysis of how the Compact violates either of these laws or any other federal statute.

4. UAMO and Water Management Board.

The Compact Parties' Motion argues the UAMO provisions (also called the "Law of Administration") conform to existing law because they fit within a general constitutional obligation for administration of water rights within the State, specifically the requirement that the Legislature "provide for the administration, control, and regulation of water rights." (Doc. 1823.00, at 67 (quoting Mont. Const., art. IX, § 3(4)). Numerous Objectors disagree for a variety of reasons. Most of these disagreements revolve around the theme that the Compact improperly delegates too much authority to the Water Management Board, and impermissibly "strips" state court jurisdiction over water issues by moving judicial review of on-reservation water disputes out of state court.

Although these challenges are a subset of the Compact Parties' argument that the Compact conforms to Montana law, the Court evaluates them as a standalone conformity issue given the stridency of some of the Objector challenges to this part of the Compact. The Court evaluates these challenges in three parts: (a) by explaining the UAMO and Board structure as there seems to be some confusion about them; (b) by evaluating the arguments that the Compact delegates an impermissible degree of authority to the Board; and (c) by evaluating the UAMO's judicial review provisions and allegations of improper jurisdiction stripping.

a. UAMO structure.

The UAMO is a detailed set of laws providing for joint administration of water within the Reservation's exterior boundaries. The UAMO is codified Montana law duly adopted by the Montana Legislature. The UAMO is quite detailed with all its provisions

contained in the statute rather than a combination of statute and administrative rules as is the case under the Water Use Act.

The UAMO covers several topics, including the process to obtain permits for new appropriation rights on the Reservation and to change existing rights. Under the *Ciotti* line of cases, the State of Montana has been precluded from issuing new water use permits or processing change applications on the Reservation for many years. These restrictions have been codified in the Water Use Act. Section 85-2-302(7), MCA. This regulatory status differs from all other reservations in Montana where DNRC had authority to administer permits and changes while a compact was being negotiated. One of the main features of the Compact is the lifting of what effectively has been a moratorium that resulted in what the Compact Parties call a "regulatory void." (Doc. 1823.00, at 62).

The procedures and requirements related to permitting and change authorizations in the UAMO generally track those set out in the Water Use Act. For example, the permitting provisions of UAMO §§ 2-2-116 to -117 (permitting) are similar to the permit provisions of §§ 85-2-302 to -311, MCA. Likewise, the UAMO provisions for change authorizations in UAMO §§ 2-2-101 to -109, are similar to those in § 85-2-402, MCA.

In addition to addressing permits and changes, the UAMO also contains measures to enforce rights – including disputes between on-reservation water users. The UAMO also is similar to the Water Use Act in that it provides for a multi-tiered structure to address applications and to resolve disputes. The UAMO requires a party to exhaust these administrative remedies before a party may seek judicial review. UAMO § 2-2-112 (providing for appeals "of a final decision of the Board"); Compact Art. IV.I.6 (providing for petitions for judicial review following proceedings before the Board). This is analogous to the Water Use Act provisions that limit petitions for judicial review on permits and change authorizations to those that first exhaust all administrative remedies. Section 2-4-702(1)(a) & (2)(e), MCA.

While the UAMO is quite detailed, its scope has limits. The UAMO does not apply to FIIP's internal operations, nor does it cover disputes about how FIIP distributes

water. The UAMO also does not intrude on the Water Court's exclusive jurisdiction to adjudicate existing water rights in Montana, which include the various aspects of the Tribal Water Right addressed in the Compact. *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145, ¶ 19, 383 Mont. 523, 373 P.3d 836 ("the Legislature created the Water Court and granted it *exclusive* jurisdiction over all matters relating to the determination of existing water rights within the boundaries of the state of Montana" (emphasis added)). The Montana Legislature tacitly confirmed the lack of any modification to the Water Court's ongoing jurisdiction by declining to modify § 3-7-224(2), MCA, the source of the Court's exclusive statewide adjudication jurisdiction. The UAMO also says nothing about the Water Use Act venue provision that puts all "matters concerning the determination and interpretation of existing water rights" before a water judge. Section 85-2-216, MCA. To that end, the UAMO does not disturb the Montana Supreme Court's determination in *Greely* that Montana's adjudication is sufficiently comprehensive to meet the McCarren Act sovereign immunity waiver under *San Carlos Apache Tribe*.

The Sego-Slack Motion argues the UAMO structure overall violates Article V, § 12 of the Montana Constitution by creating an improper special or local act. (Doc. 1821.00, at 21-23). The provision of the Constitution they cite prohibits the Legislature from passing "a special or local act when a general act is, or can be made, applicable." As authority, they reference the Blackfeet Compact and the Crow Compact, both of which provide for ongoing Water Use Act administration of non-tribal water rights on the reservations. The motion also cites *Grossman v. State, Dep't of Nat. Res.*, 209 Mont. 427, 446, 682 P.2d 1319 (1984), which recognized the only time the legislature is prohibited from passing a special or local act is "when a general act is or can be made applicable." In *Grossman*, the Court refused to invalidate statutes calling for the use of coal severance statutes to fund the development of state water resources. The Court noted that the constitutional provision is not "absolutely prohibitory" and found the statute consistent with Montana's general policy of promoting "conservation, development and beneficial use of the state's water resources." *Grossman*, 209 Mont. at 446-47.

As applied to the Compact, the factors that existed in the Blackfeet and Crow compacts do not mean the State is barred ratifying this Compact with its provisions specific to the Flathead Reservation. While the Compact provides for use of water resources in a specific area of the state, by lifting the permit moratorium that exists, and by recognizing the complexities of the ownership patterns that exist on the Reservation, the Compact is an integral part of a statewide system of water rights, analogous to what the Supreme Court approved as constitutionally permissible in *Grossman*. Every compact has some aspects unique to the reservation it covers, but as with all others, this Compact is consistent with a statewide legislatively recognized purpose of "regulat[ing] water use and provid[ing] forums for the protection of water rights, including federal non-Indian and Indian water rights." Section 85-2-101(6), MCA.

b. Board authority.

The Compact and UAMO provide for a five-member Water Management Board. As previously noted, the Board is not exclusively tribal, but instead is equally weighted between two voting members appointed by the Governor after consultation, two voting members selected by the Tribal Council, and one voting member selected by these four members. Compact Art. IV.I.2.a. The Compact specifies that the Board has "exclusive jurisdiction" in specific areas, including (1) resolution of controversies about the meaning and interpretation of the Compact on the Reservation, including controversies between on-reservation water users; (2) issuance of new Appropriation Rights; and (3) issuance of Change in Use authorizations. Compact Art. IV.I. 1 & 4. The UAMO contains the provisions to implement these three categories.

Several Objectors contend the Legislature abdicated its responsibility by delegating to the Board too much authority over on-reservation water use, especially as to non-tribal water users. For example, the Sego-Slack Motion argues the UAMO violates Article IX, § 3, which requires the Legislature to "provide for the administration, control, and regulation of water rights." Mont. Const. art. IX, § 3(4). They contend that by providing certain jurisdiction to the Board, "a separate, non-state governmental entity," the Legislature and DNRC "no longer administer, control, or regulate the water rights

belonging to Montana citizens who live on the Reservation." (Doc. 1821.00, at 18).

The Sego-Slack Motion's constitutional challenge to the Legislature's adoption of the UAMO must meet a high bar:

> The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.

Powell v. State Comp. Ins. Fund, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877; *Cottonwood Env't L. Ctr. v. State*, 2024 MT 313, ¶ 7, 419 Mont. 457, ¶ 7, 560 P.3d 1227, ¶ 7 ("[a] statute is presumed constitutional, and a facial challenge must show a law is unconstitutional in all its applications").

Contrary to Sego-Slack's suggestion, nowhere in Montana does the Legislature retain day-to-day administration, control, or regulation of water rights. The Legislature does not issue permits, authorize changes, call for water curtailment, or bring enforcement actions anywhere in Montana. Rather, the Legislature fulfills its constitutional mandate by adopting legislation delegating these functions throughout the Water Use Act and by using WPIC to conduct oversight.

As to how the Legislature delegates authority, Article IX of Montana's Constitution does not identify any specific entity for water rights administration, control, or regulation. Even though Article VI, §7 of the Constitution provides for the creation of departments, the Constitution does not mandate that any of these functions are the sole province of DNRC or any other "department." The Constitution also does not say these functions must be housed solely in any single department or entity. Contrary to Objectors' arguments, nothing in the text of the Constitution or the Water Use Act generally prohibits the Legislature from recognizing a delegation of authority to the Board within the Reservation, especially with the UAMO's detailed procedures.

Although Sego-Slack does not specifically reference the statute, their Article IX challenge is a tacit constitutional challenge to the Water Use Act provision requiring DNRC to "recognize the jurisdiction of the Flathead reservation water management board over water rights, including permitting of new uses, changes of existing uses, enforcement of water right calls, and all aspects of enforcement within the exterior boundaries of the Flathead Indian reservation." Section 85-2-111(2), MCA. Contrary to what Sego-Slack suggests, this statutory provision expressly recognizing the Board's functions under the UAMO aligns with the "administration, control, and regulation of water rights," consistent with the text of Article IX of the Montana Constitution.

The Sego-Slack Motion also argues the UAMO violates Article III, Section 1 of the Montana Constitution "as an unconstitutional delegation of the legislative or judicial power that was reserved to another branch of government." (Doc. 1821.00, at 18). This challenge implicitly asserts the Legislature approved the UAMO without sufficient standards in violation of what sometimes is called the non-delegation doctrine.

A non-delegation violation exists when the Legislature grants authority to a board or agency without sufficient criteria to guide decisions. For instance, in *In re Petition to Transfer Territory from High Sch. Dist. No.* 6, 2000 MT 342, 303 Mont. 204, 15 P.3d 447, a case Sego-Slack cites, the Supreme Court invalidated a statute delegating authority to county school superintendents to rule on petitions to transfer territory among school districts when the law did not provide standards to guide the petition decision. However, the Supreme Court did not rule that a legislative delegation of authority to a board is per se invalid. Rather, as Sego-Slack acknowledges, the *In re Petition* case is recognized as valid legislative grants of authority with checks on standards, policies, rules of decision, or "specific criteria to be weighed." *In re Petition*, ¶ 19.

While Sego-Slack correctly cites the applicable law, they fail to accurately apply it to what the UAMO actually says or does. As noted, the UAMO contains permit and change criteria that mirror those the Legislature delegated to DNRC in the Water Use Act, which Sego-Slack seems to accept. For instance, the UAMO contains specific detailed criteria for permit and change applicants, including the requirement that new

permits and changes not adversely affect other appropriators. UAMO § 2-2-102(2)(a)-(f). The UAMO contains an extensively detailed procedural and substantive process to set enforceable instream flow schedules. UAMO § 2-1-115(1)-(26). The UAMO also provides specific standards for complaints about improper water use and enforcement generally. UAMO § 3-1-103 and Ch. III generally. Sego-Slack's improper delegation argument does not analyze any of these UAMO provisions to demonstrate improper delegation in comparison to the DNRC process, or really at all. Given the burden of constitutional challenges to statutes adopted by the Montana Constitution, Sego-Slack's delegation arguments do not justify invalidating the Compact.

Next, the Sego-Slack Motion argues the "exclusive jurisdiction" provisions strip jurisdiction away from state courts by forcing disputes into a Board proceeding. (Doc. 1821.00, at 16-17). As authority, they cite *United States v. Klein*, 80 U.S. 128, 146 (1872), and a Harvard Law Review article[43] that discusses jurisdiction stripping. *Klein* addresses a different issue than what Sego-Slack raises. In *Klein*, the Supreme Court held that Congress may not, by limiting appellate jurisdiction, dictate a rule of decision that undermines the independence of the judiciary. Yet Sego-Slack cites this case for the apparent proposition that the Montana Legislature cannot put disputes into an administrative-like proceeding where the Board has exclusive jurisdiction. This is not an issue of jurisdiction stripping, rather it reflects a common structure to require administrative-type tribunals to develop records and make decisions before a party goes to Court. This structure does not deprive any court of jurisdiction. Instead, it merely codifies a structure in Montana law where the Board rather than a DNRC hearings examiner makes a decision before court review may occur. *See, e.g.*, § 85-2-309, MCA (providing for contested case hearings on permit and change applications). The UAMO does the same thing, and with clear standards. Additionally, any decision by the Board remains subject to judicial review to determine whether it was legally correct. UAMO § 2-2-112.

[43] Grove, "The Structural Safeguards of Federal Jurisdiction," 124 Harv. L. Rev. 869 (2011).

The Omvig Hammer Motion uses a different approach to challenge delegation by referencing a statement of intent by the Legislature in the Water Use Act as to how it fulfills its constitutional duties. The relevant provision of this policy-statement statute states:

> It is further the legislature's intent that the state, to the fullest extent possible, retain and exercise its authority to regulate water use and provide forums for the protection of water rights, including federal non-Indian and Indian water rights, and resolve issues concerning its authority over water rights and permits, both prior to and after the final adjudication of water rights.

Section 85-2-101(6), MCA.

Regardless of whether this is an overarching general statement of policy or a binding substantive provision, the UAMO does not violate it in connection with what it delegates to the Board. The statement is qualified by the "to the fullest extent possible" proviso, which implicitly recognizes the jurisdictional issues posed by the *Ciotti* cases concerning permits and changes. More importantly, the UAMO's provisions provide the State with a co-equal role in designating Board members.

The Mission-Jocko Motion argues the system of approving change authorizations poses risks to off-reservation junior users who are entitled to insist on the protection of stream conditions that existed at the time of their appropriation. (Doc. 1815.00, at 17-18). Several features of the Compact mitigate the concern regarding protecting off-reservation water users in the change process. The UAMO requires the Board to include all Board-authorized new appropriation rights and changes in use "to be entered into the DNRC water rights database in a format agreed to by the Board and the DNRC." UAMO, § 1-1-108. This requirement also fulfills Montana Legislature's obligation to provide for a system of centralized water rights records Mont. Const. Art. IX, § 3(4) and does not disturb DNRC's role in maintaining that system. Section 85-2-112(3), MCA. It also bears noting that UAMO contains provisions for DNRC to provide technical assistance to the Board. UAMO, § 1-2-108.

c. Judicial review.

The final category of challenges to the UAMO are those aimed at its judicial review provisions. The UAMO provides a procedure for appealing several types of Board decisions including permit and change appeals (UAMO § 2-2-112), Groundwater Management Areas (§ 1-1-109(12)), the determination of enforceable schedules of certain instream flow rights (§ 2-1-115(26)), and certain others. In these situations, the Compact and UAMO provide that any person aggrieved from a Board decision may file a petition for judicial review ("PJR") with a "Court of Competent Jurisdiction." Compact Art. IV.I.6.; UAMO § 2-2-112. The Compact defines a Court of Competent Jurisdiction as a:

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

Compact Art. II(26).

Several Objectors argue the UAMO improperly precludes review in a Montana state court. The Objectors generally contend the Court of Competent Jurisdiction definition consent provisions are structured in such a way as to force all disputes into federal court, thereby depriving water users of a state court forum and effectively eliminating state court jurisdiction. Before analyzing the Objector arguments, it bears noting that the first part of the definition ("a State or Tribal court that otherwise has jurisdiction over the matter") is a statement regarding subject matter jurisdiction. Lack of subject matter jurisdiction is not subject to party consent. *See Thompson v. State,* 2007 MT 185, ¶ 28, 338 Mont. 511, ¶ 28, 167 P.3d 867, ¶ 28 (subject-matter jurisdiction cannot be conferred by the consent of a party). Subject matter jurisdiction in cases that may involve tribal members or lands depends on the facts of a particular case, not the consent of the parties. *Big Spring v. Conway (In re Estate of Big Spring)*, 2011 MT 109, ¶ 46, 360 Mont. 370, ¶ 46, 255 P.3d 121, ¶ 46 (test for Montana courts to exercise jurisdiction over tribal members or lands).

In evaluating the Objectors' arguments about the Court of Competent Jurisdiction definition, it also is important to note that the arguments make some blanket assumptions that may not be true in all situations. For example, when a party aggrieved in a permit or change decision files the petition for review that party selects the court, not the respondent. The default court is either a state court or tribal court, not federal court. There is nothing in the definition that prevents the party from filing the petition in state district court (or potentially even the Water Court). At that point the Board could decline to challenge personal jurisdiction, which means the state court would hear the case unless it lacks subject matter jurisdiction. No Objector provides a viable argument that the definition eliminates state court jurisdiction for all kinds of appeals of Board decisions. That means there is a viable path to state court jurisdiction for disputes where the state court has subject matter jurisdiction.

Notwithstanding the possibility of state court jurisdiction, the Sego-Slack Objectors continue their argument that state court jurisdiction has been "stripped." As support, they argue "if the CSKT declines to submit to the jurisdiction of Montana's courts, there is no path to review by the state judiciary." (Doc. 1821.00, at 14). The problem with this argument is it assumes the Tribes are the Board, which is not an accurate assumption. The Mission-Jocko Motion makes a similar argument by suggesting the consent provisions alter this recognition of state court authority by "insisting that Montana courts may not exercise their authority unless all parties to a proceeding before the Board, and in addition the State of Montana, the Tribes, and the United States, agree to the exercise of such jurisdiction." (Doc. 1815.00, at 11). This is not what the Compact says. The Compact does not require judicial review petitioners to "name and join" the State, the Tribes, and the United States in any appeal of a Board decision. (Doc. 1815.00, at 3). Rather, the cited Compact provision (Art. IV.I.6.a) only requires the petitions be served on these entities. It does not require that they be joined as parties, nor does service automatically equate to party status triggering the consent provision.

Neither the Sego-Slack Motion, the Mission-Jocko Motion, or any other motion provide an analysis as to how or when the Tribes would be a party to a dispute with

consent rights under the Court of Competent Jurisdiction definition. There is nothing in the Compact or the UAMO that makes the Tribes an automatic necessary party to all appeals from Board decisions. So, contrary to what the motions state, there is a clear and viable path to review by the state judiciary.

The Objectors' concerns about the consent provisions also are problematic because they ask the Court to make a facial ruling that the Compact is unconstitutional by containing a judicial tribunal definition that does not guarantee all non-Tribal objectors a state court venue. In supplemental briefing, the Sego-Slack Objectors argue this deprives them of a fundamental right. As already noted, the Compact does not facially deprive them of such a right because the possibility exists to have their dispute resolved in state court following exhaustion of their remedies before the Board.

The Mission-Jocko Motion also argues the judicial review provisions alter the McCarren Amendment's policy of resolving water determination and administration in state courts in unified proceedings. (Doc. 1815.00, at 6). This issue is not one the Court must address in ruling on Compact validity. The judicial review provisions of the Compact provide that the petitioner selects the Court in which to file. If the petitioner selects a state court forum, the McCarren sovereign immunity provisions applicable to water rights administration could come into play if the United States or the Tribes are implicated as a party. But those concerns would be dependent on the alignment of the parties and the particular issues being raised. Because the possibility of a state court forum exists for judicial review, the Court need not and cannot project the jurisdictional issues that might be raised in such a case.

In summary, the UAMO provisions conform to Montana and federal law, as do all other provisions of the Compact described in the Compact Parties' Motion and the Objector cross-motions and responses. The Compact Parties have demonstrated the Compact meets the requisite thresholds necessary to meet the fairness and adequacy standards of review that have been established in prior cases. The Compact Parties have met their burden of proof as necessary to shift the burden of proof to the Objectors.

IV. OBJECTOR BURDENS

Most of the Compact Parties' lengthy motion is aimed at demonstrating the Compact meets the threshold standards of fairness and reasonableness based on the tests Montana uses to evaluate whether to approve a Commission-negotiated Compact. As the preceding sections demonstrate, they meet this threshold standard, which means the burden shifts to the Objectors.

The Compact Parties' Motion spends one page to support the position that the Court should rule as a matter of law that Objectors do not meet this burden. The Compact Parties argue the Objectors cannot meet their burden because "[n]o Objector can demonstrate the necessary illegality in the Compact to even start the material injury analysis." (Doc. 1823.00, at 71). The statement assumes an Objector must prove the Compact is illegal as a condition precedent to proving material injury. This statement of the standard does not match the standard approved by the Montana Supreme Court in *Crow Compact II*. There the Court stated that once the burden shifts, the "'heavy burden' the objector must show is that its interests are 'materially injured' by *operation* of the Compact." *Crow Compact II*, ¶ 18 (emphasis added).

The Compact Parties' focus on illegality as part of the material injury burden appears to be based on issues before the Water Court when it approved the compact between the State and the federal government for the Bowdoin National Wildlife Refuge. Case WC-2013-04, 2015 WL 9699486 (Oct. 7, 2015) ("*Bowdoin*"). In that case, an objector challenged an aspect of the compact at issue relating to discharges of saline water to a creek. The Water Court upheld the compact on summary judgment when the objector was only able to cite evidence of a single discharge event thirty years prior and could not prove the discharge allegedly authorized by the compact violated any water quality laws. *Bowdoin*, *7.[44]

[44] The Court acknowledges that in *Bowdoin* the Water Court required the objector to prove "material injury, and that her injury is caused by a failure of the Compact to conform to applicable law." *Bowdoin*, *6. However, this statement of the standard was made in the context of the saline discharge facts before the Court. Moreover, the Water Court's October 7, 2015 *Bowdoin* case predates the Supreme Court's December 30, 2015, decision in *Crow Compact II.* The Compact Parties also cite the Blackfeet Compact

The evaluation conducted by the Court in other cases indicates a showing of illegality is not the only way to establish material injury. For example, in *Crow Compact II*, the Supreme Court upheld the Water Court's approval of the compact after concluding the objectors failed to demonstrate the manner in which water was administered would injure the objectors' state-based rights. *Crow Compact II*, ¶ 31.

In the Water Court's approval of the Chippewa Cree Compact for the Rocky Boys Reservation, the Court concluded an objector failed to provide any facts to demonstrate he would be adversely affected by the exercise of the compact-authorized right to water stored in an off-stream reservoir (somewhat analogous to the Hungry Horse provision of this Compact). *Chippewa-Cree Order*, at *28. In the approval of the Fort Peck Compact, the Court provided the following description of the possibility of material injury:

> Accordingly, the State negotiates, approves, and ratifies a compact that grants more water to a reserved water right entity than that entity might have obtained under a strict adherence to the "limits" of the Reserved Water Right Doctrine through litigation and does so without injuring other existing water users, the State is effectively allocating and distributing surplus state waters to that entity to resolve a dispute. In the absence of material injury to existing water users, the merits of such public policy decisions is for the legislature to decide, not the Water Court.

In re Adjudication of Existing and Reserved Rights to the use of Water, No. WC-92-1, 2001 WL 36525512, at *9 (Aug. 10, 2001). As with other compact cases involving objectors, the Court in the Fort Peck compact case went on to find the burden of proving material injury was not met.

In none of the Montana compact cases has an objector establish material injury sufficient to prove the Court should not approve a compact. However, the Court mentions these cases because they indicate a demonstration of illegality may not be the only way for an objector to prove material injury. Likewise, neither the Water Court nor the Montana Supreme Court ever has held that confirmation of tribal reserved rights with

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Order for the proposition that "the Court is limited to determining whether anything in the Compact's quantification provisions violate or are prohibited by applicable law." (Doc. 1823.00, at 71). This statement was made in relation to the question of quantification, not material injury.

senior priority dates alone is sufficient material injury to disapprove a compact. Prior appropriation is the core system for how Montana distributes water statewide. If the prior appropriation system were found to cause impermissible material injury, priority dates would become meaningless.

For the most part, the cross-motions for summary judgment filed by various Objectors do not ask the Court to rule as a matter of law that the Compact results in material injury to an Objector. For example, even though the Sego-Slack Motion for Summary Judgment identifies nine different grounds on which they contend the Compact is legally insufficient, the motion does not ask the Court to make a ruling on material injury. (Doc. 1820.00). The Jore Motion only frames material injury in the context of the threshold fairness issues.[45] (Doc. 1832.00, at 59-60). The other motions for summary judgment are similarly sparse on this issue.

The Omvig Hammer Motions move the Court to declare the Compact and Preliminary Decree void based in part on material injury for four reasons: (1) elimination of water duties; (2) creating the Board with "unfettered control"; (3) creating a new law of administration; and (4) failing to protect stock water. (Doc. 1836, at 2; Doc. 1837.00, at 4). None of these establish a sufficient basis of injury to make a finding of material injury as a matter of law.

As to the first reason, by "elimination of water duties," the Omvig Hammer Motions refer to distribution of water from FIIP. The Compact does not address this issue, so it cannot form the basis to invalidate the Compact. The second and third issues address the Board and UAMO and are incorrect interpretations of the Compact. The fourth issue asserts stock water deliveries allegedly curtailed to several landowners. (Doc. 1836.00, at 51-54). The stock water issue lacks sufficient detail to tie it the operation of the Compact. Moreover, the Compact Parties respond that the stock water deliveries either raise issues with FIIP water distribution or distribution under water right claims

[45] The Jore Motion states that "[s]everal amended objections have stated material injuries to their property" and references them by objection document nos. (Doc. 1832.00, at 59). However, none of these objections form the basis for any pending motion.

owned by districts that are not part of the Compact case. The lack of specificity and the Compact Parties' responses raise sufficient disputed facts to preclude summary judgment as to material injury to the Objectors mentioned in the Omvig Hammer Motions.

Lastly, the focus of the motions was on whether the Compact Parties proved they could meet the threshold standards for compact fairness and adequacy, or whether the Objectors proved they could not. *See* Case Management Order No. 3, at 3 (Doc. 1395.00) (setting deadlines for motions "regarding Compact adequacy and fairness, and any other issues of law). Although not necessarily specific to the issue of material injury, a number of Objectors responded to the Compact Parties' Motion simply by requesting the opportunity for a hearing. (*e.g.,* Doc. 1852.00 (Hartzell) and others similar).

Based on the filings, the Court concludes that the Compact Parties' Motion does not prove lack of material injury as a matter of law. The Compact Parties have demonstrated threshold fairness and adequacy, so the material injury burden now is on the Objectors. At this point no Objector has proved material injury under the applicable standards as a matter of law. The Court, therefore, has established a schedule for proceedings for Objectors to provide evidence, if any, as necessary to prove material injury. No other issues remain pending before the Court and the Court will issue a ruling on whether to approve the Compact following completion of the scheduled hearings.

ORDER

For the foregoing reasons, the Compact Parties' Motion is GRANTED as to the issues of fairness, adequacy, legal conformity, arms-length negotiations, and any other threshold issues necessary to shift the burden of proof to the Objectors. The remainder of the Compact Parties' Motion is DEFERRED. The motions of Objectors as to all issues of law pertaining to the Compact Parties' burden of proof are DENIED. The procedures for evidentiary hearings on the Objectors' burdens of proof have been set in separate orders.

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