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

CASE NO. WC-0001-C-2021

**FINAL ORDER APPROVING COMPACT
AND CERTIFYING ORDER AS FINAL**

I. INTRODUCTION

This order grants the collective request by 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”) to approve incorporation of the Confederated Salish and Kootenai Tribes of the Flathead Reservation—State of Montana—United States Compact (the “Compact” or “CSKT Compact”) into final decrees of the Water Court. This order also dismisses all remaining objections to the Compact, and certifies this matter as final pursuant to Rule 54(b) of the Montana Rules of Civil Procedure.

II. BACKGROUND

A. Compact Approval and Preliminary Decree Proceedings.

1. Compact Approvals.

The Compact settles the Tribes’ claims to water rights within the State of Montana. The Compact is one of several tribal water rights compacts negotiated by the Montana

Reserved Water Rights Compact Commission. The Montana Legislature ratified the CSKT Compact in 2015. Ch. 294, L. 2015, codified as § 85-20-1901, MCA. Congress ratified the Compact by passing the Montana Water Rights Protection Act (“MWRPA”) in 2020. Division DD, Pub. L. No. 116-260, 134 Stat. 1182. The Tribes ratified the Compact on December 29, 2020, by Resolution 21-023 of its Council. The United States Department of Interior approved the Compact on September 17, 2021.

2. *Compact Parties’ Motion to Approve Compact.*

On March 15, 2022, the Compact Parties filed a joint motion with the Water Court to incorporate the Compact into preliminary and final decrees. (Doc. 8.00). On June 9, 2022, the Court granted this motion by issuing a Preliminary Decree (the “Preliminary Decree”). (Doc. 19.00). The Preliminary Decree incorporated the terms of the Compact and included several appendices, including appendices with abstracts of the various components of the Tribal Water Right, as defined in the Compact. Compact, Art. II.67.

3. *Preliminary Decree Process.*

In conjunction with the issuance of the Preliminary Decree, the Water Court instituted the process mandated by the Water Use Act to provide notice and the opportunity for interested parties to file objections. The Court issued an order directing the United States to mail notice of entry of the Compact Preliminary Decree and its availability. (Doc. 20.00) (“Notice Order”). The Notice Order required the United States to send notice of the Preliminary Decree to various water users, government entities, tribes and other interested persons. The order also specified requirements for newspaper notice.

The United States met the terms of the Notice Order by publishing notice of the Preliminary Decree for three consecutive weeks in twenty-seven newspapers. The Water Court and the DNRC also posted notice of the Preliminary Decree on their websites. With the Water Court’s approval, the United States mailed individual notice of the Preliminary

Decree to 68,293 water users in twelve basins within the Clark Fork Division.¹ The United States also sent notice to several other government and tribal entities.

As with all other preliminary decrees issued by the Water Court, issuance of this Preliminary Decree commenced a 180-day objection period. Section 85-2-233(2), MCA. Initially the objection period was scheduled to close on December 6, 2022. On December 2, 2022, the Court granted several extension requests, which moved the objection deadline to February 9, 2023. (Doc. 240.00). The Court received 875 objections during the objection period.²

4. Case Management.

Although the Water Court previously conducted proceedings to address motions and resolve objections to approve other tribal compacts, the Court institute some special procedures to address the complexity of this case. The Court conducted a public meeting on July 11, 2020 to provide information about the preliminary decree and objection process. (Doc. 25.00). The Court also set case management procedures specific to this case in a series of case management orders.³

The Court provided additional mechanisms to communicate information to objectors. For docketing and overall management of filings, the Court used its publicly accessible Full Court Enterprise (“FCE”) case management system. The FCE system allowed electronic service of case management orders and other pertinent filings to be made on all parties who filed objections (“Objectors”) and their legal counsel who appeared in the case and registered for electronic service. The Court also established a Master Service List⁴ and adopted the provisions of Rule 5(c) of the Montana Rules of Civil Procedure applicable to cases like this with a large number of parties.

¹ The Clark Fork Division includes the hydrologic basins west of the Continental Divide in Montana. Details about compliance with the notice procedures is contained in Document (“Doc.”) numbers 23.00, 24.00, 27.00, and 28.00.

² Many of these objections were filed by multiple parties so the number of Objectors is greater than the number of objections. The objection count is based on the objection list generated by the Court.

³ The various case management orders were docketed in FCE.

⁴ The Master Service List is maintained on the CSKT page of the Court’s website under “Service Lists.” The website shows the evolution of the services lists over the life of this case as parties withdrew, were dismissed, changed addresses, or otherwise were modified in some way.

In addition to the official court docket, the Court created and actively maintained a website to disseminate information and to provide an accessible repository for case-related information and to provide alternative access to documents and filings.⁵ The Court conducted periodic case management conferences to provide procedural information to the Objectors. These conferences were livestreamed with recordings posted to the website to provide accessible information to parties.

B. Settlement Track Proceedings.

1. Mediations and Orders Dismissing Objectors.

The Court initially put this case on a settlement track. On March 3, 2023, the Court entered a case management order requiring all Objectors to participate in mediation. (Case Mgmt. Or. No. 1, Doc. 1042.00). The Court appointed a senior water master as the mediator. The mediator conducted a series of mediation conferences over the summer of 2023 in various locations in western Montana.

The mediator filed eleven mediation reports, a final report and a supplemental report documenting the Objectors who attended mediation sessions.⁶ These reports also identified the Objectors who reached settlements with the Compact Parties.

The Court approved all settlement agreements resolving the objections of particular Objectors. The Court confirmed the approvals in sixteen separate orders dismissing objections, many of which covered multiple objections.⁷ The orders also dismissed numerous parties who voluntarily withdrew their objections.

The Court also entered an order dismissing Objectors who did not participate in the court-ordered mediation process. Prior to dismissing any Objector based on failure to participate in mediation, the Court provided the opportunity for non-participating Objectors to show cause why they should not be dismissed for failing to participate.

⁵ <https://courts.mt.gov/courts/water/CSKT>.

⁶ The mediator's Final Mediation Report provides additional detail about how the mediation process was conducted. (Doc. 1366.00).

⁷ All of the Orders Dismissing Objectors are included in a section of the CSKT Compact webpage.

(Doc. 1394.00 (documenting process for dismissing Objectors who failed to participate in mediation process)).

C. Hearing Track Proceedings.

Following the Settlement Track, the Court held a case management conference and set a hearing track to address the remaining unresolved objections. The Hearing Track proceeded in three phases. First, in Case Management Order No. 3, the Court set a deadline for any Objector to move to amend their objections. (Doc. 1395.00). Numerous Objectors filed motions requesting amendments. The Court addressed the motions in a series of forty-four orders either granting or denying the motions. The Court also set a deadline for the Compact Parties to move to dismiss any objections. The Compact Parties filed a single motion to dismiss objections filed by artificial entities, which the Court granted in part. (Doc. 1781.00).

Second, the Court set a deadline for parties to file substantive motions addressing Compact adequacy and fairness, and any other issues of law. The Court received nineteen separate motions, including a comprehensive 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. (Doc. 1823.00). After all briefing was complete, the Court held two days of oral argument in the Federal Courthouse in Missoula on November 14-15, 2024. (Doc. 2087.00 – Court Minutes). The Court addressed the motions in an Order on Pending Motions Regarding Compact Approval dated April 1, 2025. (Doc. 2336.00) (“Order on Motions”).⁸ The Order on Motions concluded that the substance of the Compact and the process followed to ratify it complied with the standards Montana law requires, subject only to the fact question of whether any Objector could prove material injury related to the Compact.

⁸ The Order on Motions did not address an Objection to Mediation Process filed by Paul R. LaMarche (Doc. 1766.00) because LaMarche later withdrew his Objection and was dismissed from the case. (Order No. 15 Dismissing Objections, Doc. 2462.00). The Court addressed the Objection to Denial of Jury Trial filed by Rick Schoening (Doc. 1788.00) in a separate Order on Motion for Jury Trial. (Doc. 2600.00).

Third, the Court provided the opportunity for any Objector to request the opportunity to participate in an evidentiary hearing for purposes of presenting evidence of material injury. (Case Mgmt. Or. No. 5 – Doc. 2109.00). Various Objectors, either individually, or in some cases collectively, filed sixteen separate Requests for Hearing. Some of these Objectors later withdrew their hearing requests. After discovery and various prehearing proceedings, the Court conducted ten evidentiary hearings over the course of several weeks in three different county courthouses in western Montana. The Court addressed the evidence in nine sets of findings and conclusions filed simultaneously with this order, and which this order incorporates.⁹

III. DISCUSSION

A. Water Court Jurisdiction.

The Water Court does not have unlimited jurisdiction over the Compact. Instead, the Court’s jurisdiction is set by statute as interpreted by case law. The Water Court adjudicates “existing rights,” which includes “Indian reserved water rights created under federal law.” Section 85-2-102(13), MCA. When, as here, the State reaches a settlement with the federal government and various tribes through the Compact Commission process, the Legislature assigned to the Water Court responsibility to include compacts in a preliminary decree. If no objections are sustained the Water Court must include the compact in final decrees without alteration. Section 85-2-702(3), MCA.

The Water Court’s general process for adjudicating and decreeing water rights is set forth in pertinent provisions of the Water Use Act. With respect to federal and tribal reserved rights, the Court conducts the adjudication to ensure that a final decree states each of the water right elements listed in § 85-2-234(7), MCA for the reserved rights included in the final decree.

⁹ To reduce docketing confusion, each hearing was assigned a hearing number ranging from Hearing No. 1 to Hearing no. 16. (Doc. 2445.00 – Case Mgmt. Or. No. 8). Due to withdrawals, settlements, and efficiency consolidations, not all hearings took place, but those that did retained their original hearing numbers. No hearings took place for those designated as Hearing Nos. 4, 7, 8, 9, or 10. Hearing Nos. 12 and 13 were consolidated into a single proceeding. Hearing Nos. 15 and 16 occurred separately, but were combined into a single set of findings and conclusions. All hearing proceedings are docketed in the case file for this case.

The Water Court’s jurisdiction is further defined by the terms of the Compact, which the Court has no authority to alter absent consent of the parties. Section 85-2-234(2), MCA. While the CSKT Compact covers numerous topics, the Compact – as approved by the Montana Legislature – specifies that the Water Court’s jurisdiction is limited. Compact Art. VII.B.2.

The Water Court follows several steps to evaluate compact settlements presented to the Court for approval within this structure. The Court presumes a compact is valid if the parties to a compact prove (a) the compact is fundamentally fair, adequate and reasonable and (b) the compact conforms to applicable laws. If non-parties to a compact file objections, the parties to the compact also must also prove the compact was the product of good faith, arms-length negotiations. If the parties to a compact prove these elements, the burden shifts to objectors to prove their interests are materially injured by operation of the compact. The Montana Supreme Court approved this framework in two cases involving the Crow Compact. *In re Crow Water Compact*, 2015 MT 217, ¶ 8, 380 Mont. 168, 354 P.3d 1217 (“*Crow Compact I*”) and *In re Crow Water Compact*, 2015 MT 353, ¶ 18, 382 Mont. 46, 364 P.3d 584. (“*Crow Compact II*”).

In the Order on Motions the Court ruled as a matter of law that the Compact Parties proved the Compact is presumptively valid, shifting the burden of proof to the Objectors. The Court also concluded that the Objectors should have the opportunity to present evidence as they deemed necessary to prove material injury, as the test requires. The ten evidentiary hearings the Court conducted were the Objectors’ opportunity to prove evidence to the Court to determine whether the Objectors met their burden.

B. Material Injury Standard.

Once the burden of proof shifted to the Objectors, the compact approval standard required that Objectors prove their interests are “materially injured by operation of the Compact.” *Crow Compact II* ¶ 18 (citing prior Water Court decisions). As articulated by the Montana Supreme Court, the standard can be broken down into three elements requiring an Objector to prove (1) the identification of a legally protected interest; (2) some material injury to that interest; and (3) some connection between the proven injury

to an interest and an operative provision of the Compact. This standard includes a requirement that the Objector prove the Compact is unreasonable as applied to the Objector. *Crow Compact II*, ¶ 20. The Montana Supreme Court characterizes this standard as a “heavy burden.” *Id.*, ¶ 37. This characterization reflects the nature of these proceedings as a challenge to a government-to-government settlement previously approved by the State, the United States and the Tribes.

C. Application of Standard.

The nine sets of findings of fact and conclusions of law issued simultaneously with this Order apply the material injury standard to a variety of different objections following presentation of evidence by the Objectors who participated in hearings (“Hearing Objectors”). While many of the Hearing Objectors demonstrated they hold interests in the form of some type of state-based water right, contract right to receive water from the Flathead Indian Irrigation Project (“FIIP”), or some other property interest, in no case did a Hearing Objector prove material injury to that interest connected to operation of the Compact. The following sections summarize some of the general reasons for the lack of proof of material injury by reason of the Compact.

1. Failure to Overcome Presumed Validity of Compact Water Rights.

The Compact contains detailed provisions quantifying the Tribal Water Right and describing how the Tribal Water Right will be enforced. The Compact sets forth the elements of the Tribal Water Right in Article III and in the 222 water right abstracts attached as appendices and incorporated into the Compact. The Compact organizes the abstracts around various Compact provisions such as the FIIP Water Use Right, instream flows on and off the Flathead Reservation, various natural lakes and wetlands, the natural level of Flathead Lake, and an overall system water right. Compact Article III also contains provisions that represent compromises that would not exist if the water rights at issue were litigated before the Water Court without a settlement. The Hearing Objectors did not offer probative evidence to challenge the basis or the reasonableness of any of the water right elements or abstract provisions as settled, or to overcome the presumed validity of the water rights quantified in the Compact.

2. *Evidence of Injury Not Caused by an Operative Compact Provision.*

Many of the actions the Hearing Objectors identify as injurious arise out of actions or authorizations that are not part of the operative provisions of the Compact, and therefore outside the issues before the Court in this case and beyond the Court's limited jurisdiction. For example, several of the Hearing Objectors¹⁰ own property on the Flathead Reservation and receive contract water delivered by the FIIP. These Hearing Objectors raised concerns about reductions in the timing of water deliveries and general concerns about the operation, maintenance and fees associated with the FIIP system. These alleged injuries do not arise out of an operative Compact provision because the FIIP is operated by the United States Bureau of Indian Affairs ("BIA"). The Compact did not modify the FIIP's operations. Rather, the Compact preserves the legal period of use for the portion of the Tribal Water Right (the "FIIP Water Use Right") used by the FIIP.¹¹ Even though several Hearing Objectors testified that they have perceived differences in the timing of water deliveries from the FIIP, the Objectors failed to connect water delivery modifications to the manner in which the Compact approves the FIIP Water Use Right or any of its operative terms. As the hearing findings and conclusions explain, the Compact does not modify the legal periods of diversion or periods of use for the FIIP Water Use Right. Water availability varies from year to year. Water use in Montana always is subject to the prior appropriation system. The Hearing Objectors failed to prove the Compact materially changed their legal access to water supplied by the FIIP.

As another example, several of the Hearing Objectors with property on the Reservation argued the Compact results in a taking of "Walton" rights¹² or "Secretarial"

¹⁰ All of the evidentiary hearings other than Hearing Nos. 15 and 16 involved one or more Objectors that own property on the Flathead Reservation. The parties to Hearing Nos. 2 (Ammens) and 6 (Root) own property on the reservation, but do not receive water from the FIIP. The parties to Hearing No. 3 (Mission and Joeko Irrigation Districts) operate on the Reservation, but do not own property.

¹¹ The Compact defines the FIIP Water Use Right as "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." Compact Art. II.32. The three water right abstracts (water right nos. 76L 30052930, 76L 30052931, and 76L 30052932) for the FIIP Water Use Right are set forth in Compact Appendix 5 (part of Decree Appx. 2).

¹² 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*

rights. The Court addressed and rejected this issue as a matter of law in the Order on Motions. Order on Motions, at 50-51 and 57-58. None of these Hearing Objectors presented any evidence or a legal theory as to how the Compact operates to extinguish any Walton or Secretarial rights. Whether these rights are viable may be the subject matter of separate proceedings in the ongoing adjudication proceedings in Basins 76L and 76LJ. The Hearing Objectors failed to prove the Compact extinguishes any water right or otherwise takes any property right.

3. Failure to Prove Injury From a Compact Provision.

The third general category involves Hearing Objector contentions that a specific provision of the Compact causes material injury to a Hearing Objector's protected interest. As detailed in the various sets of findings and conclusions, in each of these instances, the Court concludes the Objector failed to prove material injury.

The Carter (Hearing 14) and Allen (Hearing 15) hearings illustrate this category. Both of these Hearing Objectors own property and groundwater rights upstream from Flathead Lake and the Flathead Reservation. They each claim injury resulting from the Compact provision that quantifies and reserves for uses specified in the Compact a volume of up to 90,000 acre feet of water stored in Hungry Horse Reservoir. Compact Art. III.C.1.c.i. While Carter and Allen each offered lay arguments about their perceptions of how their domestic groundwater rights might be injured by this Compact provision – specifically how refilling the reservoir might lower the groundwater table downstream from the reservoir – the arguments they made were not supported by expert testimony or credible hydrologic evidence.

As a second example, the Compact also protects several categories of water rights from being called to curtail water use when insufficient water is available to satisfy the Tribe's senior water rights. These categories protect most non-irrigation rights and irrigation rights below certain flow thresholds. Compact Art. III.G (various call protection provisions). Several Hearing Objectors responded to the call protection provisions by

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)).

arguing they are illusory because they do not protect these water users from calls for water made by unprotected water users who might hold senior water rights. However, none of these Objectors offered evidence of any senior water user that could make a viable call, or how the call might work if the senior user already was curtailed. The Court also notes that no party with water right flow rates in excess of call protection threshold sought a hearing to prove they anticipate material injury by not being receiving the same call protection. Additionally, the Hearing Objectors making these arguments fail to acknowledge the lack of call protection if the Compact is not approved. The Compact does not impose the prior appropriation system. Rather, it exists as a basic tenet of Montana law. Section 85-2-401(1), MCA (“[a]s between appropriators, the first in time is the first in right”); *Mettler v. Ames Realty Co.*, 61 Mont. 152, 201 P. 702 (1921). The call protection provisions the Hearing Objectors allege as injurious actually provide them more protection, not less. These arguments fail to prove material injury.

4. Summary.

These are just some examples based on what is detailed in the findings and conclusions for the various hearings. But they illustrate that even though parties may own property and water right or use interests on or off the Flathead Reservation, none of the Hearing Objectors proved a provision of the Compact causes them material injury as the Compact is structured. The Compact is a far-reaching document replete with compromises that would not be possible for the Court to impose in the event the Tribes’ water rights were litigated. The Hearing Objectors failed to either acknowledge these provisions or to explain how they result in material injury.

The Court’s conclusion as to lack of injury also is bolstered by the cross-section of Objectors who participated in evidentiary hearings. Even though only a small subset of Objectors requested an evidentiary hearing, collectively the Hearing Objectors’ various situations allowed the Court to measure the Compact provisions against a variety of interests, including water users on the Flathead Reservation, users upstream from the Reservation, and users downstream from the Reservation. The Court also evaluated evidence presented by water users who rely on the FIIP for their water supply, users

claiming state-based water rights on and off the Reservation, users claiming Walton or Secretarial rights, and various local government interests. As the findings and conclusions from the hearings show, in no case did the Court conclude that any of these water users or entities proved material injury connected to the Compact even though given the opportunity to do so. In light of the heavy burden on the Objectors once the burden of proof shifted to them, the Court concludes no material injury to the interests of any Objector has been proved by operation of the Compact.

D. Dismissal of Objections and Approval of Compact.

Issues of fact regarding proof of material injury were the only issues remaining after the Order on Motions concluded the Compact is presumptively valid. The evidentiary hearings provided all remaining Objectors the opportunity to prove material injury. Only a small number of Objectors availed themselves of this opportunity. Because the remaining Objectors who did not participate in an evidentiary hearing offered no proof of any material injury, they failed to carry their burden of proof, which means their objections should be dismissed.

As to those Objectors who did participate in evidentiary hearings, their failure to meet their burden of proof means their objections also should be dismissed. With the dismissal of all objections there are no remaining issues before the Court to preclude approval of the Compact and incorporation of its terms in the final decrees for each of the nine basins identified in the Preliminary Decree.

IV. APPROVAL OF ABSTRACTS

The Water Court's approval of the Compact is governed both by the legislation approving the Compact, and by the general provisions of the Water Use Act. The Act requires that all federal and tribal rights included in a final decree contain the following elements:

- a) the name and mailing address of the holder of the right;
- b) the source or sources of water included in the right;
- c) the quantity of water included in the right;
- d) the date of priority of the right;

- e) the purpose for which the water included in the right is currently used, if at all;
- f) the place of use and a description of the land, if any, to which the right is appurtenant;
- g) the place and means of diversion, if any; and
- h) any other information necessary to fully define the nature and extent of the right, including the terms of any compacts negotiated and ratified under 85-2-702.¹³

Section 85-2-234(7), MCA.

The Compact addressed this provision by including 222 separate abstract forms. The abstracts describe the various characteristics of the Tribal Water Right, as that term is defined in the Compact.

Although Objectors raised numerous objections to the Compact, none of the Objectors objected to the specific elements of the abstracts. The Compact Parties also did not self-object to any of the abstracts. The abstract forms, together with the Compact itself as set forth in the Preliminary Decree, are reasonable and meet the terms of the Water Use Act. In light of the number of abstracts and the level of detail many of them contain, the Court will provide a separate notice of the approved abstracts, with the post-decree versions attached. The Court makes no substantive modifications to the abstracts from what were published in the Preliminary Decree.

V. RULE 54(b) CERTIFICATION

Water Court approval of a compact between a tribe, Montana, and the United States does not alone constitute a final judgment. To bring finality to Water Court compact approval proceedings, the Court issues certification pursuant to Rule 54(b) of the Montana Rules of Civil Procedure. *See, e.g., Order Granting Rule 54(b) Certification and Final Judgment*, Case No. WC-006-C-2018, 2021 Mont. Water LEXIS 288 (Blackfeet Tribe – Montana – United States Compact) (Jan. 15, 2021). Rule 54(b) governs whether a judgment is final for the purpose of appeal. The rule states:

(b) Judgment on Multiple Claims or Involving Multiple Parties.

¹³ Section 85-2-702(3), MCA references the terms of a compact.

(1) When an action presents more than one claim for relief -- whether as a claim, counterclaim, crossclaim, or third-party claim -- or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(2) Any order or other decision granted pursuant to Rule 54(b)(1) must comply with the certification of judgment requirements of Montana Rule of Appellate Procedure 6(6).

Mont. R. Civ. P. Rule 54(b).

The Compact addresses water rights in nine hydrologic basins being adjudicated by the Water Court. The Water Court has not yet entered final decrees in any of these basins. Ultimately, each basin's final decree will incorporate the terms of the Compact, without modification. Section 85-2-234(2), MCA. For those basins with abstracts, the final decrees also will include the abstracts, which also will be referenced on the various tabulations of water rights.

Because proceedings regarding state-based water rights in these basins generally are not complete,¹⁴ the Water Court's order approving the Compact cannot be made final by incorporating it into a basin-specific final decree at this time. Therefore, the Water Court's approval of the Compact adjudicates "one or more but less than all of the claims," and adjudicates "the rights and liabilities of fewer than all the parties" as to these basins. *See Roy v. Neibauer*, 188 Mont. 81, 84, 610 P.2d 1185, 1188 (1980); Rule 54(b)(1), M.R.Civ.P.

¹⁴ The Court notes that a final decree incorporating the Compact conceivably could be issued in Basins 76D (the Kootenai River Basin) and 76I (the South Fork of the Flathead River Basin), unresolved issue remarks and objections remain in the general adjudication proceedings for the other basins. Issuing a single Rule 54(b) Order therefore makes more sense than waiting for final decrees in each of the individual basins. However, when the final decrees are issued, the Compact and any pertinent abstracts will be included in each decree.

Rule 54(b) authorizes the Water Court to certify a judgment as final to “strike a balance between the undesirability of piecemeal appeals and the need to make review available at a time when it best serves the needs of the parties,” *Roy*, 188 Mont. at 85, 610 P.2d at 1188. In certifying an order pursuant to Rule 54(b), M.R.Civ.P., the Court follows three guiding principles:

(1) the burden is on the party seeking certification to convince the district court that the case is the “infrequent harsh case” meriting a favorable exercise of discretion; (2) the district court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final; and (3) the district court must marshal and articulate the factors upon which it relied in granting certification so that prompt and effective review can be facilitated.

In re Blackfeet Tribe, Case WC-0006-C-2018, 2021 Mont. Water LEXIS 288 (quoting *Rogers v. Lewis & Clark Cnty.*, 2020 MT 230, ¶ 11, 401 Mont. 228, 472 P.3d 171).

In determining whether to certify an order, Rule 54(b) requires that the order “comply with the certification of judgment requirements of Montana Rule of Appellate Procedure Rule 6(6).” Rule 54(b)(2), M.R.Civ.P. Appellate Rule 6(6) states that a court may grant certification upon expressly determining there is no just reason for delay. M.R.App.P. 6(6).

The Montana Supreme Court has outlined factors to guide a lower court’s discretion to grant a Rule 56(b) certification on appeal. The factors include:

(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of computing claims, expense, and the like.

Rogers, ¶ 11.

Approval of the Compact closes proceedings regarding the adjudication of the Tribe's water rights. The proceedings have been lengthy. Prior to the Court's issuance of the Preliminary Decree, Compact was negotiated and approved by the Reserved Water Rights Compact Commission, as directed by the Montana Legislature. The Montana Legislature then approved the Compact after two sessions with lengthy proceedings. The Montana Supreme Court already has approved aspects of the Compact. *Flathead Joint Bd. of Control v. State*, 2017 MT 277, 389 Mont. 270, 405 P.3d 88 (holding that the Compact does not violate Mont. Const. art. II, § 18 by granting new immunities). The Compact was then approved by Congress and the Tribes.

The negotiations and legislative and tribal approval process occurred over several decades. *See* Mont. Dept. of Nat. Resources and Conservation, Staff Report on the Confederated Salish and Kootenai – Montana Compact (2022) (describing history of negotiations preceding Compact approval). Once the Compact Parties filed their motion for approval with the Water Court, the case proceedings also have been lengthy and complex, as previously explained in the Order on Motions and in this order. The substantial effort of the Compacting Parties, the Reserved Water Rights Compact Commission, and the Objectors cannot be overstated. The background and facts in this case establish that it is the “infrequent harsh case” meriting a favorable exercise of discretion from this court per Rule 54(b), M.R.Civ.P. *See Rogers*, ¶ 11.

Additionally, the enforceability date of the federal MWRPA is tied to the date “the Montana Water Court has approved the Compact *in a manner from which no further appeal may be taken.*” MWRPA § 10(b)(1)(A) (emphasis added). Rule 54(b) certification is necessary to make this approval final waiting for final decrees in all nine basins. Certification, therefore, avoids unnecessary and unjust delay to the enforceability date.

Rule 54(b) certification also satisfies a condition precedent to resolve 2,814 reserved right claims filed by the Tribes and 7,312 reserved right claims filed the United States for the benefit of the Tribes. Compact Art. VII.C.1.c. These claims are the subject matter of a series of stays issued by the Water Court which are docketed in the Water Court's basin files for Basin 76L (Basin-0001-76L-1985) and Basin 76LJ (Basin-0002-

76LJ-1985). As a practical matter, these stays impede the Water Court from issuing final decrees in several dozen basins across the state. Rule 54(b) certification begins the process to remove this barrier and allow the Water Court to issue final decrees in basins where all other issues and objections to claims have been resolved.

In considering the requirements of M.R.App.P. 6(6), the Court notes the many stages in the proceedings leading up to the Water Court's approval of the Compact. The Water Court's Order on Motions concluded the Compact is presumptively valid based in part on detailed consideration of procedural and substantive fairness to water users in the compacting and approval process. Likewise, the substance of the Compact reflects the balance and sense of justice the parties recognized as necessary to reach resolution. The Water Court also emphasizes that the government-to-government negotiations resulting in ratification of the Compact by the Montana Legislature, and subsequently by the United States Congress, pursuant to the MWRPA, demonstrate the compacting process is consistent with the overall public interest.

Certifying the Compact approval order as valid will not affect ongoing adjudication proceedings in the nine basins. The Compact is not at issue in any of those basin adjudication proceedings, nor can the Compact be collaterally attacked in basin-specific cases involving State-based water rights. All objections to the Compact had to be filed in the Compact approval proceeding. The Water Court has no legal authority to modify the Compact based on anything that occurs in cases in the basins. There is no risk of having to address the same issue twice, nor risk that an issue related to the Compact will be mooted by something that occurs in one of those cases. Thus, in the interest of sound judicial administration and public policy, the facts and circumstances particular to this case make it proper for the Water Court to certify its order approving the Compact as a final judgment pursuant to Rule 54(b), M.R.Civ.P.

ORDER

Therefore, it is ORDERED:

1. The Compact Parties' Motion is GRANTED and the Compact is APPROVED.

2. All remaining objections to the Compact as included in the Preliminary Decree are DISMISSED.

3. All abstracts included as appendices to the Preliminary Decree are APPROVED without modifications to any of their substantive elements. The abstracts have been updated to conform to Water Court format. Post decree versions of the abstracts are included in a separate Notice to confirm they have been included in the State's centralized water rights record system.

4. A Notice of Abstracts is entered simultaneously with this Order.

5. This case is CLOSED and certified as FINAL pursuant to Rule 54(b) of the Montana Rules of Civil Procedure.

6. A copy of this Order shall be sent to all Objectors who participated in an evidentiary hearing. Notice of this Order shall be provided to all other Objectors on the Master Service List who were not previously dismissed from this case.

Stephen R. Brown
Chief Water Judge

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