

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

CASE NO. WC-0001-C-2021

NOTICE OF OBJECTION AND REQUEST FOR HEARING

1. Objector's Name, Address, and Phone Number:  
Sego, William and Bill & Irene, LLC

| LAST NAME                     | FIRST NAME | MID. INITIAL |
|-------------------------------|------------|--------------|
|                               |            |              |
| STREET ADDRESS OR PO BOX      |            |              |
| Fountain Hills, Arizona 85268 |            |              |
| CITY                          | STATE      | ZIP CODE     |
| ( )                           |            |              |
| PHONE NUMBER                  | E-MAIL     |              |

2. Objector's Attorney name, address, and phone number:  
Brautigam, Kathryn M.

| LAST NAME                    | FIRST NAME                  | MID. INITIAL |
|------------------------------|-----------------------------|--------------|
|                              |                             |              |
| STREET ADDRESS OR PO BOX     |                             |              |
| P.O. Box 639                 |                             |              |
| Billings, Montana 59103-0639 |                             |              |
| CITY                         | STATE                       | ZIP CODE     |
| (406)                        |                             |              |
| PHONE NUMBER                 | E-MAIL                      |              |
| 896-4605                     | kmbrautigam@hollandhart.com |              |

3. State the specific part(s) of the Preliminary Decree objected to. Identify the specific ground(s) and evidence on which the objection(s) are based. (Use additional paper if necessary)

See attached Objection and Table 1

4. If you are objecting to a specific water right number, identify the water right number, decree page number, and the water source. If you are objecting to more than one water right number, use a separate form for each water right number.

Water Right #: See attached Objection and Table 1  
(One Number Per Form)

Page number in Decree: See attached Objection and Table 1  
Source: See attached Objection and Table 1

DATED this 18 day of January, 2023.

  
SIGNATURE OF OBJECTOR OR OBJECTOR'S ATTORNEY

(TURN FORM OVER AND COMPLETE OTHER SIDE)

**YOU MUST MAIL OR EMAIL A COPY OF THIS OBJECTION TO THE FOLLOWING ATTORNEYS REPRESENTING THE U.S. DEPARTMENT OF JUSTICE, THE STATE OF MONTANA, AND THE CONFEDERATED SALISH AND KOOTENAI TRIBES. COMPLETION OF THE CERTIFICATE OF MAILING, FOUND BELOW, REPRESENTS TO THE COURT THAT YOU HAVE MAILED A COPY OF THIS OBJECTION TO THESE ATTORNEYS.**

**CERTIFICATE OF MAILING**

I, Kathryn M. Brautigam, declare under penalty of perjury, that on the 18 day of January, 2023, I mailed a copy of this Objection postage prepaid, addressed to the following attorneys for the Federal, State, and Tribal Agencies:

Daniel J. Decker  
Confederated Salish & Kootenai Tribes  
Tribal Legal Department  
PO Box 278  
Pablo, MT 59855  
[objections@cskt.org](mailto:objections@cskt.org)

David W. Harder  
U.S. Department of Justice  
Indian Resources Section  
Environment & Natural Resources Div.  
999 18th St.  
South Terrace, Suite 370  
Denver, Colorado 80202  
[efile\\_denver.enrd@usdoj.gov](mailto:efile_denver.enrd@usdoj.gov)

Molly M. Kelly  
Montana Department of Natural Resources and Conservation  
1539 Eleventh Avenue  
PO Box 201601  
Helena, MT 59601  
[Jean.Save@mt.gov](mailto:Jean.Save@mt.gov)

  
SIGNATURE FOR CERTIFICATE OF MAILING

**Please send this completed original to: Montana Water Court  
PO Box 1389  
Bozeman, MT 59771-1389**

**or E-mail: [watercourt@mt.gov](mailto:watercourt@mt.gov)**

**Questions? Call the Montana Water Court at 1-800-624-3270 or (406) 586-4364.**

**OBJECTIONS MUST BE RECEIVED AT THE WATER COURT BY FEBRUARY 9, 2023.**

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

**CASE NO. WC-0001-C-2021**

**NOTICE OF OBJECTION AND REQUEST FOR HEARING**

**1. Objector's Name, Address, and Phone Number:**  
Slack, Grace

|                            |            |              |
|----------------------------|------------|--------------|
| LAST NAME                  | FIRST NAME | MID. INITIAL |
| 32930 East Post Creek Road |            |              |
| STREET ADDRESS OR PO BOX   |            |              |
| St. Ignatius, MT 59865     |            |              |
| CITY                       | STATE      | ZIP CODE     |
| ( )                        |            |              |
| PHONE NUMBER               | E-MAIL     |              |

**2. Objector's Attorney name, address, and phone number:**  
Brautigam, Kathryn M.

|                              |                             |              |
|------------------------------|-----------------------------|--------------|
| LAST NAME                    | FIRST NAME                  | MID. INITIAL |
| P.O. Box 639                 |                             |              |
| STREET ADDRESS OR PO BOX     |                             |              |
| Billings, Montana 59103-0639 |                             |              |
| CITY                         | STATE                       | ZIP CODE     |
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| 896-4605                     | kmbrautigam@hollandhart.com |              |

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See attached Objection and Table 1

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SIGNATURE OF OBJECTOR OR OBJECTOR'S ATTORNEY

**(TURN FORM OVER AND COMPLETE OTHER SIDE)**

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1539 Eleventh Avenue  
PO Box 201601  
Helena, MT 59601  
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SIGNATURE FOR CERTIFICATE OF MAILING

**Please send this completed original to: Montana Water Court  
PO Box 1389  
Bozeman, MT 59771-1389**

**or E-mail: [watercourt@mt.gov](mailto:watercourt@mt.gov)**

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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**

**ATTACHMENT TO NOTICE OF OBJECTION AND REQUEST FOR HEARING OF  
OBJECTORS WILLIAM SEGO, BILL & IRENE, LLC, AND GRACE SLACK**

Objectors William Segó and Bill & Irene, LLC (hereinafter referred to collectively as “Segó” or “Objector”), and Grace Slack (hereinafter referred to as “Slack” or “Objector” and together with Segó, the “Objectors”), by and through their counsel, Holland & Hart LLP, respectfully provide the following information in support of their Notice of Objection to the settlement of the Confederated Salish and Kootenai Tribes Water Rights Compact, codified at Mont. Code Ann. § 85-20-1901 (“CSKT Compact” or “Compact”), and Request for Hearing pursuant to Mont. Code Ann. § 85-2-233(1)(a)(iii).

Objectors are the owners of land and water rights located in Basin 76L, in Lake County, within the boundaries of the Flathead Reservation. As described in greater detail below, many of Objectors’ water rights were initiated by appropriation in the late 1880s and early 1890s and have been beneficially used since that time. Objectors have haying and cattle operations, and use water for irrigation, stock, and domestic purposes. Objectors’ water rights include Secretarial Water Rights initiated prior to the development of the Flathead Irrigation Project, and “*Walton*” water rights acquired from Indian allottees in the early 1900s.

The CSKT Compact was ratified by the Montana Legislature in 2015, ratified by the United States Congress in 2020, and was enacted by the Department of the Interior on September 17, 2021. Notice of the Compact and the Preliminary Decree herein was mailed in June of 2022. The Compact and its appendices, including the Preliminary Decree, contain sweeping and unprecedented claims for water rights, many of which are not quantified and bear a

priority date of time immemorial. The Unitary Administration and Management Ordinance, concurrently approved by the Montana Legislature in 2015, now purports to govern the administration of all water rights on the Flathead Reservation, including Objectors' water rights.

Although specific appendices and water right numbers are identified herein, this Notice of Objection is directed at all portions of the Compact and the Preliminary Decree, as many of the grounds for objection raised herein apply generally to all components.

**A. APPLICABLE LAW**

1. Objectors incorporate the preceding paragraphs as if fully restated herein.

2. Objectors were not parties to the Compact between the State, the Federal government, and the Tribe. Therefore, in reviewing Objectors' non-party objections, the Court will first determine whether the Compact should be presumed valid by analyzing whether the Compact was "fundamentally fair, adequate and reasonable" and "conforms to applicable laws." *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770, \*18 (Mont. Dec. 9, 2020) (citation omitted).

3. In determining the fairness of the Compact, the Court looks to whether the "agreement is ... the product of fraud or overreaching by, or collusion between the negotiating parties." *In re Adjudication of Existing and Reserved Rights of Chippewa Cree Tribe*, 2002 Mont. Water LEXIS 1, \*7 (Mont. June 12, 2002). To evaluate the Compact's conformation to applicable law, the Court looks to whether "the Compact's quantification provisions violate or are prohibited by applicable law." *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770, \*24.

4. Then the Court will evaluate whether the Compact "was the product of good faith, arms-length negotiations." *Id.* at \*18–19 (citation omitted).

5. If the Court presumes the Compact valid after analyzing the Compact's reasonableness, negotiation process, and congruence with applicable law, the burden is on Objectors "to prove the compact is unreasonable and their 'interests are materially injured by operation of the Compact.'" *Id.* at \*25 (citation omitted). Unreasonableness is demonstrated when a Compact "follows an approach to quantify and allocate water rights that departs from existing law." *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770, \*33. Material injury can be demonstrated by objecting "to the process used to reach consensus in the Compact," the quantification of water rights within the Compact, "any substantive term of the Compact," priority dates, "principles of reserved water rights jurisprudence," any "vague or ambiguous" provisions, that "the documents were not prepared in good faith," or that "the documents fail to reflect the public interest." *Id.* at \*25–33.

6. Here, this Court should *not* presume the Compact's validity, because Objectors contend the Compact is unfair due to demonstrated overreach in the way Tribal water rights are framed within the Compact, and because the terms of the Compact violate applicable Federal reserved water law principles, Montana constitutional law, and United States constitutional law.

7. If the Court still determines the Compact is presumably valid, Objectors urge that they will carry the burden to demonstrate that the Compact is both (A) unreasonable, because it follows a completely new approach to Tribal water rights "that departs from existing law," and (B) materially injurious, because of the "substantive terms" within the Compact injure Objectors' water rights and state and federal constitutional rights. *See In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770, \*25, \*33.

**B. IDENTIFICATION OF OBJECTORS' WATER RIGHTS WHICH WILL BE MATERIALLY INJURED BY THE COMPACT OR THE PRELIMINARY DECREE**

8. Objectors incorporate the preceding paragraphs as if fully restated herein.

9. Objectors Sego and Slack own property and water rights located in Lake County, within the boundaries of the Flathead Indian Reservation (“Reservation”).

### **Objector Sego’s Water Rights**

10. Objector Sego’s land ownership includes approximately 910 acres located in portions of Sections 32, 33 and 34, Township 19 North, Range 19 West, P.M.M., and Section 4, Township 18 North, Range 19 West, P.M.M., formerly known as the Pope Ranch (hereinafter referred to as the “Sego Ranch”).

11. The Sego Ranch consists of a combination of grazing land, irrigated crop production land, mature growth timbered areas, a residence and various improvements, including water-related capital improvements (e.g., ditches, stock ponds, and diversion structures).

12. Objector Sego’s title to the Sego Ranch traces back to several parcels originally allotted to individual Flathead Indians in a series of conveyances generally occurring between 1908 and 1912. Patents were later issued to these Indian allottees, and after mesne conveyances, title to the allotted parcels is held by Objector Sego.

13. The Sego Ranch is located in proximity to Ashley Creek, in Basin 76L, and derives a significant portion of its water supply from Ashley Creek pursuant to the water rights described below. Ashley Creek is a tributary of Post Creek, which is tributary to the Flathead River below Flathead Lake.

14. Objector Sego also owns approximately 600 acres in Sections 16, 17, and 21, Township 19 North, Range 21 West, P.M.M., near the town of Moiese (“Sego Moiese Property”). The Sego Ranch and Sego Moiese Property are located within the Flathead Irrigation Project (“Flathead Project” or “FIP”) and have historically been irrigated with water delivered from the FIP.



15. Objector Segó also owns approximately 22 acres adjacent to Flathead Lake, where Objector Segó maintains a residence for himself and his family (“Segó Lake Property”). Objector Segó’s properties within the Reservation, including the Segó Ranch, Segó Moiese Property, and Segó Lake Property, are collectively referred to herein as the “Segó Lands.”

16. Objector Segó owns numerous water rights and interests in water appurtenant to or associated with the Segó Lands, including without limitation State-Law Claims, “*Walton*” water rights, and Secretarial Water Rights. Objector Segó’s various water rights and interests in water are collectively referred to herein as the “Segó Water Rights” and are described with greater particularity below. The Segó Water Rights are now and have historically been used for a variety of beneficial uses on the Segó Lands including, without limitation, irrigation for haying and ranch operations, stock watering, and domestic purposes. The Segó Water Rights include the following interests:

a. State-Law Water Right Claims. The Segó Water Rights include Water Right Claim Nos. 76L 15152-00 (irrigation); 76L 15151-00 (stock); and 76L 15150-00 (domestic). These water rights divert from Ashley Creek, and supply irrigation, stock, and domestic uses, respectively, on the Segó Ranch. The priority dates for these water right claims date to December 31, 1889.

b. Secretarial Water Rights. Objector Segó owns Secretarial Water Rights in Ashley/Dry Creek. Secretarial Water Rights are those water rights allocated to Indian allotments by the Assistant Secretary of the Interior by his approval on November 25, 1921, of the findings of the Commission appointed by him to investigate the “private rights” on the Reservation. Secretarial Water Rights generally predate the development of the Flathead Irrigation Project and

were granted by the Department of the Interior in order to protect these senior private rights from disruption upon establishment of the Project.

c. Walton Rights. Pursuant to the chains of title to certain of the Segó Lands, Objector Segó is the successor in title to Indian allottees and thereby owns “*Walton*” water rights with a priority date of July 16, 1855. See *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

d. Flathead Irrigation Project Rights. Objector Segó owns lands within the Flathead Project which are now and have historically been irrigated with water delivered from Objector’s vested interest in the Flathead Project, including the Segó Moiese Property. Objector Segó’s water rights in the Flathead Project are associated with, *inter alia*, Water Right No. 76L 30052932, Nos. 59, 60 (Pablo Feeder Canal); Nos. 111, 112 (Hillside Ditch); and Nos. 115, 116 (Moiese A Canal).

e. Groundwater Rights. Objector Segó owns groundwater rights including Water Right Claim Nos. 76LJ 37244-00 (groundwater well); 76LJ 39717-00 (Flathead River/Lake Pump); and 76LJ 80351-00 (developed spring, exempt).

17. The Segó Water Rights may overlap each other, in that while several of the above water rights are presently documented as state law-based claims, the historical use of these water rights can be traced to original Indian allotments irrigated on the Reservation. As such, these claims may in fact be *Walton*, or Secretarial, water rights and entitled to a senior priority as against the Flathead Project and other, more junior water rights.

#### **Objector Slack’s Water Rights**

18. Objector Slack owns land in Lake County, including approximately 500 acres in portions of Sections 8, 10, 17, 18, and 19 in Township 19 North, Range 19 West, P.M.M.; and Section 21 Township 19 North, Range 20 West, P.M.M., known as the Doubleshoe Ranch

(hereinafter, the “Slack Property”) and numerous water rights in Basin 76L (“Slack Water Rights”).

19. The Slack Water Rights (owned in whole or in part) include, *inter alia*, the following State-Law water right claims: Water Right Claim Nos. 76L 134609-00; 76L 134611-00; 76L 134614-00; 76L 134615-00; 76L 100386-00; 76L100387-00; 76L 100481-00; 76L 100482-00; 76L 100483-00; and 76L 100484-00. These water rights include ditches which divert from Post Creek and/or its tributaries, spring rights and wells, and supply irrigation, stock and domestic uses on the Slack Property. The priority dates for many of these water right claims date to the 1890s.

20. Upon information and belief Objector Slack also owns Secretarial Water Rights and *Walton* water rights in Post Creek and/or its tributaries. The Slack Water Rights, including those State-Law claims cited above, include water rights that were appropriated by Indian allottees. Like the Se-go Water Rights, the Slack Water Rights may overlap, in that while several of the water rights are presently documented as state law-based claims, the historical use of these water rights can be traced to original Indian allotments irrigated on the Reservation. As such, these claims may in fact be *Walton*, or Secretarial, water rights and entitled to a senior priority as against the Flathead Project and other, more junior water rights.

### **C. MATERIAL INJURY TO WATER RIGHTS**

21. Objectors incorporate the preceding paragraphs as if fully restated herein.

22. Pursuant to Mont. Code Ann. § 85-2-233(4) and Rule 5(a) of the Water Right Adjudication Rules (W.R.Adj.R), a summary table containing a listing of Objectors’ water rights, together with citation to specific sections of the Compact and the Preliminary Decree to which objection is made and the grounds therefore, is attached hereto as Table 1. As noted above, however, this Notice of Objection is directed more broadly to all portions of the Compact

and the Preliminary Decree, and Table 1 is not intended to be exhaustive. Because the Compact and the Unitary Administration and Management Ordinance purport to implement an entire new system of water rights administration, an analysis of the impact on any single water right will often implicate several portions of the Compact and its Appendices, and many of the grounds for objection raised herein therefore apply to numerous claims or apply generally to all components of the Compact.

23. The June 9, 2022 Notice of Entry of Preliminary Decree states that “the Court’s review of a compact is to allow the Court ‘to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties.’” (quoting *Chippewa Cree Tribe Water Compact*, 2002 Mont. Water LEXIS 1 at \*7. Upon information and belief, and as further documented herein and below, the proposed settlement as embodied in the Preliminary Decree does not meet this standard.

24. The Flathead Reservation Water Management Board (“Flathead Board” or the “Board”), as created by the Compact pursuant to Mont. Code Ann. § 85-20-1901 and the Unitary Administration and Management Board pursuant to Mont. Code Ann. § 85-20-1902, purports to be the exclusive regulatory body for water rights administration on the Reservation. Mont. Code Ann. § 85-20-1901, art. III, § I(1), (5). The creation of the Board was authorized by the Compact which became effective on September 17, 2021, and the Board appears to have held its first public meeting in January 2022. The creation of the Flathead Board conflicts with historical operation of the Flathead Project, under which water rights have been allocated to the Segó Lands. Objector Segó has already seen material and costly reductions in both the timing and amount of deliveries of water under Objector Segó’s Flathead Project rights. Without limiting

the foregoing, since the Flathead Board began operations, Objector Segó's allocation of Flathead Project water has been reduced from approximately 2.7 acre-feet/acre to 1.04 acre-feet/acre.

25. The CSKT Compact states that irrigators within the Flathead Project who hold state-law based water right claims may enter into consensual agreements to determine the amount and priority of their water rights. In the absence of such agreement, it is presumed that Objectors' State-Law Based Claims must await adjudication in a separate proceeding but will already be judicially determined to be junior to the competing Compact claims adjudicated herein. Moreover, the general adjudication of claims in Basin 76L is currently stayed by the Water Court pending further proceedings, forcing Objectors to stand by and wait while the full scope of the Compact claims are adjudicated in the Water Court. Objectors' state law-based water right claims must be acknowledged and protected in any final decree entered by this court.

26. The process of "Adaptive Management" in the CSKT Compact undercuts the vested water rights of Objectors by authorizing the Flathead Board to allocate water to instream flow and fishery uses in any given year, resulting in diminished supply for irrigation, stock and other uses, based solely on determinations made by the Flathead Board. *See* Mont. Code Ann. § 85-20-1901, art. II(2). Under Adaptive Management, instream flow water rights located outside of the Reservation may be administered by the Flathead Board in such a way as to reduce allowed diversions by the Flathead Project, resulting in injury to, *inter alia*, Objectors' interests in their land that has historically been irrigated by the Flathead Project. Objector Segó has already experienced instances of reduced flow deliveries, resulting in measurable damage to the Segó Lands from loss of hay crop and financial and operational impacts. Objectors' water rights and interests in land are injured by operation of the Compact and the Unitary Administration and Management Ordinance which effectively repurpose the federal irrigation project to support

instream flow and fishery uses under a claimed time immemorial priority, depriving existing water right holders of their water uses and priorities

27. The Claimed CSKT Compact Water Right Nos. 76L 300052707, 76L30052708, 76L30052834, 76L 52835, and 76L 30052836 all claim surface water rights in Ashley Creek or its tributaries, for fish and wildlife uses, with a time immemorial priority date. The amounts claimed range from 18.50 cfs up to 134.70 cfs. Upon information and belief, the mean discharges of Ashley Creek range from lows of around 2.0 cfs to a monthly high of only 54.32 cfs during peak spring flows. Despite the fact that these claimed Compact water rights appear to be for instream uses, and are thus nonconsumptive, they have measurement points located downstream of the diversion points for Objector Segó's Ashley Creek water rights and claim far more than the available flow in the stream. As such, Objector Segó's Ashley Creek rights would be subject to call in the event that the Compact rights are not satisfied. Objectors have not had the opportunity to review any technical support for the claimed flow rates, which appear excessive. The claimed time immemorial priority, when combined with the excessive and unsupported flow rates, effectively renders Objector Segó's Ashley Creek water rights worthless.

28. Many of the consumptive use flow rates claimed in the Preliminary Decree are similarly excessive and unsubstantiated. For example, CSKT Water Right Nos. 76L 30052929 and 30052932, and for the Flathead Project, Mission District, claim diversion rates from Ashley Creek ranging from 300 cfs to 400 cfs. These water rights claim an appropriation date of July 16, 1855. Objectors have not had an opportunity to review any technical support for the claimed flow rates, which appear excessive and unsupported.

29. The Compact and the Preliminary Decree have failed to appropriately quantify the reserved water right claims, including with respect to the maximum allowable diversions from

Ashley Creek. For example, claimed CSKT Compact Water Right No. 76LJ 30063812 (*see* Compact Appendix 9) will result in material injury to Objectors' water rights, given the large quantity, 1855 priority, and vague description of types and places of use. Without limiting the foregoing, the CSKT may initiate a water rights call against Objectors' rights on Ashley Creek and Post Creek. A claim for 229,383 acre-feet for "any purpose," with no set flow rate and diversion allowed by "any means" is not sufficiently precise to assess the impact to, or protect, Objectors' water rights.

30. Finally, Objectors' Secretarial Water Rights, which are valuable property interests granted by the federal government, will be subject to reduction and/or cancellation by operation of the Compact water rights as set forth in the Preliminary Decree. Upon information and belief, the newly constituted Flathead Board has already indicated that it does not recognize the full scope of Secretarial Water Rights on the Reservation and will take actions to reduce or eliminate historical canal crossings, stock water uses, and other components of Secretarial Water Rights. Any such actions will result in material injury to Objectors' water rights.

**D. THE CSKT COMPACT IS INVALID BECAUSE ITS NEWLY CREATED "TRIBAL WATER RIGHTS" ARE INCONSISTENT WITH FEDERAL PRECEDENT AND NULLIFY EXISTING WATER RIGHTS CAUSING MATERIAL INJURY**

31. Objectors incorporate the preceding paragraphs as if fully restated herein.

32. The Compact relies upon a new formulation of Federal reserved water rights to reach its conclusions regarding the scope of the Tribe's water rights. These newly created "Tribal water rights" do not comply with Federal reserved water right caselaw. The Compact incorrectly states that Tribal water rights are reserved by the Tribe and conflates the Tribe's on-reservation water rights with the Tribe's right to off-reservation instream flows. This results in assigning virtually unquantified off-reservation instream flows to the Tribe.

33. As a result, the Compact is invalid because it is not “fundamentally fair, adequate and reasonable” due to its unlawful expansion of the Tribe’s water rights and the Compact does not “conform[] to applicable” Federal reserved water right caselaw. *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*18.

34. Alternatively, were the Court to presume the Compact valid, the Compact is unreasonable because its approach to Federal reserved water rights “departs from existing law” and as a result its “substantive terms” are materially injurious to Objectors’ water rights. *Id.* at \*25, \*33.

35. The Compact begins by stating that the CSKT “reserved [its] water rights” under the Hellgate Treaty of 1855, 12 stat. 975. Mont. Code Ann. § 85-20-1901, art. I. This is an incorrect statement of Federal law. The concept of “reserved water rights” for Tribal entities arose from the U.S. Supreme Court case of *Winters v. United States*, 207 U.S. 564 (1908), wherein the Court explained “[t]hat *the Government* [of the United States] did reserve” water rights in a treaty with a Montana tribe on “May, 1888, resulting in the creation of Fort Belknap Reservation.” *Id.* at 575, 577 (emphasis added).

36. These Federal reserved water rights are tied to the Reservation. The “Government impliedly reserves *appurtenant* unappropriated water to the extent needed to fulfill the purposes of the reservation,” *United States v. Adair*, 478 F. Supp. 336, 345 (D. Or. 1979) (emphasis added), and “[t]he purpose of a federal reservation of land defines the scope and nature of impliedly reserved water rights.” *United States v. Adair*, 723 F.2d 1394, 1419 (9th Cir. 1983).

37. “When adjudicating water rights, including tribal water rights, the Water Court is a state court with a ‘solemn obligation to follow federal law.’” *In re Blackfeet Tribe Compact*,



2020 Mont. Water LEXIS 770 at \*16 (quoting *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983)). “Thus, as applied to tribal water rights and the approval of compacts, *Winters* and its progeny apply.” *Id.* (citing *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 92, 712 P.2d 754, 764 (1985); *In re Crow Water Compact*, 2015 MT 217, ¶ 17, 380 Mont. 168, 174, 354 P.3d 1217, 1221).

38. In quantifying such rights, Federal “[r]eserved water rights are established by reference to the purposes of the reservation rather than to actual, present use of the water” and “Treaty interpretation and statutory construction are governed by federal Indian law.” *State ex rel. Greely*, 219 Mont. at 90, 712 P.2d at 762.

39. This formulation of the *Winters* water rights as “federal reserved rights” is still the law in the Ninth Circuit, which recently reiterated that “[u]nder the *Winters* doctrine, ‘when the Federal Government withdraws its land from the public domain’ for the purpose of establishing an Indian reservation, ‘the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.’” *Navajo Nation v. U.S. DOI*, 26 F.4th 794, 801 (9th Cir. 2022) (emphasis added) (citation omitted).

40. On-reservation Federal reserved water rights under *Winters* have a priority date as of the date of the creation of the Reservation, because they were reserved by the United States upon the creation of the Reservation. *Adair*, 723 F.2d at 1415.

41. These *Winters* Federal reserved water rights apply to the Reservation but can also belong to individual Indians due to the enactment of the General Allotment Act. “It is settled that Indian allottees have a right to use reserved water.” *Walton*, 647 F.2d at 50.

42. Furthermore, individual “Indian allottee[s] may sell [their] right to reserved water” under *Winters*. *Id.* “The non-Indian [water rights purchaser] also acquires a right, with a

date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title.” *Id.* at 51.

43. Objectors purchased *Winters* Federal reserved water rights under *Walton*, 647 F.2d 42, when they (via their predecessors) purchased land on the Reservation from Indian allottee(s) and therefore under Federal law possesses water rights of the same priority as those *Winters* rights held by the Reservation.

44. But the CSKT Compact incorrectly conflates the Tribes’ *Winters* Federal reserved water rights with the Tribes’ treaty-reserved fishing rights from a different provision of the Treaty of Hellgate. The Compact misapplies the treaty-reserved fishing rights to create new “Tribal reserved water rights” for fisheries purposes, which the Compact applies to give the CSKT unquantified off-reservation instream flows with a time immemorial priority.

45. The off-reservation fishing right within the Treaty of Hellgate grants a “right of taking fish at all usual and accustomed places, in common with the citizens of the Territory[.]” 12 Stat. 975, art. III. This right was originally interpreted as allowing Tribal members to cross non-reservation land to access their “usual and accustomed” fishing grounds. *United States v. Winans*, 198 U.S. 371, 381–82 (1905). And while that right is given the priority of “time immemorial,” that right is explicitly “nonconsumptive in nature” and “the holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses.” *Adair*, 723 F.2d at 1411, 1418.

46. The Ninth Circuit further interpreted this off-reservation right to hunt and fish as allowing the Tribe to “prevent other appropriators from depleting the streams waters below a protected level” to ensure fish continue to be available in the Tribe’s “usual and accustomed places.” *Id.* at 1411.

47. But this expanded interpretation still does not allow the Tribe to use its off-reservation fishing right to divert “the natural flow of a stream” to increase in-stream flows—the right only “confirm[s] to the Tribe the amount of water necessary to support its hunting and fishing rights as *currently* exercised to maintain the livelihood of Tribe members, not as these rights once were exercised by the Tribe” when the Treaty was signed. *Adair*, 723 F.2d at 1410–11, 1414–15 (emphasis added).

48. The protected amount of water flow necessary to maintain the Tribe’s current level of fishing must be quantified, and that level may be reduced if demonstrated that current “tribal needs may be satisfied by a lesser amount.” *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n* (“*Fishing Vessel*”), 443 U.S. 658, 685 (1979).

49. The CSKT Compact does not disclose the volume of fish that the Tribe currently takes to establish how its right to fish is “currently exercised,” *Adair*, 723 F.2d at 1414, nor does the Compact quantify the requisite “volume of water needed to preserve [that currently exercised level of] fishing” at the Tribe’s usual and accustomed fishing areas. *United States v. Anderson*, 591 F. Supp. 1, 5 (E.D. Wash. 1982), *aff’d in part, rev’d in part*, 736 F.2d 1358 (9th Cir. 1984).

50. The new “Tribal reserved water right” claimed for the Tribes in the Compact conflates these two types of water rights to create a reserved right to water with the priority date of “time immemorial” that includes off-Reservation instream flows, with none of the limits applied by Federal precedent regarding the purpose of the Reservation, analysis of how the Tribe’s fishing right is “currently exercised,” *Adair*, 723 F.2d at 1414–15, or identification of the volume of water that amount of fish necessitates. *Anderson*, 591 F. Supp. at 5; *see also* Mont. Code Ann. § 85-20-1901, art. I.

51. Furthermore, the Treaty of Hellgate and the implied *Winters* water rights do not apply to the CSKT subsistence range south and east of the continental divide in Montana—they apply only to the water appurtenant to the Reservation, and CSKT has not demonstrated “usual and accustomed” fishing areas in those areas. The CSKT’s previously asserted claims to water throughout the State of Montana should not be adjudicated under the Compact nor the Compact used as a basis to expand *Winters* rights to off-Reservation flows.

52. Because the “Tribal reserved water right” greatly expands the Tribe’s water rights and does not accord with current Federal precedent, the CSKT Compact is not a “reasonable factual and legal determination” and represents a determination of Tribal water rights that is “prohibited by applicable law” and the Compact is therefore invalid. *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*21, \*24. Put another way, the CSKT Compact represents a substantial overreach by the negotiating parties.

53. The CSKT Compact is also unreasonable and materially injurious to Objectors’ water rights because it creates an unquantified senior right for the Tribe. Creating unquantified “Tribal reserved water rights” with a priority of “time immemorial” does not accord with Federal reserved water rights precedent. The Compact cannot simply “[r]ecogn[ize] ... Congress’ power to reserve water for land which is itself set apart from the public domain” without “answer[ing] the question of the *amount* of water which has been reserved or the purposes for which the water may be used.” *United States v. New Mexico*, 438 U.S. 696, 699 (1978) (emphasis added). The Supreme Court has emphatically stated that it “unequivocally rejected the Tribe’s claim to an untrammelled right to take as many of the steelhead running through its reservation as it chose.” *Fishing Vessel*, 443 U.S. at 684. Yet the CSKT Compact does just that—by assuming the Tribe’s right has priority to all other water rights for an unlimited amount both on and off the

reservation. Ceding vast quantities of water to the Tribes under a new “Tribal reserved water right” unnecessarily nullifies the rights of non-Tribal Reservation residents without proper quantification.

54. The CSKT Compact is the seventh compact between the State of Montana and the Tribes within the State, but no previous compact has created such broad new water rights out of whole cloth for the negotiating Tribe.<sup>1</sup> Moreover, previous tribal compacts actually quantified the water allocated to the Tribes. Although the CSKT Compact’s Appendices quantify some water rights, it leaves many open ended and vague. As an example, the Compact awards the Tribes the unquantified amount of “all naturally occurring surface water in Flathead Lake up to the shoreline elevation of 2,883 feet” which includes “all named and unnamed tributaries that drain directly into Flathead Lake.” Mont. Code Ann. § 85-20-1901, art. III, § C(1)(h) and Appendix 18 at 1–2.

55. As recognized by the Water Court, “[a] compact may be unreasonable if it follows an approach to quantify and allocate water rights that departs from existing law,” *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*26, \*33, and this Compact is demonstrably in conflict with “settled principles of reserved water rights jurisprudence.” *Id.* By rewriting the Treaty of Hellgate and reworking subsequent developments in Federal law, the CSKT Compact disregards the requirements and analyses implicated by “Federal reserved water rights” to create unreasonable “Tribal reserved water rights.” Because the Compact reinterprets the Treaty of Hellgate in a manner unmatched by existing law or practice, “substantive terms” within the Compact enable the Tribes to utilize their new rights to eliminate the rights of non-Tribal

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<sup>1</sup> The CSKT Compact therefore “deviated in [a] material way from Compact Commission negotiations that led to the prior federal and tribal compacts,” further demonstrating the invalidity of the Compact. *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*21.

members on the Reservation, resulting in material injury to the rights of Objectors. *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*25.

56. By changing the actor reserving water rights from the United States government to the Tribes, the CSKT Compact violates Federal precedent by (1) reconstructing its *Winters* Federal reserved water rights, (2) separating those rights from the purposes of the Reservation, and (3) conflating *Winters* rights with off-reservation fishing rights to incorrectly claim newly-created “Tribal reserved water rights,” which include off-reservation instream flows. *See* Mont. Code Ann. § 85-20-1901, art. III, § D. These changes have no basis in law and do not “reflect the balance and sense of justice ... necessary to reach resolution” in this adjudication, emphasizing the invalidity of the Compact. *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*23.

57. The result is that Objectors face an arbitrarily determined Tribal water right with a “time immemorial” priority date that nullifies any water rights they held before the settlement of the CSKT Compact, resulting in material injury. The Compact denies Objectors the opportunity to (1) negotiate their *Winters* water rights against the Tribes’ *Winters* water rights, and (2) to challenge the science supporting the amount of water the Tribes need “to provide a ‘moderate living’” by fishing. *United States v. Washington*, 827 F.3d 836, 853 (9th Cir. 2016). Instead, the Compact’s “substantive terms” unreasonably assume that the CSKT’s off-reservation right to a “moderate living” of fishing exceeds any amount of water that Objector or other irrigators could be due under Federal law, causing Objectors material injury. *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*25.

#### **E. MATERIAL INJURY TO MONTANA CONSTITUTIONAL RIGHTS**

58. Objectors incorporate the preceding paragraphs as if fully restated herein.

59. Furthermore, additional “[s]ubstantive terms” of the CSKT Compact violate Objectors’ rights under the Montana Constitution, causing Objectors material injury. *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*25.

**The CSKT Compact Violates Article IX, Section 3 and Article III, Section 1 of the Montana Constitution**

60. Montana Constitution Article IX, Section 3(4), states that “[t]he legislature shall provide for the administration, control, and regulation of water rights[.]”

61. The Montana Supreme Court has likewise long held that “[t]he state legislature cannot enact a valid law which goes counter to any of the mandatory and prohibitory provisions of the state constitution,” observing “[t]he rule is well settled that the judicial power cannot be taken away by legislative action.” *State ex rel. Bennett v. Bonner*, 123 Mont. 414, 429, 214 P.2d 747, 755 (1950) (citation omitted).

62. Article III, Section 1 of the Montana Constitution similarly states that “[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.”

63. But by enshrining the CSKT Compact into law, the Montana Legislature relinquished its control over Montanan’s water rights in multiple ways.

64. First, the Compact establishes a Flathead Reservation Water Management Board which has “exclusive jurisdiction to resolve ... any controversy over the right to the use of water as between the Parties,” including the water rights of non-Tribal Montanans who purchased land from Tribal allottees. Mont. Code Ann. § 85-20-1901, art. IV, § I(1).

65. The Montana Legislature thus no longer administers, controls, or regulates the water rights belonging to Montana citizens who live on the Reservation under the Compact,

violating Article IX, Section 3 of the Montana Constitution. The Compact is therefore invalid because its provisions “violate ... applicable law.” *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*24.

66. The situation created by the CSKT Compact is similar to that in Wyoming where its Constitution likewise “recognize[d] that state control of water is essential to the development and prosperity of Wyoming” and directed that a state engineer supervise the waters of the state, but a district court judge “assign[ed] the duties of administering state water within the reservation to the tribal water agency.” *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 835 P.2d 273, 281 (Wyo. 1992).

67. The Wyoming Supreme Court concluded that “the district court had no ‘inherent equitable enforcement authority,’ as argued by the Tribes, to effectuate a de facto removal and replacement of the state engineer as the administrator of state water within the reservation.” *Id.* at 282. Similarly, here, the Legislature cannot replace its control over the regulation of state water with the Board through the Compact.

68. This unreasonable element of the Compact follows “an approach to quantify and allocate water rights that departs from existing law,” *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*33, and causes material injury to Objectors by depriving them of their rights under Article III, Section 1 of the Montana Constitution.

69. Second, under the Compact the Board’s exclusive jurisdiction can be insulated from review by the Montana judiciary.

70. Although the Compact states that an individual “dissatisfied with a decision of the Board ... may appeal that decision by filing a petition for judicial review with a Court of



Competent Jurisdiction,” the Compact later clarifies that such a court need not be in the Montana judiciary. Mont. Code Ann. § 85-20-1901, art. IV, § B(7)(g)(v).

71. The Compact defines a “‘Court of Competent Jurisdiction’ [to] mean[] 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.” Mont. Code Ann. § 85-20-1901, art. II(26) (emphasis added).

72. Therefore, if the Tribe declines to submit to the Montana district court’s jurisdiction, the Compact directs that the dispute over Montana water rights will not be heard by the Montana judiciary but by the Federal judiciary.

73. Consequently, under the Compact, the Montana water rights of non-tribal Montanans on the Reservation are adjudicated by the Board and appealed to the Federal judiciary—neither of which are state institutions.

74. Although the Montana Constitution directs that the Montana Legislature “regulat[e]” state water rights, in the Compact “the legislature ... vest[ed] [the Board] with an arbitrary and uncontrolled discretion with regard thereto, and [therefore] a statute or ordinance which is deficient in this respect is invalid.” *Douglas v. Judge*, 174 Mont. 32, 38, 568 P.2d 530, 533-34 (1977).

75. By taking the adjudication of water quantity disputes from the Montana Judiciary, the Compact follows “an approach to quantify and allocate water rights that departs from existing law,” *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*33, causing Objectors material injury and depriving them of their rights under Article II, Section 26 of the Montana Constitution.

76. “It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis* ... resist the first beginnings.” *Bonner*, 123 Mont. 414, 431–32 (quoting *Boyd v. United States*, 116 U.S. 616 (1886)).

77. The Montana Legislature failed to resist “the first beginnings” of the degradation of their citizens’ rights by approving the Compact and by passing the “administration” of certain Montana water rights to the Board. The Board, bestowed with discretion unfettered by the Montana judiciary, is outside the “control” of the Montana Legislature. Both actions constitute substantial overreach and violations of the Montana Constitution.

**The CSKT Compact Violates Article VII, Sections 2 and 4 of the Montana Constitution**

78. Article VII, Section 4(1) of the Montana Constitution requires Montana district courts to retain “original jurisdiction in all ... cases at law and equity,” and specifically states that the district court’s “process shall extend to all parts of the state.” Section 4(2) explains that the district court “shall hear appeals from inferior courts” and “court decisions of administrative agencies.”

79. Article VII, Section 2(4) similarly directs that the Montana Supreme Court’s “process shall extend to all parts of the state.”

80. The CSKT Compact does not give the Montana district courts or the Supreme Court the authority to hear appeals from the decisions of the Board, and instead vests the Tribe with the ability to take disputes over Montana water rights to the Federal judiciary. Mont. Code Ann. § 85-20-1901, art. II(26).

81. Removing the Montana district court and Supreme Court’s jurisdiction to review decisions of the Board unreasonably violates Article VII, Section 4 of the Montana Constitution

because it prevents the district court from exerting its constitutional jurisdiction over water rights appeals, causing Objectors material injury in future adjudications of water quantity under the Compact.

**The CSKT Compact Violates Article V, Section 12 of the Montana Constitution**

82. Article V, Section 12 of the Montana Constitution mandates that “[t]he legislature shall not pass a special or local act when a general act is, or can be made, applicable.”

83. A local law is one which “operates in a particular locality rather than the entire state.” Black’s Law Dictionary (11th Ed. 2019). A special law “pertains to and affects a particular case, person, place, or thing, as opposed to the general public.” *Id.*

84. To implement the Montana Constitution’s mandate that the Legislature “administer[], control, and regulat[e]” Montana water rights, the Legislature passed the Montana Water Use Act of 1973, which “comprehensively adjudicate[s] existing water rights and regulate[s] water use within the state.” Mont. Code Ann. § 85-2-101(2), (6).

85. The Montana Water Use Act applies to the seven Reservations within Montana and allows for compacts with Tribal groups to quantify a Tribe’s water rights. This process normally includes “[v]arious technical reports . . . to quantify the available water, the anticipated water needs of the Tribe, potential impacts to . . . other water users, and other related issues.” *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*5.

86. But unlike other compacts that settled quantification disputes, *see, e.g., id.*, the CSKT Compact creates an ongoing water administration regime that is both unique to the Reservation and outside the Montana Legislature or judiciary’s jurisdiction, as discussed above.

87. The CSKT Compact created a Unitary Administration and Management Ordinance (“UAMO”), which within the Reservation purports to “govern all water rights,

whether derived from tribal, state or federal law, and shall control all aspects of water use, including all 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. Any provision of Title 85, MCA, that is inconsistent with this Law of Administration is not applicable within the Reservation.” Mont. Code Ann. § 85-20-1902 (1-1-101(3)).

88. By going beyond settling water claims and instead creating a new, localized system of administration, the CSKT Compact’s UAMO is a “local act” over a “particular locality” that “operate[s] over a select class” of Montanans and tribal members on the Reservation. The UAMO therefore unreasonably violates “applicable law” under the Montana Constitution by creating a new set of laws for a specific locality, materially injuring Objectors under the “substantive term[s]” of the Compact. *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*24–25.

**The CSKT Compact Violates Montana Citizens’ Due Process Rights under Article II, Section 17 of the Montana Constitution**

89. Article II, Section 17 of the Montana Constitution states that “[n]o person shall be deprived of life, liberty, or property without due process of law,” which includes that the Montana “Courts of Justice shall be open to every person.” *Id.* at Section 16.

90. It is a “fundamental violation of a person’s rights to due process, individual dignity, and liberty ... should a ‘judge’ with no vested judicial authority, ... adjudicate rights regarding property or the law.” *Brown v. Gianforte*, 2021 MT 149, ¶ 18, 404 Mont. 269, 280, 488 P.3d 548, 554.

91. But as discussed above, the installation of the UAMO and the Flathead Board replaces the Montana judiciary as the adjudicator of water rights of Montanans within the Reservation. The Tribes can unilaterally decline the jurisdiction the Montana district courts

under the Compact, depriving Montanans within the Reservation of their due process right to litigate before the Montana judiciary.

92. Furthermore, “the power to exercise judicial functions comes from the people [of Montana]. Article II, Section 1, of the Montana Constitution so provides: ‘All political power is vested in and derived from the people.’” *State ex rel. Wilcox v. Dist. Court*, 208 Mont. 351, 356, 678 P.2d 209, 212 (1984).

93. But the Board itself, as the adjudicator of the rights of Montanans within the Reservation, is neither an elected or delegated power as a result of an electoral process. And it likely will not be, as the majority of the Board is comprised of Tribal members or their former employees, and the majority of those living on the Reservation are not Tribal members.

94. The CSKT Compact’s Board is comprised of “two members selected by the Governor ..., two members appointed by the Tribal Council; and one member selected by the other four members.” Mont. Code Ann. § 85-20-1901, art. IV, § I(2)(a).

95. Practically, that has resulted in a Board comprised of a majority of members who either belong to or have worked for the Tribes. The current fifth member of the Board, Georgia Smies, currently works at the Salish Kootenai College and previously worked for the Confederated Salish and Kootenai Tribes. *See Georgia Smies*, <https://naturalresources.skc.edu/georgia-smies/>.

96. Because the majority of the Board is controlled by the interests of the Tribe, the adjudication of non-tribal member water rights within the Reservation by the Board does not comport with due process and violates the Montana Constitution. This “[un]reasonable ... legal determination” is “an approach ... that departs from existing law” and materially injures Objectors. *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*21, \*33.

### **The CSKT Compact Unconstitutionally Immunizes the Board from Suit**

97. Section 1-2-111 of Mont. Code Ann. § 85-20-1902, the administrative and management statute under the CSKT Compact, provides that “Members of the Board, the Engineer, and Designee, and Water Commissioner appointed pursuant to Section 3-1-114 of this Ordinance, and any Staff shall be immune from suit for damages arising from the lawful discharge of an official duty associated with the carrying out of powers and duties set forth in the Compact or this Ordinance relating to the authorization, administration, or enforcement of water rights on the Reservation.”

98. But in order to grant immunity to the Board and its members, such a legislative act would require a two-thirds vote from the Montana Legislature. Mont. Const. art. II, § 18.

99. The Montana Supreme Court previously decided that the Compact only granted “new immunities ... specifically ... only to designated individuals,” not the Board itself. *Flathead Joint Bd. of Control v. State*, 2017 MT 277, ¶ 17, 389 Mont. 270, 275, 405 P.3d 88, 92.

100. But by creating the Board and imbuing it with the power under the Compact to adjudicate water rights, the Compact resulted in “the acts performed by the Board [coming] within the statutory definition of ‘quasi-judicial function’ found at § 2-15-102 (10), MCA: ‘Quasi-judicial function’ means an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies ....” *State ex rel. Div. of Workers’ Comp. v. Dist. Court*, 246 Mont. 225, 229, 805 P.2d 1272, 1275 (1990) (citation omitted).

101. A Quasi-judicial entity is “immune from suit ... under the common-law theory of quasi-judicial immunity.” *Id.*

102. Despite the Montana Supreme Court’s analysis of the text of the CSKT Compact’s immunity provision, the plain text of the provision combined with the responsibilities

of the Board demonstrate that the Board received immunity under the Compact without the requisite two-thirds vote by the Legislature.

103. Although “[t]he Board is required to maintain primary general liability insurance coverage through the Agreement with the State and the Tribes,” the Board is a “government instrumentality” with an “independent role as a governing authority—both administratively and judicially—within the boundaries of the Reservation.” Hallee C. Frandsen & W. John Tietz, *Memorandum - Board Jurisdiction and Entity Authority* at 3, 6, (Nov. 16, 2022), <http://dnrc.mt.gov/divisions/water/water-compact-implementation-program/confederated-salish-and-kootenai-tribes-compact/flathead-reservation-water-management-board/Board%20Jurisdiction%20Memo.pdf>.

104. Because the Board constitutes a “quasi-judicial entity” by its own admission, the common-law immunity that accompanies that classification demonstrates that by enshrining the Compact in law the Montana Legislature created an entity to oversee the rights of Montanans that is immune from suit without the requisite two-thirds vote in violation of the Montana Constitution. *See Flathead Joint Bd. of Control*, ¶ 6, 389 Mont. at 273, 405 P.3d at 90–91 (“The parties agree that neither the Compact nor the management provisions passed either house by a two-thirds majority vote.”); *see also* House Vote on SB 262 (Apr 16, 2015), *available at* <https://openstates.org/mt/votes/MTV00014485/> (SB 262 implementing the Compact passed the Montana Senate by a bare majority, 53 to 47).

105. This “[un]reasonable ... legal determination” is “an approach ... that departs from existing law” and materially injures Objectors. *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*21, \*33.

**F. MATERIAL INJURY TO UNITED STATES CONSTITUTIONAL RIGHTS**

106. Objectors incorporate the preceding paragraphs as if fully restated herein.

107. Other “[s]ubstantive terms” of the CSKT Compact violate Objectors’ rights under the United States Constitution, causing Objectors material injury. *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 at \*25.

**Takings Violations (Physical)**

108. The Takings Clause, in the Fifth Amendment of the United States Constitution, provides: “[N]or shall private property be taken for public use, without just compensation.”

109. The Takings Clause applies to the State of Montana via the Fourteenth Amendment. *Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir. 1996).

110. The prohibition against takings without just compensation “is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 318-19 (1987) (internal quotation marks omitted).

111. Montana recognizes water rights as an interest in real property. *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 572, 39 P. 1054, 1056 (1895). The Objectors’ Water Rights are thus legally recognized and constitutionally protected property rights, which Objectors and their predecessors have put to beneficial use for their intended purposes over many decades.

112. The Preliminary Decree confirms the water rights of the Confederated Salish and Kootenai Tribes as recognized in the State of Montana pursuant to the CSKT Compact.

113. The Compact has effected a change to the long-standing formula for the number of acre feet of water allocated to Objectors and others who have also purchased land and appurtenant water rights on the Reservation including Flathead Project lands. Analysis of Flathead Project farm turnout allowances under the Compact, as compared to historical



operations, demonstrates significant reductions. The Compact has reprioritized water rights with a priority of 1855 subordinate to those it has assigned a priority date of “time immemorial.”

114. The adoption of the Preliminary Decree would result in a significant reduction of water to the Objectors’ real property. Application of new methodologies and formulas for determining deliveries and reprioritization of water rights under the Compact have already caused significant reduction of water to the Sego Ranch and will continue to do so.

115. The new allocation of water violates Objectors’ Fifth Amendment rights—and will continue to violate Objectors’ Fifth Amendment rights—by effecting a physical taking without just compensation.

116. Objectors have received no compensation for this taking, much less just compensation. Nor does the Compact provide for just compensation to Objectors and others whose allocations have been—and will continue to be—reduced due to the Compact.

#### **Takings Violations (Regulatory)**

117. The Compact, by changing the long-standing formula for allocation of water, essentially reprioritizing Objectors’ water rights subordinate to those assigned a priority date of “time immemorial,” and significantly reducing the allocation of water to Objectors’ lands, has effected a partial regulatory taking. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

118. The reduced allocation of water has already been diminished to a level that does not permit hay or other crop growth on the Sego Ranch, which, in turn, renders it useless, or greatly devalues it, as a cattle production or agricultural operation. Cattle production is no longer viable because, among other reasons:

a. Objector Segó has been forced to purchase hay or other feed from third parties rather than growing it on the Segó Ranch, as Objector Segó was previously accustomed to do, depriving Objector Segó of profit on the cattle raised on the Segó Ranch; and

b. The water rights as decreased under the Compact are substantially likely to continue to be insufficient to support the head of cattle raised on the Segó Ranch in its historical and ordinary course of business.

119. The water rights as decreased under the Compact have diminished the market value of the Segó Ranch real property to such a significant degree that it likely could not be sold for any price close to its market value before the Compact was ratified and may not be marketable at all. The reduction in water rights under the Compact has greatly diminished the value of the Segó Ranch business.

120. The Compact substantially interferes with Objectors' investment-backed expectations.

121. Objectors have received no compensation for this taking, much less just compensation. Nor does the Compact provide for just compensation to Objectors and others similarly situated.

### **Procedural Due Process Violations**

122. The Due Process Clause, in the Fourteenth Amendment of the United States Constitution, provides that no state may "deprive any person of life, liberty or property without due process of law[.]"

123. The Objectors' Water Rights are legally recognized and constitutionally protected property rights, which Objectors have put to beneficial use for their intended purposes.

124. Objectors are entitled to notice and hearing before their water rights may be reduced and before any diminishment of the water rights occurs. The hearing to which Objectors are entitled must be a full and fair hearing before an impartial tribunal.

125. Objectors have already experienced instances of reduced deliveries as a result of implementation of the Compact. Analysis of Flathead Project farm turnout allowances under the Compact, as compared to historical operations, have demonstrated significant reductions. In 2022, Flathead Project water deliveries to the Segoe Land began late (starting in June, as opposed to May historically) and were cut off early (in mid-August as opposed to mid-September historically). Upon information and belief, the Flathead River and its tributaries were largely in flood stage in May, but the Flathead Board determined to allocate water for downstream uses instead of supplying irrigators including Objectors.

126. Objectors have been deprived of due process when, among other things:

a. Objectors' water rights were reduced before being afforded any process to provide information and input to the Flathead Board;

b. Objectors' water rights were reduced before being offered any pre-deprivation hearing; and

c. Objectors' water rights were reduced without sufficient information detailing how the diminishment had been calculated, quantified, or otherwise reached.

127. The Preliminary Decree, if adopted, will impose ongoing procedural due process violations because, among other things, the Compact:

a. Permits Objectors' water rights to be reduced without any pre-deprivation process, including sufficient notice and a full and fair hearing before an impartial tribunal;

b. Allows Objectors' water rights to be reduced without sufficient information detailing how the diminishment had been calculated, quantified, or otherwise reached; and

c. Arbitrarily imposes a "time immemorial" priority date to tribal water rights to the detriment of Objectors' water rights. *See* Mont. Code Ann. § 85-20-1901, art. III.

**G. REQUEST FOR HEARING AND PRESERVATION OF APPEAL**

128. Objectors incorporate the preceding paragraphs as if fully restated herein.

129. Objectors request a hearing on this Objection pursuant to Mont. Code Ann. § 85-2-233(1)(a)(iii). The foregoing Objection demonstrates that Objectors (1) are persons within the basin who to received notice under Mont. Code Ann. § 85-2-232(1), (2) have ownership and economic interests in existing water rights as well as rights to receive water through the Flathead Project, and (3) that these rights and economic interests are materially affected by the Compact. Accordingly, Objectors have demonstrated "good cause shown" for a hearing pursuant to pursuant to Mont. Code Ann. § 85-2-233(1)(a)(iii), (b).

130. Objectors have preserved their right to appeal a final decree by this Court pursuant to Rule 25, W.R.Adj.R. and Mont. Code Ann. § 85-2-233(1)(a) by (1) demonstrating that their existing rights and priorities will be determined by the Court's final decree, (2) requesting a hearing, and (3) appearing and entering objections to the Court's June 9, 2022 preliminary decree.

131. Objectors reserve the right to amend their Notice of Objection as additional information becomes available.

## PRAYER FOR RELIEF

- A. WHEREFORE, Objectors respectfully request the following relief: Enter judgment in favor of Objectors on all claims raised herein, including and without limitation:
- i. Declare the CSKT Compact invalid, unreasonable, and materially injurious;
  - ii. Affirm that Objectors' water rights are entitled to protection of their historical amounts and uses;
  - iii. Declare the scope of reserved water rights as indicated in the CSKT Compact is inconsistent with Federal reserved water rights law;
  - iv. Declare that the CSKT Compact's creation of exclusive jurisdiction for the Flathead Reservation Water Management Board over any controversy over the right to the use of water between the Parties to the Compact violates Article III, Section 1 of the Montana Constitution;
  - v. Declare that the Tribe's ability under the CSKT Compact to submit a dispute over water rights to the Federal judiciary instead of the Montana state courts violates Article VII, Section 4(1) and 4(2) of the Montana Constitution;
  - vi. Declare that the CSKT Compact's UAMO creates a special and local law applicable only to the Reservation and violates Article V, Section 12 of the Montana Constitution;
  - vii. Declare that the CSKT Compact's direction that the UAMO replace the Montana judiciary as the adjudicator of water rights of Montanans within

the Reservation is a denial of due process under Article II, Section 17 the Montana Constitution;

- viii. Declare that the Flathead Reservation Water Management Board's immunity from suit under the CSKT Compact violates Article II Section 18 of the Montana Constitution because it was not ratified by the Montana Legislature with the required two-thirds votes;
  - ix. Declare that the CSKT Compact's allocation of water rights violates Objectors' Fifth Amendment right against a physical taking without just compensation under the United States Constitution;
  - x. Declare that the CSKT Compact's allocation of water rights violates Objectors' Fifth Amendment right against a regulatory taking without just compensation under the United States Constitution; and
  - xi. Declare that the CSKT Compact's allocation of water rights constitutes a procedural due process violation under Objectors' Fourteenth Amendment right under the United States Constitution;
- B. Award Objectors their costs, including reasonable attorney's fees pursuant to Montana Rule of Civil Procedure 54 and any applicable rules or statute; and
  - C. Grant Objectors such further relief as may be necessary and appropriate.

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

**CASE NO. WC-0001-C-2021**

**ATTACHMENT TO NOTICE OF OBJECTION OF WILLIAM SEGO, BILL & IRENE,  
LLC, AND GRACE SLACK**

**TABLE 1. SEGO/SLACK WATER RIGHTS AND OBJECTIONS**

| <b>OBJECTOR</b>    | <b>W.R. NO., SOURCE,<br/>USE, PRIORITY<br/>DATE</b>   | <b>SEGO/SLACK OBJECTION<br/>Reference to Preliminary Decree, Compact &amp;<br/>Appendices</b>  |
|--------------------|---|--|
| <i>Sego</i>        | <b>FIP Project Water Rights<br/>Mission District</b><br>Pablo Feeder Irrigation<br>Hillside Ditch Irrigation<br>Moise A Canal Irrigation  | <ul style="list-style-type: none"> <li>a. Compact W.R. No. 76 L30052932 Preliminary Decree Appendix 2</li> <li>b. Preliminary Decree, Appendix 1 (Compact as Ratified) P.D. p. 9 Appendix 1, Article III Water Rights of the Tribes, C.1.a.</li> <li>c. Preliminary Decree Part II B.1.a, p. 3,4. Change of FIP Project Beneficiary</li> <li>d. Preliminary Decree Appendix 2 (Compact Appendix 5) FIIP beneficiary now the Tribes, not landowner Segoe</li> <li>e. Article IV.D.2 p 33 PD FIIP Customers equitable share of water</li> <li>f. Article IV.C p 29 PD</li> <li>g. Article IV .D.1. and D.2 PD p. 31, 33</li> <li>h. Article IV. F p. 35 PD</li> <li>i. Article IV.E p. 33 PD</li> <li>j. Compact Appendix 3 it its entirety. Not included in PD, first mentioned PD pages 10 and 30. Prediction of water supply, instream flows, adaptive management;</li> <li>k. Compact Appendix 15 Decree report p. 438 Minimum pool elevations</li> <li>l. Part IV.D. 1 d, e page 32 PD. Referencing Compact Appendix 3.6 which is not part of the Preliminary Decree</li> <li>m. Compact Appendix 3.5 CITT</li> <li>n. Dispute resolution Part IV G.5 (Implementation of the Compact CITT, dispute resolution)</li> <li>o. Court of Competent Jurisdiction Part IG.G.5.3</li> </ul> |
| <b>Sego, Slack</b> | <b>State,<br/>Private/Secretarial,<br/>and Walton Rights</b>  |  |
| <i>Sego</i>        | <p><b>Ashley Creek 1889- 1921</b><br/>76L 15151-00 Domestic<br/>76L 15150-00 Stock<br/>76L 15152-00 Irrigation</p> <p><b>Flathead Lake/River 1961</b><br/>76LJ 37244-00 Well<br/>76LJ 39717-00 Flathead Lake pump<br/>76LJ 80351-00 Developed spring<br/>76LJ 80351-00 Developed spring</p> | <p>Incorporation of FIIP objections a-o<br/>Compact Water Rights<br/>Incorporate Slack objections below</p> <p>Preliminary Decree p. 505-506 Appendix 18 Flathead Lake;<br/>Compact Appendix 10 Natural Flow Node Maps<br/>Article III 1.c. p. 6 Flathead system compact water Compact Appendix 9</p>  |

|                     |  |   |
|---------------------|--|---|
| <p><b>Slack</b></p> | <p><b>Post Creek 1855-1908</b><br/> 76L 100386 00 Stock 1908<br/> 76L 100387 00 Irrigation 1855<br/> 76L 100482 00 Irrigation 1905<br/> 76L 134611 00 Irrigation 1855</p> <p><b>Spring Unnamed tributary of Post Creek 1956-1963</b><br/> 76L 134609 00 Irrigation 1963<br/> 76 134615 00 Irrigation 1956</p> <p><b>Poison Oak Creek 1882-1891</b><br/> 76L 100481 00 Irrigation 1882<br/> 76L 100484 00 Irrigation 1891</p> <p><b>Subirrigation from Unnamed tributary of Poison Oak Creek 1891</b><br/> 76L 100483 00 Irrigation 1891</p> <p><b>Ground Water 1961</b><br/> 76L 134614 00 Irrigation 1961</p> | <ul style="list-style-type: none"> <li>a. Preliminary Decree Part III G.3. p. 22</li> <li>b. P.D. p. 64; Compact p 26 Article IV Implementation of Compact; MCA 85.20.1902</li> <li>c. Objections 1. a-o incorporated in full</li> <li>d. Compact Appendix 3.1 &amp; specific Compact instream flow rights</li> <li>e. Compact Appendix 13</li> <li>f. Compact Appendix 14 Interim Instream Flow Protocols</li> <li>g. Part III G.3. c. I. Prelim Decree p 23</li> <li>h. Part III G.3.a. prelim Decree p 23</li> </ul> |
|---------------------|--|---|