Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER AND LOWER MISSOURI RIVER DIVISIONS
ROCKY BOY'S COMPACT SUBBASIN

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| IN THE MATTER OF THE ADJUDICATION OF EXISTING AND RESERVED RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, OF THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION WITHIN THE STATE OF MONTANA | **CASE NO. WC-2000-01** |

**FILED**
JUN 12 2002
**Montana Water Court**

## MEMORANDUM OPINION
## CHIPPEWA CREE TRIBE-MONTANA COMPACT

### PROCEDURAL HISTORY

In January 1997, the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation reached an agreement in accordance with § 85-2-702, MCA. After five years of research, analysis, revisions, meetings and negotiations, the Chippewa Cree Tribe-Montana Compact ("the Compact") was ratified by the Tribe on February 21, 1997; approved by the Montana State Legislature on April 10, 1997; signed by the Governor of Montana and the Chippewa Cree Tribal Chairman on April 14, 1997, making it the third such "government-to-government" compact to be completed between an Indian Tribe and the State of Montana. The Compact is codified at Mont. Code Ann. § 85-20-601.

The federal Act ratifying the Compact, "the Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999,".

("Federal Settlement Act") was passed by both houses of Congress and signed by the President on December 9, 1999. P.L. 106-163, 113 Stat. 1778 (1999).

On February 15, 2000, pursuant to Section 101(b)(1) of the Federal Settlement Act, the State of Montana, the Chippewa Cree Tribe, and the United States of America ("Settling Parties") jointly filed in this Court a Motion for Incorporation of Rocky Boy's Compact into Preliminary and Final Decrees and for a consolidated Hearing on Any Objections to Such Compact.[1] On April 27, 2000, the Court entered its Findings of Fact, Conclusions of Law, Order for Commencement of Special Proceedings for Consideration of the Rocky Boy's Compact and thereby granted the motion. On April 27, 2000, the Montana Department of Natural Resources and Conservation ("DNRC") mailed a Notice of Availability and the Summary Description of Water Right to approximately 3,750 water users in all of the basins comprising the Rocky Boy's Compact Subbasin in accordance with § 85-2-233, MCA, which included Big Sandy Creek (Basin 40H), Milk River (Basin 40J), Marias River (Basin 41P), and Willow Creek (Basin 41N), collectively referred to as the Special Rocky Boy's Compact Subbasin.[2] Objections were required to be filed by October 24, 2000.

Seventeen objections to the Rocky Boy Compact were filed.[3] Eight Objections were subsequently withdrawn.[4] On December 4, 2001, the Court granted the Settling Parties' motion to

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[1] Section 101(b)(3) of the Federal Settlement Act states that if "the approval by the appropriate court, including any direct appeal, does not become final within 3 years after the filing of the decree," the "approval, ratification, and confirmation of the compact by the United States shall be null and void," and with certain exceptions, the "Act shall be of no further force and effect." Since the Settling Parties filed the Compact and proposed decree with this Court on February 15, 2000, the applicable deadline is February 14, 2003.

[2] *See* Order Designating the DNRC to Mail Notice of Entry of Rocky Boy's Compact Preliminary Decree and Notice of Availability (April 18, 2000). In addition, On June 2, 2000, the Court directed the DNRC to mail postcards to these same persons identifying two corrections to the Summary Description.

[3] *See* Notice that Objections have been Filed and Hearings Requested (November 9, 2000).

[4] *See* Orders Dismissing Objection of: Aaron Pursley and Roger L. & Gaye L. Genereux (Jan. 30, 2001); Haney L. Keller (Mar. 23, 2001); Richard N. Looby, Wesley Berlinger, and Wilfred A. Berlinger (Jun. 8, 2001); Brian G. Berlinger (Jun. 13, 2001); and Ronald W. Butler (Sept. 21, 2001).

dismiss Eric Fjelde on the grounds that Mr. Fjelde did not file an objection in this case.[5] On January 25, 2002, the Court ordered the dismissal of the objection of Hjortur Hjartarson, *dba* H & J Quarter, Inc.[6]

On February 1, 2002, the Settling Parties moved the Court for summary judgment (1) to approve the Chippewa Cree Tribe-Montana Compact pursuant to §§ 85-2-234 and 85-2-702(3), MCA and 43 U.S.C. §666, and Art. VII(B) of the Compact; and (2) to grant summary judgment in favor of the Settling Parties dismissing the remaining seven objections. On the same date, the Settling Parties also filed a Motion in Limine . . . Concerning Evidence to be Brought Before the Court. Answer and reply briefs were filed.

On April 18, 2002, the Montana Water Court held a pre-hearing conference and a hearing on the motions at the Chouteau County Courthouse, in Fort Benton, Montana. Present were Lyle K. Ophus; Sam J. Bitz, *dba* Rocky Crossing Ranch Co.; Lisa Swan Semansky, representing Bitz, *dba* Rocky Crossing Ranch Co., and for purposes of the hearing, Keith H. Rhodes; Candace West, Ass't Attorney General for the State of Montana; Susan Schneider, Attorney for the United States Department of Justice, and Richard Aldrich, Field Solicitor, representing the United States; Yvonne T. Knight, attorney for the Native American Rights Fund, and Daniel D. Belcourt, attorney for the Chippewa Cree Tribe, both representing the Tribe; and Faye Bergan, attorney for the Montana Reserved Water Rights Compact Commission. Affidavits were filed, testimony and evidence was taken, and oral arguments on the pre-hearing motions were heard. The Court dismissed the request of Mr. Bitz, *dba* Rocky Crossing Ranch Co., to withdraw or amend admissions deemed pursuant to

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[5] *See* Order Granting Motion For Dismissal of Eric Fjelde (Dec. 4, 2001).

[6] Order Granting Motion for Partial Summary Judgment and Dismissing Objection of Hjortur Hjartarson, *dba* H & J Quarter, Inc. (Jan. 25, 2002).

Rule 36, M.R.Civ.P., for his failure to respond to discovery requests. The matter was fully submitted.

On May 22, 2002, the Court entered its Order Approving Compact for reasons that would be set forth in a future memorandum. This is that future memorandum.

## JURISDICTION

The Montana Water Court has jurisdiction to review the Chippewa Cree Tribe-Montana Compact under the authority granted by the McCarran Amendment of 1952 (43 U.S.C. § 666); authority granted in §§ 85-2-231, 85-2-233 and 234, 85-2-701 and 702, MCA; and Section B of Article VII of the Chippewa Cree Tribe-Montana Compact. *See also* Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 564 (1983), and State ex rel. Greely v. Confederated Salish & Kootenai Tribes ("Greely II"), 219 Mont. 76, 89, 712 P.2d 754 (1985). In adjudicating federal or Indian reserved water rights, this Court must apply federal law. San Carlos Apache, 463 U.S. at 867; Colorado River Water Conservation District v. United States, 424 U.S. 800, 812-813 (1976); Greely II, 219 Mont. at 89, 95.

## STANDARD OF REVIEW

This Court previously concluded in its August 10, 2001 Memorandum and Order Approving Fort Peck-Montana Compact (Fort Peck Memorandum) that a compact negotiated, ratified, and approved pursuant to the authority and procedures set forth in § 85-2-702, MCA, is closely analogous to a consent decree, in that it represents a voluntary, negotiated settlement between parties that is subject to continued judicial policing. *See e.g.*, United States v. Oregon, 913 F.2d 576, 580 (9th Cir. Ore.1990), *cert. denied sub nom.* Makah Indian Tribe v. United States, 501 U.S. 1250 (1991). The following description of consent decrees by the United States Supreme Court illustrates the similarities:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation. . . . [T]he parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

United States v. Armour & Co., 402 U.S. at 681-82.

Essentially, in reviewing a consent decree, "a . . . court must be satisfied that [the settlement] is at least fundamentally fair, adequate and reasonable, [and] because it is a form of judgment, a consent decree must conform to applicable laws." State of Oregon, 913 F.2d at 580.[7] The review and resulting decree is not a "decision on the merits or the achievement of the optimal outcome for all parties," nor must it "impose all the obligations authorized by law." Id. at 580, 581. Rather, it is a *limited* review, the extent and limitations of which have been described by the Ninth Circuit Court as follows:

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be *limited* to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators. (Citations omitted) Ultimately, the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.'

Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 625 (9th Cir. Cal. 1982), *cert denied*,

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[7] *See also* Davis v. City and County of San Francisco, 890 F.2d 1438, 1445 (9th Cir. Cal. 1989); SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. Cal. 1984).

Byrd v. Civil Service Commission, 459 U.S. 1217 (1983).

While the review is intended to be limited, it requires more than automatic incorporation of the proposed compact into a decree.[8] As the Ninth Circuit Court further explained in Officers for Justice:

> The . . . court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. (Citations omitted) This is by no means an exhaustive list of relevant considerations, nor have we attempted to identify the most significant factors. The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claims advanced, the types of relief sought, and the unique facts and circumstances presented by each individual case.

688 F.2d at 625.

The purpose of this kind of judicial review is not to ensure that the settlement is fair or reasonable between the negotiating parties, but that it is fair and reasonable to those parties and the public interest who were not represented in the negotiation, but have interests that could be materially injured by operation of the compact. State of Oregon, 913 F.2d at 581. Where an objector can establish standing, i.e. "good cause," to object to the compact, the responsibility of the Court to protect those interests is heightened, and the Court's level of inquiry should be commensurate with the potential degree of injury. Id., and Fort Peck Memorandum pp. 7-8.

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[8] This Court is not bound by stipulations filed by the parties in the statewide adjudication. *See* analysis in Memorandum on Anderson and Harms Amended Stipulation, Water Court Case WC-90-1, September 7, 2000, incorporated herein by reference.

## ISSUES PRESENTED

I. The Compact: Whether the Compact is in conformance with applicable law, and whether the settlement, taken as a whole, is fair, reasonable and adequate to all concerned?

II. The Objections: Whether the Objectors have established "good cause" to object, and whether any of the objections invalidate the Compact?

III. Summary Judgment: Whether there are any genuine issues of material fact, and whether the Settling Parties are entitled to summary judgment as a matter of law?

## DISCUSSION

### I.

### Winters Doctrine of Indian Reserved Water Rights

Indian reserved water rights were first recognized by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908), where it held that the 1888 Treaty creating the Fort Belknap Indian Reservation in Montana reserved not only land, but impliedly reserved sufficient water to accomplish the purposes of the treaty agreement. 207 U.S. at 577. Recognizing that the "lands were arid, and, without irrigation, were practically valueless," the Court concluded that Congress, by creating the Indian reservation, impliedly reserved all of the waters of the river necessary for the purposes for which the reservation was created. Id. The Court held:

> The power of the Government to reserve the waters [of the Milk River] and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888 [treaty date], and it would be extreme to believe that within a year Congress destroyed the reservation and . . . took from [the Indians] the means of continuing their old habits, yet did not leave them the power to change to new ones.

Id.

Despite the Fjelde family's objections and argument to the contrary, the United States

Supreme Court has repeatedly found that Indian reserved water rights prevail over junior state-based rights in the same water source even when the settlers have made substantial investments in the land and water, developed entire communities, and generated substantial employment in reliance upon federal homestead and state water laws. *See e.g.*, Winters, 207 U.S. at 569-570; Cappaert v. United States, 426 U.S. 128, 138-139 (1976); United States v. Walker River Irrigation Dist., 104 F.2d 334, 339 (9th Cir. Nev. 1939).

In Cappaert, a more contemporary United States Supreme Court decision, the Court summarized the federal reserved water rights doctrine as follows:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.
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> * * *
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> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

426 U.S. at 138-139.

**Indian Reserved Water Rights in the Montana General Stream Adjudication**

In 1979, the Montana Legislature passed Senate Bill 76 to expressly recognize Indian reserved water rights and incorporate them into the state-wide general adjudication. State ex rel. Greely v. Water Court ("Greely I"), 214 Mont. 143, 146, 691 P.2d 833 (1985). In Greely II, the Montana Supreme Court distinguished between state-based water rights and Indian reserved water

rights and held that "[s]tate-created water rights are defined and governed by state law" and "Indian reserved water rights are created or recognized by federal treaty, federal statutes or executive order, and are governed by federal law." 219 Mont. at 89.[9] In the absence of controlling federal authority, the Water Court has been instructed to follow the directives of the Montana Supreme Court. Greely II, 219 Mont. at 99-100.

To expedite and facilitate the difficult process of comprehensively and finally determining Indian reserved water rights in Montana, the legislature created a nine-member Montana Reserved Water Rights Compact Commission. Section 2-15-212, MCA. The Commission is charged by the Montana legislature to negotiate "compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state," the terms of which are ultimately included in the preliminary and final basin decrees pursuant to Montana law. §§ 85-2-701(1) and 85-2-702, MCA In this process, the Commission negotiates with the Tribes on a "government-to-government" basis, without representing the interests of any single water user.[10]

The Montana Legislature possesses all the powers of lawmaking inherent in any independent sovereign and is limited only by the United States and Montana Constitutions. *See e.g.,* Hilger v. Moore, 56 Mont. 146, 163, 182 P. 477, 479 (1919), and State ex rel. Evans v. Stewart, 53 Mont. 18, 20, 161 P. 309 (1916). As long as the State acts within the parameters of the United States and

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[9] *See also*, Confederated Salish & Kootenai Tribes v. Clinch ("Clinch"), 297 Mont. 448, 451-453, 992 P.2d 244 (1999); In re Application for Beneficial Water Use Permit ("Ciotti"), 278 Mont. 50, 56, 923 P.2d 1073 (1996); and State ex rel. Greely v. Water Court ("Greely I"), 214 Mont. 143, 157-160, 691 P.2d 833 (1985).

[10] *See e.g.*, Governor Marc Racicot's State of Montana Proclamation, March 10, 1993, and Governor Judy Martz' State of Montana Proclamation, June 27, 2001. Barbara A. Cosens, "The 1997 Water Rights Settlement Agreement Between the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Reservation: The Role of the Community and the Trustee," 16 UCLA J. Envt'l L. & Policy 255, 266 (1997/1998). ("Cosens, 16 UCLA J. Envtl. L. & Pol'y")

Montana Constitutions, Montana has broad authority over the administration, control and regulation of the water within its boundaries. Accordingly, if Montana negotiates, approves, and ratifies a compact that grants more water to a reserved water right entity than that entity might have obtained under strict adherence to the "limits" of the Reserved Water Right Doctrine through litigation and does so without injuring other existing water users, the State is effectively allocating and distributing surplus state waters to resolve a dispute. *See* analysis in Fort Peck Memorandum at 13-15, incorporated herein by reference. In the absence of material injury to existing water users, the merits of such public policy decisions is for the legislature to decide, not the Montana Water Court.

Therefore, in the absence of clear federal authority prohibiting the various Compact provisions and in the absence of demonstrated injury to Objectors by these provisions, compacting parties are within their authority to craft creative solutions to resolve difficult problems caused by ambiguous standards. This Compact is a product of that creative negotiation process.

## Preliminary Review of the Chippewa Cree Tribe-Montana Compact

### Introduction

The Rocky's Boy Reservation is located in north central Montana, with portions of the Reservation extending onto the plains between the Bearpaw Mountains and the Milk River to the north. The Reservation serves as the permanent homeland for over 3,000 Tribal members, with an annual population growth rate in excess of three percent.[11] Unemployment on the Reservation is traditionally high, and many live below the poverty line.[12]

Although historically the Tribe has been economically dependent on agriculture and

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[11] MSE-HKM Engineering, Municipal, Rural and Industrial Water Supply System Needs Assessment, Rocky Boy's Indian Reservation, prepared for the Bureau of Reclamation in 1996, pp. 21-26, as cited in Technical Report Compiled by the Montana Reserved Water Rights Compact Commission ("Commission Technical Report"), p. 11.

[12] Id.

ranching, the potential arable land base is small, its historically irrigated land even smaller, and its water supply scarce.[13] Big Sandy Creek and Beaver Creek, the two major tributary drainages on the Reservation, both flow through a checkerboard of private and Reservation land before leaving the Reservation, making the administration of private and Tribal water rights difficult. Water storage and developed wells are minimal, and the Reservation's existing domestic water supply and distribution system seriously inadequate.[14] Providing water sufficient to make the Reservation a self-sustaining permanent homeland for the Chippewa Cree Tribe, both now and in the future, while protecting the environment and existing water users, was clearly a challenge of monumental proportions.

**Summary of the Compact**

In 1979, the Reserved Water Rights Compact Commission commenced negotiations for this Compact by serving a written request to negotiate on the governing body of the Tribe. Affidavit of Chris D. Tweeten ("Tweeten Aff."); *See* § 85-2-702(1), MCA. Active negotiations began in 1992 and involved the Compact Commission (representing the State of Montana), the Chippewa Cree Tribe, and the United States as trustee for the Tribe. The parties formed three teams of official, legal, and technical advisors to conduct the negotiations: the Commission's Rocky Boy's negotiating

[13] *See e.g.,* Commission Technical Report at 11-12, 20; Affidavit of Ronald E. Billstein ("Billstein Aff."), pp. 2-4; *See generally*, Cosens, 16 UCLA J. Envtl. L. & Pol'y at 268-273; and "Average Annual Precipitation, Montana," USDA, SCS, 1977.

[14] Billstein Aff. at 3-4; and Commission Technical Report at 23-25, 29-30, 38, and Appendices referenced therein.

team,[15] the Tribal Negotiating Committee,[16] and the Federal Negotiation Team.[17] The Chippewa Cree Tribe and the United States agreed to open all negotiations to the public, and the Commission published and mailed notice to interested individuals one to two weeks prior to each negotiating session. Over the course of the negotiations, public meetings in the area were held on October 29, 1992, June 23, 1993, July 19, 1993, November 4, 1993, April 18, 1994, February 27, 1995, March 21, 1995, June 21, 1995, and January 30, 1997. Cosens, 16 UCLA J. Envt'l L. & Pol'y at 274-275; Commission Technical Report at 18.

In January of 1997, the State and the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation reached an agreement in accordance with § 85-2-702, MCA. Commission Technical Report at 15. Chris Tweeten, Chairman of the Compact Commission and member of the Commission's negotiating team, described the process as follows:

> The Compact negotiations were based on 10-15 years of work by legal and technical professionals with expertise in water resources and related fields. The Compact is a result of 5 years of intensive good-faith negotiations between well-represented parties with dissimilar interests on some important issues. There was extensive public involvement, including numerous public meetings, information sessions and individual meetings with water users. Many ideas that were eventually incorporated

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[15] Initially composed of Chris Tweeten, Chairman of the Compact Commission; Gene Etchart, Senator Mike Halligan (succeeded by Representative Antoinette R. Hagener), Jack Salmond, and Commission staff Barbara Cosens, Legal Counsel; Bill Greiman, Agricultural Engineer; Arial Anderson, Soil Scientist; Bob Levitan, Hydrologist; and Joan Specking, Historical Researcher. *See* Affidavit of Susan Cottingham ("Cottingham Aff."), p. 2; and Commission Technical Report at 4.

[16] Initially composed of Rocky Stump, Sr., Chairman, Ray Parker, Jr., Duncan Standing Rock, Jim Morsette (Chairman, 1992), and Joe Big Knife. Affidavit of Jim Morsette ("Morsette Aff."), Exhibit 1.

[17] In the late 1980s, the Department of the Interior established the Department of the Interior Working Group in Indian Water Settlements, composed of five Assistant Secretaries of the Interior (Indian Affairs, Water and Science, Land and Minerals, Parks and Wildlife; and Policy, Management, and Budget) and the Solicitor. On May 7, 1990, the Working Group appointed a federal negotiation team comprised of representatives of the Bureau of Indian Affairs, Bureau of Reclamation, Fish and Wildlife Service, Department of Justice, and Solicitor for the Department of the Interior. The Team was chaired by David Pennington of the BIA. In addition, the Team was supported by consultants and agency technical staff as needed. Memorandum in Support of Settling Parties' Motion for Compact Approval and Summary Judgment, at p. 14, n. 8. While the federal government participates in negotiations through the federal negotiation team, all decisions are made by the Working Group. Criteria and Procedures, 55 Fed. Reg. 9, 223 (1990).

> into the terms of the Compact were originally proposed by water users. The Compact has been ratified by the State, the Tribe, and Congress. State monies promised under the Compact to fund mitigation measures and provide contract water, have been paid out. Construction of mitigation measures paid for by the State are complete and contract water purchase options are paid for and in place.

Tweeten Aff. at 5.

Article III of the Chippewa Cree Tribe-Montana Compact, codified at § 85-20-601, MCA, quantifies the Tribal Water Right as 20,000 AFY, allocated in amounts by basin and drainage. To facilitate implementation of the Tribal Water Right, and to minimize or mitigate the adverse affect of increased Tribal water use on the environment and on downstream off-reservation water users, the Tribe agreed to limitations on new total depletions in water-short drainages.

In accord with the requirements of § 85-2-702, MCA, the Compact was ratified by the Tribe, approved by the Montana State Legislature, and signed by the Governor of Montana and the Chippewa Cree Tribal Chairman on April 14, 1997. Id. After jointly drafting the Federal Settlement Act with the State and the Tribe, the United States Department of the Interior joined the State and the Tribe in supporting the Federal legislation in Congressional hearings. Memorandum in Support of Settling Parties' Motion for Compact Approval and Summary Judgment, p. 15, n. 2. The Compact was eventually "approved, ratified, and confirmed" by Congress on December 9, 1999. Federal Settlement Act, Section 101, Pub. L. 106-163, 113 Stat. 1782.

In confirming the Compact, Congress specifically found that:

> (1) in fulfillment of its trust responsibility to Indian tribes and to promote tribal sovereignty and economic self-sufficiency, it is the policy of the United States to settle the water rights claims of the tribes without lengthy and costly litigation;
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> (2) the Rocky Boy's Reservation was established as a homeland for the Chippewa Cree Tribe;
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> (3) adequate water for the Chippewa Cree Tribe of the Rocky Boy's Reservation is

important to a permanent, sustainable, and sovereign homeland for the Tribe and its members;

(4) the sovereignty of the Chippewa Cree Tribe and the economy of the Reservation depend on the development of the water resources of the Reservation;

(5) the planning, design, and construction of the facilities needed to utilize water supplies effectively are necessary to the development of a viable Reservation economy and to implementation of the Chippewa Cree-Montana Water Rights Compact;

(6) the Rocky Boy's Reservation is located in a water-short area of Montana and it is appropriate that the Act provide funding for the development of additional water supplies, including domestic water, to meet the needs of the Chippewa Cree Tribe;

(7) proceedings to determine the full extent of the water rights of the Chippewa Cree Tribe are currently pending before the Montana Water Court as a part of In the Matter of the Adjudication of All Rights to the Use of Water, Both Surface and Underground, within the State of Montana;

(8) recognizing that final resolution of the general stream adjudication will take many years and entail great expense to all parties, prolong uncertainty as to the availability of water supplies, and seriously impair the long-term economic planning and development of all parties, the Chippewa Cree Tribe and the State of Montana entered into the Compact on April 14, 1997; and

(9) the allocation of water resources from the Tiber Reservoir to the Chippewa Cree Tribe under this Act is uniquely suited to the geographic, social, and economic characteristics of the area and situation involved.

113 Stat. 1779, December 9, 1999.

**Preliminary Conclusion**

There is no evidence in the record that the Chippewa Cree Tribe-Montana Compact is the product of fraud or overreaching by, or collusion between, the negotiating parties. The Court finds that each party to the negotiation organized its own "negotiation team" bristling with private and government legal and technical advisors experienced in the fields of soils, hydrology, agricultural engineering, fish and wildlife, statistics, computer modeling, economics, and law. The information

and technical data necessary to conduct the negotiation was collected by all three teams and exchanged openly between the parties and the public. Commission meetings and negotiation sessions were publicized and open to the public, with opportunities for public questions and comment. In addition, the Compact Commission conducted meetings with individual off-Reservation water users, who participated in crafting mitigation measures to protect their interests.

The possibility of collusion or over-reaching by or between the parties was also foreclosed by the competing interests and goals involved. The inherently adversarial nature of the negotiations became apparent when the State of Montana rejected the Tribe's first settlement proposal, because it required the transfer of all State lands within the 1939 "greater purchase area" to the Tribes, and called for large and expensive dams on most drainages arising on the Reservation -- both of which could have had serious impact on downstream off-Reservation water users. The final Tribal proposal approved by the State addressed not only the present and future needs of the Tribe, but more effectively reduced the adverse impact of increased Tribal water use and storage on the environment and the downstream off-Reservation interests.

This Court has adopted the rule employed by the Ninth Circuit Court in reviewing consent decrees, which is that "once the court is satisfied that the [settlement] was the product of good faith, arms-length negotiations, a negotiated [settlement], is presumptively valid, and the objecting party has a 'heavy burden' of demonstrating that the [settlement] is unreasonable." *See e.g.*, State of Oregon, 913 F.2d at 581. The Court finds this presumption particularly appropriate where, as here government actors committed to the protection of the public interest have "pulled the laboring oar in constructing the proposed settlement." United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. Mass. 1990). *See also*, Davis, 890 F.2d at 1445; Randolph, 736 F.2d at 529; and

Officers for Justice, 688 F.2d. at 625.

For these reasons, the Court finds there is no genuine issue of material fact with respect to the legality of the manner in which this Compact was negotiated, approved and ratified by the Settling Parties, and that the Settling Parties are entitled to summary judgment that the Compact was the product of good faith and arms length negotiation and in compliance with applicable law. The Compact, taken as a whole, is therefore presumptively fair, reasonable and adequate to all concerned.

## II.

## The Objections & Heightened Review

### A. Standing of the Objectors

**1. Objectors Lyle and Barbara Ophus - Keith Rhodes - Calvin and Arlene Frelk, the Verna F. Waddell Trust, Karl Fjelde, and Martha Fjelde Ondrejko.**

On April 27, 2000, the Montana Water Court ordered the Commencement of Special Proceedings for Consideration of the Rocky Boy's Compact and issued a Notice of Entry of Rocky Boy's Compact Preliminary Decree and Notice of Availability notifying the public that:

> . . . all affected parties are required to state any objections that they may have to the [Rocky Boy's] Compact. Your water usage may be affected by the [Rocky Boy's] Compact. If you do not agree with the Tribal Water Right recognized in the Compact, you may file an objection and request a hearing and the Water Court will hear your objection. * * * All objections must be received by the Montana Water Court . . . on or before October 24, 2000.

Sam J. and Rose M. Bitz, *dba* Rocky Crossing Ranch Co., Lyle and Barbara Ophus, Keith Rhodes, Calvin and Arlene Frelk, the Verna F. Waddell Trust, Karl Fjelde, and Martha Fjelde Ondrejko filed objections and requested the Court to invalidate the Compact and dismiss the Tribal Water Right claim.

The standing to object to a claim in the state-wide adjudication process in Montana is

established by Montana statute and Supreme Court rule. Section 85-2-233, MCA, provides that:

> (1) For good cause shown a hearing shall be held before the water judge on any objection to a temporary preliminary decree or preliminary decree by . . . (iii) any person within the basin entitled to receive notice under 85-2-232(1). . ."[18]

Rule 1.II(7) of the Montana Supreme Court Water Right Claim Examination Rules defines "good cause shown" as:

> . . . a written statement showing that one has a substantial reason for objecting, which means that the party has a property interest in land or water, or its use, that has been affected by the decree and that the objection is made in good faith, is not arbitrary, irrational, unreasonable or irrelevant in respect to the party objecting. (Emphasis added)

The Montana Water Court has traditionally practiced a "broad tent" policy with respect to objections to compacts. That is to say that while objections must not be "arbitrary, irrational, unreasonable, or irrelevant," only a minimal claim or interest in land or water that could feasiblely be adversely affected by a compact is sufficient to bring an objector within the "good cause" standard to object to the compact. This policy is appropriate with compacts because the Court is ultimately required to review and approve or disapprove them, even without the filing of a single objection.

The Settling Parties do not dispute that the remaining Objectors all own an interest in land or water within the Big Sandy, Beaver Creek or Milk River drainages. They do, however, challenge the remoteness and degree of any potential harm to those interests and the reasonableness of the objections. There is no question that the potential harm to some of the Objectors is so remote that, in retrospect, it may be stretching the "broad tent" policy too far. But, in the interest of resolving all potential disputes that could arise, this Court finds that the land and water interests owned or

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[18] Section 85-2-232(1) (1993) provides in relevant part that "the water judge shall serve by mail a notice of availability of the temporary preliminary decree or preliminary decree to *each person who has filed a claim of existing right within the decreed basin* . . . ." (Emphasis added.)

claimed by the Objectors (with the exception of Sam J. Bitz) could feasiblely be adversely impacted by exercise of the Tribal Water Right, and, therefore, the Objectors meet the "good cause" standard as applied by this Court. The Objectors have standing to file their objections.

**2. Sam J. Bitz**

On June 1, 2001, the Settling Parties served joint discovery requests, including interrogatories, requests for production of documents and requests for admissions on Sam J. Bitz and Rose M. Bitz, *dba* Rock Crossing Ranch. The Settling Parties later granted Mr. Bitz and other Objectors additional time, eventually until September 1, 2001, to respond.[19]

On August 13, 2001, the Court conducted a telephonic status conference with representatives of the Settling Parties and some of the Objectors, including Mr. Bitz, wherein the Court reviewed with the parties the Water Court Rules and Procedures, discovery procedures and applicable discovery deadlines, and how to establish and use the primary contact attorney for the Settling Parties.[20] The Court also granted Mr. Bitz and other Objectors an additional extension of 13 days (until September 14, 2001) to respond to the discovery requests. Id. The Court's August 14, 2001 Scheduling Order expressly informed the parties that:

> Failure to comply with the terms of this Order may result in sanctions, up to and including entry of default and . . . . the dismissal of objections thereto. Any request for a continuance must be made before the scheduled deadlines, in accordance with Uniform District Court rules 2 and 3, and must include a showing a good cause.

Id.[21] (Emphasis in original). Mr. Bitz failed to meet the September 14, 2001 deadline and thereby

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[19] Notice of Stipulated Extension of Time Within Which to Respond to Discovery, Motion to Stay Proceedings on the Settling Parties' Motion for Partial Summary Judgment and Dismissal of Objectors Butler, H&J Quarters, and Ophus, and Request for Telephonic Status Conference, filed August 6, 2001.

[20] Court Minutes and Scheduling Order, filed August 14, 2001.

[21] "Rule 16(f), M.R.Civ.P., provides that if a party fails to comply with a Rule 16(b) scheduling order, the court may impose such sanctions as are just on its own initiative. It contains no requirement that a party move for imposition of such sanctions." Rule 37(b)(2), M.R.Civ.P. provides that "[i]f a party . . . fails to obey an order to provide or

did not comply with the Court's Order.

On September 28, 2001, the Settling Parties filed a Motion for Partial Summary Judgment in which they requested the Court to enter partial summary judgment dismissing the objections of the following Objectors: Hjortur Hjartarson, *dba* H & J Quarters, Inc., and Sam J. and Rose M. Bitz, as individuals and *dba* Rocky Crossing Ranch. The Motion was based on the failure of these Objectors to respond to the discovery requests propounded by the Settling Parties. On November 20, 2001, this Court served notice that it anticipated entering its order granting or denying the Settling Parties' motion on December 3, 2001.

On December 3, 2001, Sam J. Bitz, *dba* Rocky Crossing Ranch Co., by fax, filed an Objection of Motion for Entry of Order on Motion for Partial Summary Judgement and Dismissal of Objections; and Request for Continuance, together with a supporting brief. Mr. Bitz argued that the extenuating circumstances in his personal life and the "interrelated complexity" of the discovery requests with other title issues involving mineral interests related to the Bitz property required a six month continuance.[22]

On December 4, 2001, the Court issued its Scheduling Order on Request for Continuance, which set a briefing schedule and required oral argument on the Bitz request. In its Order, the Court noted that the time involved in resolving the Request for Continuance would operate as a *de facto* continuance for Mr. Bitz and further noted that the Court had a limited time frame under the federal

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permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just. . . ." It contains no requirement that an opposing party move for sanctions." McKenzie v. Scheeler, 285 Mont. 500, 512, 949 P.2d 1168 (1997). (Emphasis added.)

[22] Mr. Bitz stated that his wife, Rose M. Bitz, died on March 26, 2001, and the discovery requests were received "at the height of my farming and ranching season." In addition, Mr. Bitz stated that he, the Montana Department of Highways, and the Bureau of Indian Affairs were involved in a dispute involving ownership of mineral interests related to the Bitz land. Objection of Motion for Entry of Order on Motion for Partial Summary Judgment and Dismissal of Objections; and Request for Continuance, and Brief in Support, filed December 3, 2001.

Act ratifying the Compact to approve the Compact.

On January 14, 2002, the Court heard oral argument on the Request for Continuance. The Court concluded that Mr. Bitz' request for the six month continuance of all further proceedings was too long given the time constraints imposed by the Federal Settlement Act. As Mr. Bitz had obtained the services of an attorney, the Court elected to proceed without any further continuances.

On January 22, 2002, the Settling Parties, with respect to Sam Bitz, withdrew their Motion for Partial Summary Judgment, and proposed a stipulated briefing and hearing schedule. On January 25, 2002, the Court issued its Unified Briefing Schedule and scheduled a hearing on all pre-hearing motions for April 18, 2002 in Fort Benton, Montana.

On February 1, 2002, the Settling Parties moved the Court for summary judgment to approve the Compact and dismiss the objections. With respect to Mr. Bitz, they contended that by repeatedly refusing to respond to the discovery requests, including Requests for Admission Nos. 3, 10, 11, 12, 15 and 16, Mr. Bitz was deemed by law to have admitted that his land and water interests "have not and will not be affected by the . . . Tribal Water Right recognized in the Compact," that there are no genuine issues of material fact with respect to his objections, and that -- vis-a-vis the Bitz objections -- the Settling Parties were entitled to a judgment approving the Compact as a matter of law.

Rule 36(a), M.R.Civ.P., provides in part that:

> The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow. . . ., the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

*See* also Exhibit 13, General Instructions B-D, Discovery served June 1, 2001 on Mr. Bitz. Rule 36(b), M.R.Civ.P. states that "any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Admissions obtained

pursuant to Rule 36 may be used to establish that there are no genuine issues of material fact in a motion for summary judgment. Garrett v. PACCAR Financial Corp., 245 Mont. 379, 381, 801 P.2d 605 (1990); Holmes & Turner v. Steer-In, 222 Mont. 285, 721 P.2d 1276 (1986); Morast v. Auble, 164 Mont. 100, 105, 519 P.2d 157 (1974).

Rule 36(b), M.R.Civ.P., also authorizes a court to:

> . . . permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

However, this Court notes that since 1981, the Montana Supreme Court has endorsed a strict policy that dilatory discovery actions should not be dealt with leniently. Morris v. Big Sky Thoroughbred Farms, Inc., 291 Mont. 32, 36, 965 P.2d 890 (1998); McKenzie v. Scheeler, 285 Mont. at 506. In First Bank (N.A.), Billings v. Heidema, the Court emphasized that:

> When litigants use willful delay, evasive responses, and disregard of court direction as part and parcel of their trial strategy, they must suffer the consequences. . . . Where it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with rules of discovery or with court orders enforcing the rules or in flagrant disregard of those rules or order, it is within the discretion of the trial court to dismiss the action or to render judgment by default against the party responsible for the default. . . . Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. . . .

219 Mont. 373, 376, 711 P.2d 1384 (1986). This policy has been applied to *pro se* litigants, as well as those represented by counsel:

> While we are predisposed to give pro se litigants considerable latitude in proceedings, that latitude cannot be so wide as to prejudice the other party. . . . To do so makes a mockery of the judicial system and denies other litigants access to the judicial process. It is reasonable to expect all litigants, including those acting pro se, to adhere to the procedural rules. But flexibility cannot give way to abuse. We stand firm in our expectation that the lower courts hold all parties litigant to procedural standards which do not result in prejudice to either party.

Id. *See also* Federal Land Bank v. Heidema, 224 Mont. 64, 67-68, 727 P.2d 1336 (1986).

The Federal Settlement Act ratifying and approving the Chippewa Cree Tribe-Montana Compact expressly provided that:

> In the event the approval by the appropriate court, including any direct appeal, does not become final within 3 years after the filing of the decree . . . the approval, ratification, and confirmation of the Compact by the United States shall be null and void . . . .

Federal Settlement Act, Section 101(b)(3). (Emphasis added) The Settling Parties and the Court, therefore, have been working within a strict time frame, a fact that was made clear to Mr. Bitz.

While the Court sympathizes with Mr. Bitz on the loss of his wife and does not wish to trivialize his bereavement, Mr. Bitz failed to respond to discovery requests after several extensions of time. Mr. Bitz was extended considerable latitude. To grant further latitude would have prejudiced the Settling Parties' effort to have the Compact judicially reviewed within the Congressionally mandated three year deadline. In accordance with the Rule 36(a), M.R.Civ.P. admissions, the objections of Sam Bitz, *dba* Rocky Crossing Ranch Co. are denied and dismissed.

**B. Standing of the Chippewa Cree Tribe to Compact**

The Objectors contend that the Chippewa Cree Tribe lacks legal standing to claim the Tribal Water Right set forth in the Compact, because the Tribe has not been federally recognized by treaty as an autonomous, self-governing body, and because the Reservation is neither the ancestral nor permanent home of the Tribe, or even owned by the Tribe. As Mr. Ophus asserted, "It is a fact you need land to have a water right."

In 1908, the Sixtieth Congress authorized the Secretary of the Interior to:

> . . . expend not to exceed thirty thousand dollars *for the purpose of settling Chief Rocky Boy's band of Chippewa Indians*, now residing in Montana, upon public lands, if available, in the judgment of the Secretary of the Interior, or upon some suitable existing Indian reservation in said State, and to this end he is authorized to negotiate and conclude an agreement with any Indian tribe in said State, or, in his discretion, to purchase suitable tracts of lands, water and water rights, in said State of Montana . . . .

Chapter 153, Session 1, Sixtieth Congress, Session 1 (1908). (Emphasis added) On February 11, 1915, Congress authorized the Secretary of the Interior to survey Fort Assiniboine for disposal and to identify the coal, timber and agricultural lands suitable for disposal and settlement or reservation. Act of February 11, 1915, 38 Stat. 807.

In 1916, upon petition of the leaders of the Chippewa and Cree Tribes, Congress amended the Act of 1915 to "set apart [56,035 acres of land] as a reservation for Rocky Boy's Band of Chippewa and such other homeless Indians in the State of Montana as the Secretary of the Interior may see fit to locate thereon. . . ." Act of September 7, 1916, 39 Stat. 739. Senate records confirm that the amendatory Act was "approved by the President" in Document No. 14135, Pub. L. No. 261.[23]

The Objectors argue that modification of the phrase "permanent reservation" to "reservation" during the 1916 Congressional amendment process is significant in determining the validity of the Rocky Boy's Reservation. However the subsequent actions of Congress and the Department of the Interior over the next eighty years clearly evidence the federal government's intention to create a reservation and homeland for the Chippewa Cree Tribe. *See* Commission Technical Report at 13-14 and Cosens, 16 UCLA J. Envt'l L. & Pol'y at 267-271 for a more in-depth review of those subsequent actions.

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[23] Article I, Section 7 of the United States Constitution also provides that a bill automatically becomes law even without a presidential signature ten days after being submitted, if Congress has not adjourned during that time.

Section 2(2) of the Federal Settlement Act expressly finds that "the Rocky Boy's Reservation was established as a homeland for the Chippewa Cree Tribe," and Section 2(3) of the Act finds that "adequate water for the Chippewa Cree Tribe of the Rocky Boy's Reservation is important to a *permanent*, sustainable, and sovereign homeland for the Tribe and its members." (Emphasis added)

The fact that the federal government owns legal title to the Reservation in trust for the Tribe does not diminish the Tribe's standing to claim the Tribal Water Right. The Montana Supreme Court has directed this Court that:

> The United States is not the owner of Indian reserved rights. It is a trustee for the benefit of the Indians. Its powers regarding Indian water rights are constrained by its fiduciary duty to the tribes and allottees, who are the beneficiaries of the land that the United States holds in trust. Indian reserved water rights are "owned" by the Indians.

Greely II, 219 Mont. at 97.

Objector Ophus also appears to argue that Winters' reserved water rights apply only to Indian reservations created by treaty before March 3, 1871. The Act of November 10, 1888, Revised Statutes at 2079, as amended by 25 U.S.C. 71, reversed the policy of making treaties with the Indians. Thereafter, Congress subjected Indian tribes to the direct legislation of Congress. Thus, the Rocky Boy's Reservation was created by legislation, not by treaty. This fact does not diminish the Tribe's claim to reserved water rights. The Montana Supreme Court has acknowledged that Indian reserved water rights may be created or recognized by federal treaty, federal statute or executive order. Greely II, 219 Mont. at 89. In Arizona v. United States, the United States Supreme Court rejected the State of Arizona's argument that the water rights in that case were not reserved merely because the Reservation was created (or expanded) by Executive Order, rather than treaty. 373 U.S. 546, 598 (1963). Similarly, in Walker River Irr. Dist., the Ninth Circuit Court of Appeals

concluded that:

> We see no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent. While in the Winters case the court emphasized the treaty, there was in fact no express reservation of water to be found in that document. The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved.

104 F.2d at 336.

The fact that the Chippewa Cree Tribe is not indigenous to the Reservation is also immaterial to its standing in this case. The removal of Indian tribes from their ancestral homes for relocation on "reservations" is well documented in the annals of history and the courts. *See e.g.*, Act of June 5, 1850, 9 Stat. 437; Appropriation Act of March 3, 1853, 10 Stat. 226; Quinault Allottee Ass'n v. United States, 485 F.2d 1391, 1392-1393 (USCC, 1973), *cert denied*, 416 U.S. 961 (1974); Morton v. Mancari, 417 U.S. 535, 552 (1974); Getches, Rosenfelt, & Wilkinson, Federal Indian Law 52-61 (1979 ed.); and Felix S. Cohen's Handbook of Federal Indian Law 770 (1982 ed.). Federal courts have recognized Indian reserved water rights for Indian reservations even when the Indians "had no rights which they might reserve, and none to surrender in exchange for those now claimed for them." *See e.g.*, Walker River Irrigation District, 104 F.2d at 337. Aboriginal title is material only when an Indian tribe is claiming Indian reserved water rights, "from time immemorial," which the Chippewa Cree Tribe have not claimed in this Compact. *See e.g.*, United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. Ore. 1984); United States v. Klamath Indians, 304 U.S. 119, 122-123 (1938).

Any difficulty courts may have encountered in determining whether a tribe was federally recognized was substantially reduced in 1978 when Congress authorized the Executive Branch to prescribe regulations for making that determination and ordered a list of "federally recognized"

tribes to be published in the Federal Register no less than every three years. *See* 25 C.F.R. Part 83; 25 U.S.C. 1a, 2; Cherokee Nation of Oklahoma v. Babbitt, 117 F.3d 1489, 1498 (D.D.C. 1997); Western Shoshone Business Council v. Babbitt, 1 F.3d 1052, 1056-1057 (10th Cir. Utah 1993). Recognition by the Department of the Interior has traditionally been "a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. 25 C.F.R. 83.2. Acknowledgment of tribal existence has meant "that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes *by virtue of their government-to-government relationship with the United States* as well as the responsibilities, powers, limitations, and obligations of such tribes." 25 C.F.R. 83.2; and Cherokee Nation, 117 F.3d at 1498; Western Shoshone, 1 F.3d at 1057. (Emphasis added)

On November 2, 1994, Congress passed the Federally Recognized Indian Tribe List Act of 1994, which expressly stated that:

> (2) . . . the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;
>
> (3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;
>
> (4) *a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress*;
>
> (5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated. . . .

P.L. 103-454, Title I, § 103, 25 USCS 479(a). (Emphasis added.)

The Court takes judicial notice that the Chippewa Cree Tribe of the Rocky Boy's Reservation

has been included on the lists published pursuant to Part 83 of the Code of Federal Regulations and Public Law 103-45 at least since July 8, 1981 (46 FR 35360), including the list published on March 10, 2000 (65 FR 13298). That period included the years during which this Compact was negotiated and ratified by the Tribe, the State of Montana, and the Congress of the United States. Consequently, publication (i.e. formal federal recognition) was not "ex post facto to the compact," as asserted by Mr. Ophus.

Historically, the federal judiciary has deferred to such executive and legislative determinations of tribal recognition. Cherokee Nation, 117 F.3d at 1496; Western Shoshone, 1 F.3d at 1058; United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 549-550 (10th Cir. Colo. 2001); and United States v. Holliday, 70 U.S. 407, 419 (1866)("In reference to all [federal recognition] matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government .... If by them those Indians are recognized as a tribe, this court must do the same."). Although this deference was originally grounded in the executive's exclusive power to govern relations with foreign governments, federal courts have found that broad congressional power over Indian affairs justifies its continuation. Western Shoshone, 1 F.3d at 1057. States are traditionally bound by a similar doctrine of deference to federal agency recognition of Indian tribes. In re Kansas Indians, 72 U.S. 737 (1866).

Accordingly, this Court finds that for purposes of reviewing this Compact and adjudicating the Tribal Water Right, inclusion of the Chippewa Cree Tribe of the Rocky Boy's Reservation on the Department of the Interior's List of Federally Recognized Tribes is dispositive on the issue of federal recognition. If the Objectors wish to challenge such federal recognition, they must take their case to the United States Congress. Without substantive evidence to the contrary, the Court finds

that there is no genuine issue of material fact with respect to this issue, and that the Settling Parties are entitled to judgment as a matter of law that the Chippewa Cree Tribe has sufficient standing to claim the Tribal Water Right set forth in the Compact.

### C. The Rocky Boy's Reservation Boundaries

The Objectors have also challenged the size and boundaries of the Reservation as described in public meetings during the negotiation process and in the Compact. The Compact defines the "Reservation" as "the Rocky Boy's reservation and includes all lands and interests in lands which are held in trust by the United States for the Chippewa Cree Tribe, including future additions to the Reservation." Compact, Article III(42). The Reservation boundaries, however, like its population and needs, have changed over time and will continue to change in ways not entirely predictable or within the control of the State or the Tribe.

The pre-1934 Congressional actions involving the Rocky Boy's Reservation are set forth in the Commission Technical Report at pages 11 through 13 and in Cosens, 16 UCLA J. Envtl. L. & Pol'y at 268-271. Those actions need not be detailed here.

In 1938, pursuant to the Indian Reorganization Act of 1934, the Bureau of Indian Affairs purchased approximately 35,500 acres of land from private landholders to add to the Rocky Boy's Reservation. Senate Report 105, 76th Cong., 1st Sess., February 24, 1939. The land was not added to the Reservation, however, until November 26, 1947, when the Assistant Secretary of the Interior signed a proclamation transferring the land to the Reservation after the Tribe agreed to enroll more landless Indians. *See* Addition of Certain Lands to Rocky Boy's Indian Reservation, Montana, Fed. Reg. Doc. 43-2629, Proclamation of the Assistant Secretary of the Interior, November 26, 1947. *See also* Cosens, 16 UCLA J. Envtl. L. & Pol'y at 270, n. 92.

In 1939, Congress withdrew all public domain land (approximately 2000 acres in scattered tracts) within a 156,000 acre area, described as a "greater purchase area,"and added it to the Reservation. An Act to Add Certain Public Domain Land in Montana to the Rocky Boy Indian Reservation, Pub. L. No. 13, 53 Stat. 552 (1939). Senate Report 105 which accompanied the bill stated that purchase of additional acreage within the greater purchase area would depend upon future appropriations and purchases. United States Senate, Committee on Indian Affairs, 76th Cong., 1st Sess., February 24, 1939.

On May 21, 1974, Congress declared that:

> . . . all right, title, and interest of the United States in minerals, including coal, oil and gas, underlying lands held in trust by the United States for the Chippewa and Cree Indians of the Rocky Boy's Reservation and lands located within the legal subdivision described in the Act of March 24, 1939 (53 Stat. 552), are hereby . . . to be held by the United States in trust for the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana. . . .

"An Act to Declare Certain Mineral Interests are Held by the United States in Trust for the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana," Public Law 93-285, 88 Stat. 142 (1974). This transfer to the Tribe included only the mineral estate and not the surface estate in the land.

Although the 1939 Act merely withdrew *public domain* land and added it to the Reservation, the boundaries of the greater purchase area were described in the Tribal Constitution as the Reservation Boundary, which was approved by the Secretary of the Interior. The apparent conflict between the Tribal Constitution Reservation Boundary description, which was depicted on some of the maps used during the negotiation process, and the boundaries of the actual properties owned by the United States in trust for the Tribe, caused significant concern for some of the Objectors who own land within the greater purchase area.

For purposes of this Compact review, however, the Court finds there is no dispute with

respect to the fact that the greater purchase area described in the 1939 Act, includes a significant amount of private land that has never been purchased or added to the Reservation. The Chippewa Cree Tribe-Montana Compact is clear in describing the Reservation as only those "lands and interests in lands which are held in trust by the United States for the Chippewa Cree Tribe, including future additions to the Reservation." Article II(42). Those lands not yet transferred to the United States in trust for the Tribe are considered and referred to as "off-Reservation" lands. Id.

**D. Priority Date and Block Allocations during Water Shortages**

Article III of the Compact establishes the priority date for the Tribal Water Right in most cases to be September 7, 1916, the date the Rocky Boy's Reservation was created by Act of Congress. The only exceptions to this priority date are the private water rights acquired by the Tribe in Box Elder Creek and those contributed by the United States in Lake Elwell. Under the Compact, both the Box Elder Creek and Lake Elwell water rights become part of the Tribal Water Right, but the Box Elder water rights retain their original state-based priority date of September 10, 1888, and the Lake Elwell water rights retain the priority date "established for the source of supply." The Objectors argue that lands purchased within the 1939 "greater purchase area" should also have a priority date no later than 1939, and that during times of shortage, "all should suffer in proportion."

Generally, the priority date of Indian reserved water rights is the date the Indian reservation was created by treaty, act of Congress, or executive order. Arizona v. United States, 373 U.S. at 600; Winters, 207 U.S. at 577. Various tracts and interests in land were added to the Rocky Boy's Reservation after the Act of September 7, 1916 and some of the acquired land had senior state-based water rights that passed to the Tribe as appurtenant to the land. The Settling Parties assert that the State's agreement to the 1916 priority date for lands acquired after 1934 was a *quid pro quo* for the

Tribe's agreement not to assert any of the senior state-based water rights appurtenant to the acquired lands.

During the course of negotiation, the Tribe asserted earlier priority dates of "time immemorial," 1874 (original Blackfeet ("and such other Indians as the President may, from time to time, see fit to locate thereon") Treaty date), and 1880 (Fort Assiniboine Military Reservation). The State and the Tribe were able to agree on the 1916 priority date primarily because of their related agreement to subordinate priorities during periods of water shortage.

During times of shortage, water rights in Montana are normally enforced by priority date, with first in time being first in right. 85-2-401, MCA. The Compact provides that during times of shortage both Tribal and State-based water rights will be allocated in blocks of fixed amounts. In exchange for the mitigation provisions set forth in the Compact, or separately agreed to in drainage stipulations, those claiming (and decreed) senior state-based water rights downstream from the Reservation may not assert priority over the Tribal Water Right, so long as the Tribe is using water within its quantified right. In return, the Tribe may not assert priority over those claiming (and decreed) state-based water rights upstream from the Reservation with priority dates before ratification of the Compact. Compact, Article IV(A)(8). This block allocation provision was negotiated to reduce the risk of priority enforcement for both parties during times of water shortage[24] and to minimize the daily monitoring and enforcement of stream flows and allocations that would

[24] *See* e.g., Dan Tarlock, "Prior Appropriation: Rule, Principle, or Rhetoric," 76 N.Dak. L. Rev. 881, 883 (2000): "Priority's modern significance lies in the threat of enforcement rather than the actual enforcement because it encourages water users to cooperate either to reduce the risk of enforcement to as close to zero as possible or to share more equitably the burdens of shortages. This said, cooperation and ad hoc sharing do not come easily to water users. Alternative allocation systems usually emerge only when a significant group of water users thinks that cooperation will produce a superior result to the likely legal resolution allocation of the resources. If there is a credible threat of actual priority enforcement, users may cooperate to avoid the short and long term costs of the result."

have been required in the checkerboard jurisdiction of the Reservation and surrounding area.[25]

None of the Objectors have water right claims, certificates or permits in drainages that could be adversely affected by the subordination and block allocations set forth in the Compact. Keith Rhodes, Calvin and Arlene Frelk, Verna F. Waddell Trust, Martha Fjelde Ondrejko, and Karl Fjelde have claims, permits, or certificates that are on tributaries to the Milk River miles downstream from the drainages on the Reservation. Lyle Ophus has six water right claims in the Big Sandy drainage both up and downstream from points on the Reservation: three stockwater claims that are junior to the Tribal Water Right, and three irrigation claims that are senior. Greiman Aff., Exhibit 2, and Exhibits attached to Affidavit of Rita Nason ("Nason Aff."). According to the mutual subordination clause in the Compact and Appendix 3 to the Compact, the Tribal Water Right is subordinate to all of the six Ophus claims. Compact, Article IV(A)(8) and Appendix 3.

For the reasons set forth above, the Court finds that there is no genuine issue of disputed fact with respect to the priority dates, and that the Settling Parties are entitled to judgment as a matter of law that the priority dates established by the Compact, and the agreement to subordinate priorities during periods of water shortage as set forth in the Compact, are not necessarily contrary to applicable law, and are fair, reasonable and adequate to all concerned.

### E. Quantification of Tribal Water Right

The Tribal Water Right is set forth in Article III of the Compact. The Compact recognizes the right of the Tribe to 20,000 acre-feet of water per year (AFY) for irrigation, stockwatering, domestic, commercial, industrial, and environmental purposes. The water is allocated from surface

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[25] As some Objectors acknowledged: "Measuring exactly these reserved water quantifies is not as simple as words imply. Precision of the measured amounts of water used, in the particular setting is asking more than can be achieved. Keeping records of each deduction is nearly impossible." Exhibit 10, Objection to the Proceedings, Answers to Interrogatory Questions. . . By Objectors Calvin and Arlene Frelk, Verna P. Waddell Trust, Martin Fjelde Ondrejko, Eric Fjelde and Karl Fjelde, at unnumbered page 9.

and groundwater sources in the Big Sandy Creek drainage (9,260 AFY), the Beaver Creek drainage (740 AFY), and from Lake Elwell (10,000 AFY), an off-Reservation reservoir in the Marias River basin. Though not clearly articulated, the Objectors appear to question the "university text-book theories" used by the State and Tribe's technical advisors to quantify the Tribal Water Right, and the feasibility and impact of a proposed ten-acre irrigation project on Upper Big Sandy Creek.

Generally, the measure of an Indian reserved water right is governed by the amount of water necessary to fulfill the purposes of the reservation. United States v. New Mexico, 438 U.S. 696, 700 (1978); Cappaert, 426 U.S. at 138; Arizona v. California, 373 U.S. at 600; Winters, 207 U.S. at 577; Adair, 723 F.2d at 1419; Greely II, 219 Mont. at 92; and Greely I, 214 Mont. at 159.

Quantifying this open-ended standard as been difficult at best, and after nearly one hundred years of legislation, litigation and policy-making, there are still no clear or consistent bright lines. Greely II, 219 Mont. at 92.[26] Because the purposes of each reservation differ, federal courts have devised several general quantification standards. Id. While there is no exclusive or universal standard, federal courts have been clear that Indian reserved water rights must include sufficient water for the future as well as present needs of the reservation. Arizona v. California, 373 U.S. at 599-600; Winters, 207 U.S. at 577; and Greely II, 219 Mont. at 93, 97.

Because the future population and needs of an Indian tribe can only be guessed, the Court

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[26] For cases applying the doctrine broadly, *See* Colorado River Water Conservation District v. United States, 424 U.S. 808 (1976); United States v. Ahtunum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956); Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908); In re the General Adjudication of All Rights to Use Water in the Gila River System and Source (Gila River), 989 P.2d 739 (1999) and 35 P.3d 68 (2001). For cases applying the doctrine narrowly, *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); United States v. New Mexico, 438 U.S. 696 (1978); Cappaert, 426 U.S. at 141; In re the General Adjudication of All Rights to Use Water in the Big Horn River System ("Big Horn I"), 753 P.2d 76 (Wyo. 1988), *aff'd* in Wyoming v. United States, 492 U.S. 406 by an equally divided court. For cases distinguishing between Indian reserved water rights and other federal reserved water rights, *See* Clinch, 297 Mont. 448, 992 P.2d 244 (1999); Greely II, 219 Mont. 76, 712 P.2d 754 (1985). For cases that do not distinguish between Indian reserved water rights and other federal reserved water rights, *See* Colorado River, 424 U.S. at 811; United States v. District Court for Eagle County, 401 U.S. 520 (1971); Cappaert, 426 U.S. at 138; and Arizona v. California, 373 U.S. at 601.

in Arizona v. California concluded that the only feasible and fair way by which reserved water for agricultural reservations can be measured is by "practicably irrigable acreage" ("PIA"), which the Court defined as "enough water . . . to irrigate all the practicably irrigable acreage on the reservations," not merely that amount which is sufficient to satisfy the Indians' "reasonably foreseeable needs." Id. at 600-601.[27] This method involves a complex, cost-benefit analysis which weighs the arability and engineering practicability of growing crops on particular land with the economics of such irrigation. *See* Commission Technical Report at 20 and Appendices E and F; Greiman Aff. at 3; and Billstein Aff. at 4-6.

In recent years, the PIA standard has been criticized as being overly complex, overgenerous at the expense of state water users, and anachronistically assimilistic for modern times.[28] This criticism resulted in a more stringent application of the standard in Wyoming's Big Horn River System adjudication,[29] and in the United States Supreme Court's *per curium* decision affirming the application, albeit by an evenly divided Court. In Gila River, the Arizona Supreme Court observed

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[27] In Arizona v. California, both the Master and the Supreme Court rejected the State's argument that "the quantity of water reserved should be measured by the Indians' 'reasonably foreseeable needs." Adoption of the PIA standard was essentially a compromise between a standard that would be fair to the Indians and one that would provide certainty and finality for competing water users. In exchange for a generous standard and application (essentially the *maximum* amount the tribes could claim under the State's "reasonable needs" test, whether the tribes would ever actually need or use the water or not), the reserved water rights of the tribes were finally quantified and forever fixed in an amount that could not be enlarged, even for changed circumstances in the future. 373 U.S. at 600-601.

[28] As early as 1939, the Ninth Circuit Court observed that "questions as to the quantity of water reserved is one of great practical importance, and *a priori* theories ought not to stand in the way of a practical solution of it. The area of irrigated land included in the reservation is not necessarily the criterion for measuring the amount of water reserved whether the standard be applied as of the date of creation or as of the present." Walker River Irrigation District, 104 F.2d at 340. *See also* Peter W. Sly, Reserved Water Rights Settlement Manual 194 app. A (1988), at 104; Alvin H. Shrago, *Emerging Indian Water Rights: An analysis of Recent Judicial and Legislative Developments*, 26 Rocky Mt. Min. L. Inst. 1105, 1116 (1980); *Indian Reserved Water Rights: Hearings before Senate Comm. On Energy and Natural Resources*, 98th Cong., 2d Sess. 27-28 (1984)(Western States Water Council, Report to Western Governors); and Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 Ariz. L. Rev. 195 (1994); and Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 Land & Water Rev. 1, 6 (1992) (in which he asserts that Chief Justice Rehnquist and Justices White, Scalia, and Kennedy would have reversed use of the PIA standard in the Big Horn River adjudication).

[29] In Big Horn I, 753 P.2d at 111-112, the Wyoming Supreme Court was more sensitive to state-held rights by requiring that factors such as land arability, engineering and economic feasibility must be considered in determining whether reservation land was practicably irrigable for purposes of the PIA standard.

that while the PIA standard appears on its face to be an objective method of determining water rights, "its flaws become apparent on closer examination." 35 P.3d at 78.

Despite its recent criticism, the PIA standard remains the principal method of quantifying Indian reserved water rights for agricultural reservations and was used by the Settling Parties as a guideline in negotiating the Tribal Water Right. Initially, the State and the Tribe differed substantially on the amount of the Tribal Water Right for the Rocky Boy's Reservation. The Tribe quantified its present and long-term water needs to be in excess of 35,000 AFY, based on a PIA of 20,000 AFY for irrigation, and 15,000 AFY for non-irrigation purposes, such as stockwatering, domestic, municipal, commercial and industrial purposes. Billstein Aff. at 5-7. The State quantified the Tribe's reserved rights to be approximately 3,900 AFY, based on a "feasiblely irrigable lands" method of quantifying reserved water rights. *See* Commission Technical Report at 19-20; Appendix F; and Tweeten Aff. at 3-4.

An important objective of the Commission in negotiating the Compact was to minimize, to the extent possible, the impact that exercise of the reserved water right could have on off-Reservation water users. "From this perspective, the negotiation of this Compact presented several difficult legal and factual problems." Tweeten Aff. at 2. Both the State and the Tribe recognized that the Rocky Boy's Reservation is land and water poor -- a fact not disputed by the Objectors and a fact supported by the technical data gathered by the parties, the legislative history of the Reservation, and the Federal Settlement Act ratifying the Compact.

Ultimately, the parties agreed to the Tribal Water Right of 20,000 AFY, an amount equal to the Tribe's high-end PIA calculation, and one which both parties agreed to be within the range of possible litigation outcomes if the Tribal Water Right were adjudicated in a court of law. Morsette Aff. at 5; Tweeten Aff. at 4. The State agreed to the Tribe's numbers because fully one-half of the

Tribal Water Right is water imported from the Marias River drainage, and because the parties successfully negotiated mitigation measures to reduce the adverse impact on off-Reservation water users from increased Tribal water use. Id.

Mr. Ophus challenges the Compact provisions allowing for the future development of ten acres in the Upper Big Sandy Creek drainage. The fact that the proposed ten-acre development has never been irrigated does not necessarily argue against application of the PIA standard. In Greely II, the Montana Supreme Court observed that:

> The Water Use Act, as amended, recognizes that a reserved right may exist without a present use. Section 85-2-224(3), MCA, permits a 'statement of claim for rights reserved under the laws of the United States which have not yet been put to use.' The Act permits Indian reserved rights to be decreed without a current use.

219 Mont. at 94. Moreover, the development is expected to have no measurable affect on the Ophus water rights. Bill Greiman, agricultural engineer on the staff of the Reserved Water Rights Compact Commission, explained:

> The 10 acres of new irrigation is limited to a maximum diversion of 100 gpm (0.2 cfs) and 45 acre-feet annually. Estimated irrigation requirements (SCS TR-21) for the Tribe's high elevation (+4,000 ft) project is 16" for an annual water depletion of 13 acre-feet. The remaining water diverted returns to the stream in the late summer season and could be a minor (although not measurable) benefit to stock water needs near the Reservation boundary. The average flow for the irrigation season at the reservation boundary upstream of Mr. Ophus' place of use (USGS gage 06137400) is greater than 3,800 acre-feet. Thus, the Tribe's maximum use would be 0.3 percent of the available flow and that impact is not measurable. The Tribe's maximum diversion rate of 0.2 cfs would equal a depletion rate of less than 0.1 cfs. The Tribe's use is 22 stream miles up stream, 1000 feet higher, and impacts only 25% of the drainage basin above Mr. Ophus' diversion. The usable flow rate for Mr. Ophus' system is approximately 4 cfs. There is no measuring device available that can measure the Tribe's 0.1 cfs (50 gpm) impact on Mr. Ophus' minimum diversion needs of 4 cfs. . . . The Tribes' 50 gpm depletion 22 miles away will have no measurable affect on any water right claimed by Mr. Ophus.

Greiman Aff. at 4-5.

Although Mr. Ophus disagrees with the Greiman analysis, he provided no probative evidence

to support his disagreement. Significantly, during his testimony at the April 18, 2002 Fort Benton hearing, Mr. Ophus acknowledged that his water spreading irrigation system was downstream from the IX Ranch and that this upstream neighbor often diverts the entire flow of the water source and leaves Mr. Ophus with no return flow. Mr. Ophus testified that the IX Ranch "has sucked up more water than they have a right to." This testimony supports Bill Greiman's findings that the IX Ranch has a more substantial impact on Mr. Ophus's use of water then the Tribe's use could ever have. At page 5 of his Affidavit, Mr. Greiman stated:

> The IX Ranch has [a] decreed right for 3,000 acres of irrigation with a diversion right to 32 cfs above Mr. Ophus' diversion. The irrigation systems for Mr. Ophus and the IX Ranch are similar and so have similar water timing needs. The only water available to Mr. Ophus is spring flows in excess of the IX Ranch needs and IX Ranch return flows. The IX Ranch net irrigation requirement exceeds the average annual flow of the system, so it is even more improbable that the Tribe's minimal water use could be deliverable to Mr. Ophus below the IX Ranch diversion.

Id. at 5. Since the Ophus water use is so heavily influenced by his close neighbor, the IX Ranch, Mr. Ophus's disagreement with the Greiman analysis over the Tribe's prospective 50 gpm depletion use of water over 22 miles away is too speculative and conclusionary to be accepted.

For these reasons, the Court finds there are no genuine issues of material fact with respect to this issue, and that the Settling Parties are entitled to judgment as a matter of law that the scope and extent of the Tribal Water Right is fair, reasonable and adequate to all concerned.

**F. Off-Reservation Importation of Water**

During the course of the negotiations, it became clear to all the participants that the water supply on the reservation, including the existing domestic water supply, was seriously inadequate for the present and future needs of the Reservation. It also became clear, however, that exercise of the Tribal Water Right through increased development, storage and use of on-Reservation water supplies could materially damage the rights of existing water users within and downstream of the

Big Sandy and Beaver Creek drainages. A number of solutions were proposed, which included:

1. The Tribe's and Department of Interior's initial proposals to increase the available water supply by significantly enlarging existing on-Reservation storage facilities and constructing new ones for storage from on-Reservation water sources;

2. The Department of Interior's proposal to retire irrigation lands on the Reservation and provide the Reservation with subsidized hay on an on-going basis;

3. The Department of Interior's proposal to purchase off-Reservation hay land and water rights to replace retired Reservation irrigation land; and

4. The Commission's proposal that the Tribe and members from off-Reservation communities in the area facing similar domestic water supply problems form an Ad Hoc Committee to coordinate a feasibility study for a regional water system, whereby various off-reservation rural water and municipal systems could be combined with the Tribe's system to achieve safe drinking water; and

5. The combined team of technical advisors' (Tribal, United States, and State) proposal to transport 10,000 acre feet of excess water from Lake Elwell in the Marias River Basin to the Reservation to meet Tribal long-term water needs and augment the Big Sandy water supply.[30]

To resolve the stalemate, the United States agreed to contribute 10,000 AFY to the Tribe from the unallocated portion of Lake Elwell, a Bureau of Reclamation reservoir constructed on the Marias River to provide irrigation water to a Lower Marias River irrigation project that was never completed. The water is unallocated or excess water in that rights to the water have not yet been sold or allocated for other use by the federal government.

The Federal Settlement Act ratifying the Compact found importation of the Tiber Reservoir (Lake Elwell) water to be legal and "uniquely suited to the situation." Federal Settlement Act, Section 2. Accordingly, Congress enacted Title II of the Act (Tiber Reservoir Allocation and Feasibility Studies Authorization), which expressly provided that:

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[30] *See* summary of proposals in Commission Technical Report at 30-31; Morsette Aff. at 4-7; Tweeten Aff. at 3-4; and Billstein Aff. at 8-13.

> The Secretary shall permanently allocate to the Tribe, without cost to the Tribe, 10,000 acre-feet per year of stored water from the water right of the Bureau of Reclamation in Lake Elwell, Lower Marias Unit, Upper Missouri Division, Pick-Sloan Missouri Basin Program, Montana. . . . The allocation shall be part of the Tribal Water Right and subject to the terms of this Act.

113 Stat. 1789, Section 201. The importation of unallocated water from Lake Elwell will provide the Tribe with a safe and dependable drinking water supply and substantially reduce the adverse affects that increased Tribal use and storage of water from on-Reservation sources could have had on existing water users like the Objectors. *See* Commission Technical Report at 39; Tweeten Aff. at 4; and Morsette Aff. at 5.

Congress certainly has the authority to allocate unallocated water from a Bureau of Reclamation reservoir. The fact that the Rocky Boy's Indian Reservation is involved doesn't change that authority.

For these reasons, the Court finds there is no genuine issue of material fact with respect to the importation of water from Lake Elwell, and that the Settling Parties are entitled to judgment as a matter of law that importation of 10,000 acre-feet of water from Lake Elwell (Tiber Reservoir) for inclusion as part of the Tribal Water Right is not contrary to applicable law, and is fair, reasonable, and adequate to all concerned.

## CONCLUSION

The compacting process established by the Montana legislature and confirmed by the Montana Supreme Court has allowed the State and the Chippewa Cree Tribe to define and enforce its Indian reserved water right outside the strict confines of federal and state law by negotiating and concluding a compact "for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state." Section 85-2-701, MCA Greely I, 214 Mont. at 147. (Emphasis added) The provisions of this Compact, and

the process by which they were negotiated, received the confirmation of Congress in the Federal Settlement Act, where Congress explicitly found that "it is the policy of the United States to settle the water rights claims of the tribes without lengthy and costly litigation," and that its stated purpose in approving the Compact was "to achieve a fair, equitable, and final settlement of all claims to water rights in the State of Montana for . . . the Chippewa Cree Tribe; and (B) the United States for the benefit of the Chippewa Cree Tribe." Federal Settlement Act, §§ 2(1), and 3(1). (Emphasis added)

The compacting alternative provided the Settling Parties with the flexibility they needed to craft a settlement that reflected the unique conditions on the Reservation and the changing needs of the Chippewa Cree Tribe. By involving both Reservation and off-Reservation water users in the negotiation process, and by recognizing and respecting the interests and concerns of both, together with significant contributions by the United States and the State of Montana, the Settling Parties were able to negotiate a Tribal Water Right that fairly and reasonably reflects the essential purpose of the Reservation as a continuing homeland for the Chippewa Cree Tribe, and, at the same time, minimizes, to a fair and reasonable degree, the potential adverse effects that exercise of the reserved water rights could have had on off-Reservation water users.

Jim Morsette, Chairman of the Tribal Negotiating Team, described the process in his Affidavit to the Court:

> After five years of intensive negotiations; numerous public meetings to explain the settlement plan, receive input from tribal members, non-Indian water users, and other interested parties; numerous revisions of the proposed settlement agreement to meet concerns expressed by non-Indian water users and other persons and by the Commission; and extensive on-going legal and technical analysis, agreement was reached between the Tribe and the State of Montana as to quantification of the Tribe's water rights and as to administration of those rights. . . . The Compact embodies a compromise unique to the circumstances of the Rocky Boy's Reservation that meets the long-term needs of the Tribe while, at the same time, protecting investment in state-based water needs.

Morsette Aff. at 7-8.

In reviewing this settlement, the Court is not required "to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." Officers for Justice, 688 F.2d at 625. "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators. (Citations omitted)" Id.

The Compact Commission and several Indian tribes have had remarkable success in negotiating unique agreements to define the reserved water rights associated with the Fort Peck Reservation, the Northern Cheyenne Reservation, and now the Rocky Boy's Indian Reservation. Every compact approved by this Court has been unique and specific to the history of the reserved right and the resources available to the water users in the area. The parties to these compacts achieved results that were more tailored to their interests than they ever could have achieved through litigation. The equitable division and apportionment of waters reflected in these compacts bring obvious benefits to Indian and non-Indian water users, alike.

The Court reiterates that in the absence of clear federal authority prohibiting the various compact provisions and in the absence of demonstrated injury to objectors by these provisions, compacting parties are within their authority to craft creative solutions to resolve difficult problems caused by ambiguous standards. As noted by this Court in its Fort Peck Memorandum, if other parties claiming and negotiating reserved water rights proceed to litigation before the Montana Water Court on the merits of those rights and thus forsake the compacting alternative, this Court will draw hard lines and resolve ambiguous legal precedent on many of the issues which are given a broad brush in its Compact review. Fort Peck Memorandum, p. 9.

## III.

## Summary Judgment

The Montana Rules of Civil Procedure provide that "Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." Rule 56(c), M.R.Civ. P. In applying the standard, all reasonable inferences are viewed in the light most favorable to the party opposing summary judgment. Erker v. Kester, 296 Mont. 123, 128, 988 P.2d 1221 (1999). However, the opposing facts must be of a substantial and material nature. Brothers v. General Motors, 202 Mont. 477, 481, 658 P.2d 1108 (1983). Speculation and conclusory statements are not sufficient to raise a genuine issue of material fact. DeMers, 192 Mont. at 373; Young, 179 Mont. at 497. Absent affirmative evidence to defeat the motion, the motion is properly granted. Estate of Lien, 270 Mont. 295, 306 (1995).

The Montana Water Court has previously found that:

> All negotiations and adjudications quantifying Indian reserved water rights involve extensive and complex disputed issues of fact and law. They inherently involve competing interests in a scarce resource, the allocation of which must be determined by ambiguous, perhaps anachronistic law, evolving governmental policies, and increasingly sophisticated science -- all amidst rapidly changing circumstances, within the confines of a complex adjudication process. That is precisely the incentive for negotiation and settlement of complex water right adjudications.
>
> In the negotiation process, the uncertainties inherent in the determination of the . . . Tribal Water Right were employed by the parties as tools to gain leverage and bargaining power. Compromise moved the process forward. In exchange for saving the cost and inevitable risk of litigation, the parties each gave up something they might have won in a court of law. In the settlement process, the parties resolved to their own satisfaction all of the remaining issues of fact and law. It is not for the Montana Water Court to re-negotiate those disputes or rule on their merits.

Fort Peck Memorandum, pp 41-42.

The Objectors in this case have failed to prove that any additional genuine issues of material

fact remain for the Montana Water Court to decide. They have failed to provide the affirmative evidence and law necessary to defeat the motion and to overcome the strong presumption attached to this Compact that it is fair, reasonable, and adequate to all concerned.

For the reasons set forth above and further detailed in the submissions of the Settling Parties, the Court has entered its Order Approving Compact.

DATED this 12 day of June, 2002.

C. Bruce Loble
Chief Water Judge

## CERTIFICATE OF MAILING

I, Anna M. Burton, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **MEMORANDUM OPINION** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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DATED this 12th day of June, 2002.

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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER AND LOWER MISSOURI RIVER DIVISIONS
ROCKY BOY'S COMPACT SUBBASIN

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| IN THE MATTER OF THE ADJUDICATION OF EXISTING AND RESERVED RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, OF THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION WITHIN THE STATE OF MONTANA | **CASE NO. WC-2000-01** |

FILED
JAN 25 2002
Montana Water Court

**ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT and DISMISSING OBJECTION OF HJORTUR HJARTARSON, *dba* H & J QUARTERS, INC.**

**Introduction**

On September 28, 2001, the United States of America (United States), the Chippewa Cree Tribe of Montana (Tribe), and the State of Montana (State) (collectively the Settling Parties) filed a "Motion for Partial Summary Judgment and the Dismissal of the Objections of Hjortur Hjartarson, dba H & J Quarters, Inc., and Sam J. and Rose M. Bitz, as individuals and dba Rocky Crossing Ranch, the Dismissal of Eric Fjelde, and Brief in Support." On December 4, 2001, this Court granted this motion as to the dismissal of Eric Fjelde. See Order Granting Motion for Dismissal of Eric Fjelde filed December 4, 2001. On January 22, 2002, the Settling Parties filed the withdrawal of their motion as to Mr. Bitz and Rocky Crossing Ranch without waiving their ability to raise any arguments therein in any other context, including any prehearing motions.

This Order addresses the remaining portion of the Settling Parties' motion seeking partial summary judgment and the dismissal of the objection filed by Hjortur Hjartarson, *dba* H & J

Quarters, Inc. to the Chippewa Cree Tribe-Montana Compact (RB Compact), codified at Section 85-20-601, MCA. For the reasons that follow and as set forth in the Settling Parties' pleadings, the Court **GRANTS** the Motion for Partial Summary Judgment directed at Hjortur Hjartarson, *dba* H & J Quarters, Inc.

**Procedural History**

This case involves the RB Compact, a reserved water right compact entered into among the Settling Parties to settle the water rights of the Chippewa Cree Tribe of the Rocky Boy's Reservation. Seventeen objections were filed in a timely manner. One of these objections was filed by Hjortur Hjartarson, *dba* H & J Quarters, Inc. (Objector Hjartarson). The parties are, among other things, presently litigating the merits of these objections before this Court.

On June 1, 2001, the Settling Parties served joint discovery requests, including interrogatories, requests for production of documents and requests for admissions, on the objectors to the RB Compact, including Objector Hjartarson. According to the documents attached to the discovery requests filed with the Court on July 18, 2001, the joint discovery requests were delivered by the U.S. Postal Service to Hjortur Hjartarson at 11:32 a.m. on June 5, 2001 in Apache Junction, Arizona. Therefore, the responses to this joint discovery were initially due the first week of July 2001. Objector Hjartarson did not contact any of the Settling Parties to request an extension of time regarding the July deadline.

On July 18, 2001, the Settling Parties filed a "Motion and Supporting Brief for Partial Summary Judgment and the Dismissal of Objectors Ronald W. Butler, Hjortur Hjartarson, dba H & J Quarters, Inc., and Lyle K. and Barbara B. Ophus," (July Summary Judgment Motion). The motion and brief were based on the failure of these objectors to respond to the joint discovery requests.

Thereafter, the Settling Parties agreed to allow Objector Hjartarson and the other three objectors addressed in the July Summary Judgment Motion until September 1, 2001, to file their responses to the joint discovery. See Notice of Stipulated Extension of Time Within Which to Respond to Discovery, Motion to Stay Proceedings on the Settling Parties' Motion for Partial Summary Judgment and Dismissal of Objectors Butler, H & J Quarters, and Ophuses, and Request for Telephonic Status Conference filed August 2, 2001.

On August 13, 2001, this Court conducted a telephonic status conference with representatives of the Settling Parties and all but one of the remaining objectors. See Court Minutes and Scheduling Order filed August 14, 2001. Although duly ordered to use the Court's toll free number to access the telephone conference, Objector Hjartarson did not do so and did not attend the conference call. Id. at 1. During the status conference, the Court reviewed the "applicable discovery deadlines and discovery procedure, appropriate contact by litigants, Water Court Rules and Procedures, and how to establish a primary contact attorney for the Settling Parties." Id. at 1. The Settling Parties proposed a further extension of time --until September 14, 2001 --within which responses by any of the objectors to the outstanding joint discovery requests of the Settling Parties must be served. With this extension, the objectors had approximately three and one-half months within which to respond to the joint discovery requests. Objector Hjartarson never responded and never filed answers to the discovery requests, including requests for admission (RFA).

Objector Hjartarson was asked the following requests for admission:

- Admit that the Compact is consistent with state and federal law relating to the settlement of federally reserved water rights claims of Indian tribes in Montana. (RFA No. 16.)

- Admit that the Compact, in conjunction with the federal legislation, furthers legitimate state purposes such as settling water rights claims of Indian tribes and protecting existing water rights recognized under state law. (RFA No. 17.)

- Admit that the quantification of the water rights for the Reservation as set forth in Article 111, Article IV, section A. 8, and Appendix I of the Compact is scientifically, legally, and technically valid. (RFA No. 18.)

- Admit that other than the 10,000 acre-feet of water from Lake Elwell, the Tribal Water Right is appurtenant to lands held in trust for the Tribe by the United States constituting the Rocky Boy Reservation. (RFA No. 19.)

- Admit that the Compact is fundamentally fair, adequate, and reasonable, and that it conforms to applicable law. (RFA No. 20.)

Objector Hjartarson, whose claims to water rights are located in the Marias River Basin upstream of Lake Elwell, expressed concern in his objection about reservoirs drying up and was also asked the following requests for admission:

- Admit that the place of use of the water rights in which you claim an ownership interest is upstream of Lake Elwell. (RFA No. 7.)

- Admit that the sources of supply for your claimed water rights are Spring Coulee, Kapp Spring, Hartman Spring, and the Marias River, and that your points of diversion (or on stream reservoirs) are upstream from Lake Elwell. (RFA No. 8.)

- Admit that the priority date of the Tribe's storage right in Lake Elwell is the same as that of the storage rights of the United States in Lake Elwell, namely August 1952. (RFA No. 13.)

- Admit that none of the water rights in which you claim an ownership interest has ever been called out of priority by the United States exercising its storage rights in Lake Elwell behind Tiber Dam. (RFA No. 14.)

- Admit that your water right(s) have not been and will not be adversely affected by the Tribe's right to 10,000 acre feet of storage water in Lake Elwell behind Tiber Dam. (RFA No. 15.)

**Discussion**

Objector Hjartarson has never responded to the Settling Parties' discovery nor has he ever

requested an extension of time within which to respond to this discovery at any time since its delivery to him on June 5, 2001. Thus, he is in violation of this Court's Scheduling Order, which required that all responses by the objectors to the outstanding discovery requests of the Settling Parties be served on or before September 14, 2001. (Court Mins. & Sched. Order at 3, Aug. 14, 2001.) Further, Objector Hjartarson was ordered to participate in the Court's telephone conference call on August 13, 2001. In that conference call, the Court discussed the applicable rules and time schedules with the Settling Parties and objectors. As noted, Objector Hjartarson did not attend this conference. As stated in this Court's Scheduling Order:

> Failure to comply with the terms of this Order may result in sanctions, **up to and including entry of default and . . . the dismissal of objections thereto.** Any request for a continuance must be made before the scheduled deadlines, in accordance with Uniform District Court Rules 2 and 3, and must include a showing of good cause.

(Court Mins. & Sched. Order at 3, Aug. 14, 2001.) (emphasis in original). Objector Hjartarson is in violation of this Order. After filing his objection on October 10, 2000, Objector Hjartarson never contacted the Court again, never responded to any of the Settling Parties regarding the joint discovery requests, and did not participate any further in any aspect of this case. A party displaying an attitude of unresponsiveness to the judicial process warrants the imposition of sanctions, including dismissal. Landauer v. Kehrwald, 225 Mont. 322, 325, 732 P.2d 839 (1987) and Smith v. Butte-Silver Bow County, 276 Mont. 329, 916 P.2d 91 (1996). On the basis of unresponsiveness alone, it would be appropriate to dismiss Objector Hjartarson's objection. However, the Motion for Partial Summary Judgment broadens the basis supporting a dismissal of Objector Hjartarson's objection.

Motions for summary judgment are governed by Rule 56, M.R.Civ.P. Rule 56(c) provides that:

> [t]he motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

Rule 56(c), M.R.Civ.P. The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials. Klock v. Town of Cascade, 284 Mont. 167, 173, 943 P. 2d 1262 (1997) citing Berens v. Wilson, 246 Mont. 269, 271, 806 P.2d 14, 16 (1990).

The Court is required to render judgment in favor of the party requesting summary judgment if the record demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Once the moving party has sufficiently demonstrated the absence of any genuine material fact issues, the burden shifts to the non-moving party to demonstrate the existence of material fact issues rendering summary judgment improper. Thelen v. City of Billings, 238 Mont. 82, 85, 776 P.2d 520 (1989).

Generally, failure to file an answer brief to an adverse motion, as Objector Hjartarson has done here, is considered an admission that the motion is well taken. Rule 2(b), Montana Uniform District Court Rules. However, in the case of summary judgment, Rule 56(c) (quoted above) contemplates that the party opposing the motion may serve opposing affidavits raising a genuine material fact issue up until the day prior to hearing. Thus, the general rule is that where the motion is one for summary judgment, the essential question for the Court is whether a genuine issue of material fact exists, and this question cannot be decided on a mere technical fact, such as the failure to file briefs on time. Cole v. Flathead County, 236 Mont. 412, 416, 771 P.2d 97 (1989). Because a factual issue may be raised by opposing affidavits served the day prior to the time set for hearing, the general rule is that unless the right to a hearing on a Rule 56

motion is specifically waived by all parties, either the movant or the adverse parties are entitled to a hearing in the ordinary case. Cole, 236 Mont. at 419. Simply failing to file briefs on time does not amount to a specific waiver of the right to a hearing under Cole.

Notwithstanding this general rule, it is not necessary for the Water Court to hold a hearing on the Motion for Partial Summary Judgment directed at Objector Hjartarson. The facts of this case distinguish it from "the ordinary case" presented in Cole. Here, Objector Hjartarson failed to respond to the Court's orders, failed to respond in a timely manner to discovery requests made pursuant to Rule 36, M.R.Civ.P., and then failed to respond to the Settling Parties' Motion for Partial Summary Judgment.

Pursuant to Rule 36, Objector Hjartarson was asked to admit the truth of the several statements of fact set forth earlier. Failure to respond to a Rule 36 request carries with it consequences independent of Uniform District Court Rule 2 and Rule 56. Rule 36(a) provides that a request for admission is deemed admitted unless answered or objected to within thirty days after service of the request. Rule 36(b), M.R.Civ.P. then provides that "[a]ny matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." (Emphasis added.)

Several cases have held that admissions obtained by use of Rule 36 may show that there are no genuine issues of material fact and justify the entry of summary judgment. See Holmes & Turner v. Steer-In, 222 Mont. 282, 721 P.2d 1276 (1986)[1]; Morast v. Auble, 164 Mont. 100, 105,

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[1]For example, in Holmes, the sole factual allegation in the complaint was as follows:

> Defendants, and each of them, owe plaintiff SIX THOUSAND THREE HUNDRED THIRTY FIVE DOLLARS ($6,335.00) for accounting services rendered by plaintiff to defendants, and each of them, between July 15, 1980 and January 5, 1981, with interest at the rate of eighteen percent (18%) per annum.

Defendants denied this allegation in their answer and alternatively pled the affirmative defense of failure of consideration. Later, the plaintiffs made the following request for admission pursuant to Rule 36 M.R.Civ.P.:

> Admit that the Defendant Steer-In owes Plaintiff the sum of $6,335 plus interest at the

519 P.2d 157 (1974), citing 8 Wright & Miller, Federal Practice and Procedure: Civil Section 2264. These cases were decided prior to Cole and the issue of the necessity for setting a hearing was not addressed. Regardless, these cases can be reconciled with Cole. Cole specifically recognizes that there are exceptions to the hearing requirement:

> . . . unless the right to a hearing on a Rule 56 motion is specifically waived by all parties (and not waived simply by the failure to file briefs) either the movant or the adverse parties are entitled to a hearing under Rule 56 in the ordinary case. There may be an occasion when under the law and the facts adduced, the movant would be so clearly entitled as a matter of law to a summary judgment that a district court might by order dispense with the necessity of a hearing.

Cole, 236 Mont. at 419 (Emphasis added). This Court concludes that a grant of summary judgment without a hearing based on material facts deemed admitted under Rule 36 and coupled with a complete failure of Objector Hjartarson to otherwise participate in the judicial proceedings is a proper exception to the hearing requirement of Cole.

By failing to respond, Objector Hjartarson has admitted that the RB Compact is scientifically and technically valid, that it is fundamentally fair, adequate, and reasonable, and conforms to applicable law, that none of the Objector Hjartarson's water rights have ever been called out of priority by the United States exercising its storage rights in Lake Elwell behind Tiber Dam and that his water rights have not been and will not be adversely affected by the Tribe's exercise of its right to 10,000 acre feet of storage water in Lake Elwell behind Tiber Dam

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> rate of 18% per annum for accounting services rendered by Plaintiff to Defendant between July 15, 1980 and January 5, 1981.

Over eight months passed between the time Steer-In was served with the request and when the Court issued its Order deeming the facts in the request admitted and granting summary judgment to the plaintiff. The Supreme Court affirmed, holding that summary judgment based on a fact deemed established by the operation of Rule 36, M.R.Civ.P. was proper. The Court reasoned that once the particular request was admitted, there could no longer be any issues of fact for determination at trial. The Court further noted that "the very purpose of Rule 36 is to lessen the time of trial and ultimately to set the stage for summary judgment." Holmes, 222 Mont. at 283-285.

under the RB Compact. These admissions remove any potential issues of fact regarding Objector Hjartarson's objection.

Section 85-2-233(1), MCA, provides that a person is entitled to a hearing on an objection to a temporary preliminary or preliminary decree "for good cause shown." The section further defines "good cause shown" as "a written statement showing that a person has an ownership interest in water or its use that has been affected by the decree." Section 85-2-233(1)(b), MCA.

By failing to respond to the requests, Objector Hjartarson has admitted that good cause did not exist for the filing of his objection to the Compact and does not exist for the continued prosecution of his objection. A fact deemed admitted by the operation of Rule 36, M.R.Civ.P. is conclusively established. The burden has shifted to Objector Hjartarson to raise a genuine material fact issue regarding the validity and effect of the Compact, and the efficacy of his objection. Thelen, 238 Mont. at 85. To do this, Objector Hjartarson would need to file late answers to the requests for admissions. Objector Hjartarson has not attempted to file or sought leave of court to file any late answer. Further, a party has no absolute right to file late answers to requests for admissions. The matter rests within the discretion of the trial court, and the court's decision will not be disturbed in the absence of a manifest abuse of discretion. Rule 36, M.R.Civ.P.; Swenson v. Buffalo Building Co., 194 Mont. 141, 148, 635 P.2d 978 (1981).

More than four months have passed since the deadline expired for Objector Hjartarson to respond to the joint discovery requests. Objector Hjartarson did not file timely answers or request leave of Court to file late answers to the discovery requests since the last extension was granted. More than fifteen months have expired since Objector Hjartarson filed an objection to the RB Compact and neither the Court nor the other parties have received any further filings from him. For whatever reasons, Objector Hjartarson has chosen to take no further action to

support his objection after its initial filing.

The Court finds no need under the circumstances of this case to conduct any hearing related to Objector Hjartarson's portion of the Settling Parties' motion. Under the law and facts presented in their motion, and based on Objector Hjartarson's failure to respond to discovery or participate in this case in any manner other than filing his initial objection, the Settling Parties, as the movants in this motion, are "so clearly entitled as a matter of law to a summary judgment," that this Court will "by order dispense with the necessity of a hearing." Cole v. Flathead County, 236 Mont. 412, 419, 771 P.2d 97, 101 (1989).

**ORDER**

Based on the above, it is

ORDERED that the facts stated in the Settling Parties' requests for admissions are **DEEMED ADMITTED** with respect only to Objector Hjartarson, *dba* H & J Quarters, Inc.;

ORDERED that the Settling Parties' Motion for Partial Summary Judgment against Hjortur Hjartarson, *dba* H & J Quarters, Inc. is **GRANTED** without need of any further hearing, and

FINALLY ORDERED that the objection of Hjortur Hjartarson, as an individual, and *dba* H & J Quarters, Inc., is hereby **DISMISSED** and the name of Hjortur Hjartarson, *dba* H & J Quarters, Inc. shall be deleted from all future service lists in this case.

DATED this 25 day of January, 2002.

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