IN THE WATER COURT OF THE STATE OF MONTANA CONFEDERATED SALISH AND COOTENAI TRIBES MONTANA - UNITED STATES COMPACT

CASE NO. 2C-0001-C-2021

The Montana Water Court is urged to, and frankly, must deny the joint motion of the State of Montana (“State"), the Confederated Salish and Kootenai Tribes ("Tribes") and the United States of America on behalf of the Tribe ("United States; as to the adjudication of Water Rights on and off the Confederated Salish Kootenai Reservation, as that adjudication is outlined in the Preliminary Decree in its entirety and to all portions of the Compact for the following reasons:

1. It is the job of the Montana Water Court to adjudicate the water rights claims before it. The Confederated Salish Kootenai Tribes (hereinafter CSKT) are required to quantify their water rights when and as submitted. The Preliminary Decree circumvents that process and sets forth water rights 11claims” that are simply an all-encompassing overreach of unsubstantiated and unprecedented claims to the right to all water without properly quantifying or "proving up" a claim. As a landowner and owner of water rights properly filed with the Montana Department of Natural Resources and Conservation (“DNRC"), the Preliminary Decree adversely affects my inalienable rights of life, liberty and property, and specifically my rights to water as those pertain to the property I own, and to which those rights are attached, and for which I have filed a valid claim with the DNRC.

The Preliminary Decree and the Compact both attempt to allocate CSKT water rights in a manner which departs from any existing law (*In re Blackfeet Tribe Compact, 2020 Mont. Water*), are both incomplete and vague and ambiguous, not prepared in good faith by the parties thereto (CSKT, State of Montana and the United States), and the very reading of those documents smacks of fraud and collusion between those parties. The Preliminary Decree and Compact *both* fail to reflect the actual interest of the CSKT as well as the unalienable rights of the citizens of the State of Montana and of the United States of America's valid water rights claims which, by law, supersede the CSKT and United States water right reserve claim to all of the water and water rights on and off the reservation.

2. Documentation for Water Rights Claims are attached hereto as Exhibit "A".

As this Court Is aware, the Legislature over the years, since the 1855 Hellgate Treaty, has addressed the rights of Tribal Members and Homesteaders to irrigation as well as ground water through a compilation of Acts and The Treaties. The allocation of water to an Indian allotee as the predecessor in interest In the chain of title entitles such a user to receive a reserved water right with a priority date consistent with all other reserved water rights, whether given the priority date of "time immemorial• or an “aboriginal" water right. Federal Law recognizes Indian and Walton reserved water rights as appurtenant to the lands upon which they are used. The process used in the Preliminary Decree and Compact by which the CSKT and United States are awarded a "big bucket" of water, strips all other formerly adjudicated water rights holders, including Walton Rights and Secretarial Water rights

holders of their water rights and Is beyond the jurisdiction of this Water Court. The Water Court must award water rights *to the land*, and adjudication of water rights to the Tribes and the United States Is not the proper use of the Water Court1s function in adjudication process. Further, this Court cannot simply adjudicate *previously* legally valid water rights claims, including Walton Rights Claims and Secretarial. Water Rights, to the CSKT and United States, at the very least, without properly developed, quantified, and defined claims filed by the CSKT and the United States. Any decree from this Court should state that water rights are appurtenant or attached to the land, ensuring that the landowners will continue to receive water in the future.

Multiple Treaties and Acts of the Flathead Indian Reservation address the issue of water to both Indian Allotees and Homesteaders, including the Ad of August 9, 1912 (37 Stat. L., p. 265), approved and enacted by the Senate and House of Representatives of the United States of America in Congress, which states that under the reclamation Act of June 17, 1902, all entrymen on ceded Indian lands receive a patent or certificate once all sums are paid to the United States and that every patent or certificate shall be entitled to a final water-right certificate upon proof of cultivation and reclamation to *all water appurtenant or belonging to said land.*

A. The effects due to the early implementation of the Compact have been felt over the last decade. The implementation of the Compact began well before its passing, and since officially becoming effective in September 17, 2021, has been detrimental to this irrigator with historical water right claims to irrigation waters administered by the Flathead Irrigation Project. Since the beginning of the implementation, there have been material and costly reductions in the delivery of irrigation water due to the new Water Management Board and Unitary Administration and Management Board authorized by the Compact. The amount of water delivered for irrigation and stock water, compared to the historically documented delivery, despite the fact that this Water Court has not completed the adjudication of the water rights claims in Basin 76L, has been significant. The reduction in irrigation under the new Flathead Irrigation administration has resulted in lack and complete loss of stock water and loss of water for irrigating hay and grazing land causing immeasurable financial damage to this water user. Historically the Project began delivery on the 15th of April every year and used September 15th as the shutoff date. However, over the last several years, Project waters have not delivered until the second or third week of June and delivery ended late August or the first week of September.

Irrigation water and water in the ditches for stock up until the implementation of the unadjudicated right by the Tribes, has historically been available to order from April 15th until September 15th since the tine our property was purchased in 1997. In 2021 water was not available until late May and turned off the last week in August. In 2022, water was not made available until June 4th, and was turned off on September 4th• The oats, peas, barley, turnips, and radishes planted harvested 4 tons per acre of hay, plus there was sufficient irrigation water for grazing for our cattle in 2017. However, in 2018, production was down to 2 tons per acre and in 2022, down to 1 ton per acre, with alfalfa grass hay

production reduced 2/3rds, and a shortened grazing season resulting in supplemental feeding.

It is our children's intention to take over the ranch and continue to raise high quality Black Angus cattle for sale for breeding stock and feeder calves. But with the continued restriction on both irrigation and stock water, it is doubtful that they will be in a position to continue to carry on the ranching tradition.

B. The Preliminary Decree and Compact authorize allocation of water to instream flow and fishery uses, which have and will continue to arbitrarily vary from year to year, resulting in a lack of water for historical and previously adjudicated water for irrigation, stock and other uses, including on our property.

C. The "claimed" CSKT water rights in the Preliminary Decree and Compact will result in the material injury to this water user's water right given the large quantity, the priority date, and vague description of types and places of use. The CSKT may initiate water calls at any time against this water user's claim for any purpose" with no set flow rate and with diversion allowed by •any means", which leaves the means to precisely assess the Impact to or the protection of water rights claims unmeasurable at any given time, leaving the water rights user with an unknown and uncertain future.

Under *Winters v. United States,* 207 U.S. 564 (1908), to which this case is strikingly similar, individual "Indian allottee[s] may sell [their) right to reserved water which is applicable, or appurtenant to their land, and the non-Indian purchaser acquires a right, with a prior date the date of the establishment of the Reservation, to the water that is put to beneficial use with reasonable diligence after the passage of title to the land. The State of Montana has long recognized water rights as an interest in real property. Previously adjudicated water rights are a legally recognized and constitutionally protected property right and are water rights that have been put to beneficial use for their intended purpose since the occupation of the State of Montana.

3. The State of Montana - Confederated Salish and Kootenai Tribes Water Rights Compact of 2015 (Compact), ergo the subsequent Preliminary Decree, is <u>not</u> a valid legal document for adjudication of water rights for the citizens of the State of Montana, despite the process by which it has been supposedly vetted. The Compact was passed illegally through the Montana Legislature in the 2015 session. A simple majority was used to pass the compact, although a <u>super</u> majority was required. An improper/illegal amendment to the rules was passed by the Committee on Rules despite objections to the validity of the amendment as shown in the *Transcript of Committee on Rules, April 15, 2015*.

Although the Water Court has stated that it is not its "job" to determine the validity of the Compact itself, the Water Court must not base its determination on the "validity" on illegally passed legislation or the Preliminary Decree which is a result of that Illegal action.

4. Adjudication of Water Rights as outlined in the Water Compact via the Preliminary Decree, clearly violates the Montana Constitution as well as the United States Constitution

and is an Illegal taking of personal property rights without compensation. The Findings of Fact. Conclusion of Law and Fact of Mandate issued by the Honorable C.B. McNeil when the Preliminary Injunction was issued in the matter of the Compact Water Use Agreement in February 15, 2013 is applicable to the Preliminary Decree in its entirety, see attached Exhibit "B." The arguments and points of law contained therein are continuing issues and concerns with Water Compact and trickle down to the Preliminary Decree as presented to this Water Court for adjudication of Tribal Water Rights. These issues and concerns give us standing in this matter as it affects our own water rights and is a taking without compensation.

A. The Constitution of the State of Montana:

Article IX, Section 3 of the Montana Constitution recognizes and confirms all existing rights to the use of any waters for beneficial purposes, and provides that all waters within the boundaries of the State are the property of the State *subject to appropriation for beneficial uses as provided by law.* This includes appropriation for beneficial uses for both Tribal and Non-Tribal Members. We already have our water rights which set out our beneficial use adjudicated by this Water Court. Re-adjudication without any quantification or proof of beneficial use by the Tribes, without any further compensation to us, is a taking and violates our personal property rights.

The State of Montana owns and holds the waters of the State of Montana in trust for its citizens. While the citizens of Montana include both Non-Tribal and Tribal individuals, adjudicating a previously adjudicated senior water right and essentially transferring ownership of waters above and beneath the land to the Federal Government, to be held "in trust" for the Tribes, is a taking and outside the scope of the powers of the State as outlined in the Montana Constitution as well as this Montana Water Court. The State of Montana *cannot* through the Preliminary Decree or Compact bargain away its statutory and constitutional obligation to administer the water rights within the State of Montana.

There is no support, as Is required for the adjudication of water rights, for the unprecedented overreaching of this joint motion and the Compact as to off-reservation waters. Using an "aboriginal" (senior) water right to be held co-jointly with Fish, Wildlife & Parks ("FWP") on instream flows on off-reservation waterways, which rights will trump FW&P and enable the United States Government, via the Tribes, to set minimum instream flows on off-reservation waters, is not a proper quantification of a water right by any stretch. This action constitutes a taking of a right without sufficient process against a citizen of the State of Montana. The State of Montana has no authority to transfer ownership of the waters by stipulation, legislation, or otherwise, and all references in the Preliminary Decree and Compact to joint ownership of the water and water rights are in violation of the Montana Constitution.· Neither the State of Montana, nor this Water Court by adjudication, can transfer a right to the ownership of water.

Article 11. Section 16 of the Montana Constitution provides that Courts of justice shall be open to every person and speedy remedy afforded for every injury of person, property or

character. The Montana Water Court must continue to have jurisdiction over settling water disputes, not the Tribes, the United States, and/or the “Project Administrators or Operator(s}". The Preliminary Decree and Compact *both* provide unprecedented jurisdiction over non-tribal members with valid legal water rights claims and their lands, Walton right water holders, and state-water holder rights.

The Preliminary Decree specifically provides that the Tribes, the United States, and the Project Administrator(s)/Operator(s} determine the appropriation of water usage for Tribal and Non-Tribal Members, and have sole authority to terminate the same. This will deprive Montana citizens, particularly Non-Tribal citizens, living both within the Reservation and those living outside the Reservation but subject to any of these adjudicated water rights, of their previously filed water rights without sufficient or adequate recompense or recourse as to their individual rights in the prioritization of water rights.

Article II. Section 17 of the Montana Constitution provides that no person shall be deprived of life, liberty or property without due process of law. While the Montana Legislature apparently passed the Compact in the 2015 session, it was not passed with a super majority, thereby making that action Invalid as It relates to the holders of water rights within the off-reservation areas as well as those holders of water rights on the reservation, be they Tribal or Non-Tribal. Therefore, this Court has the obligation to examine the Preliminary Decree, Compact, and the process by which the Compact was approved at the State and Federal levels and determine whether there are sufficient processes and protections for both Tribal and Non-Tribal individuals who may be impacted by this process. In this instance, because of the manner of passage of this Compact, there are insurmountable issues which must be resolved by denying this joint motion and directing the Parties to rectify the issues related to the Preliminary Decree and Compact before representing their motion. Only in this way can it be said that holders of water rights in this area have had due process under the law.

Article II, Section 29 prohibits the taking of private property without just compensation.

The adjudication of water rights to the Tribes is a. depredation and taking as and from those not affiliated with the Tribes. As such, those with rights which have a history equally as long and traceable as those of the Tribe are suffering a usurpation of their property rights without either just compensation or sufficient recourse to protect them from manipulation or other restriction as to access. As we are holders of water rights, this applies to us and gives us standing to file this Objection.

The Winter's Doctrine makes it clear that while the Supreme Court recognized the Indian Nation reserved water rights in *Winters v. United States*, 207 U.S. 564 (1908), the decision limited the extent of such reserved water rights to those necessary to fulfill the purpose of the reservation. Again, the Preliminary Decree, and the Compact, show a sweeping overreach regarding the taking of individual water rights such as ours.

No proof has been established by the Tribes that the water that the tribe is claiming is necessary to fulfill the "purpose" of the reservation. Putting meters on domestic wells on the reservation and charging homeowners for water, which is appurtenant to the land and was included with the lawful purchase of the land, or shutting off stock water to the ranchers/farmers is clearly a taking of private property without compensation. Indiscriminate calls on water and limitations on water uses at the discretion of the Tribe, with no recourse for appeal or to curb abuses, drives down land prices and harms every landowner.

The irrigation water on the reservation has already been transferred to the Federal Government "in Trust' for the Salish and Kootenai Tribes. Irrigation water use on our property has already been affected by late tum-on in the spring and early shut-off in late summer which affects our ability to graze and make hay on our property. We are being denied use of water we have a right to use and which we pay for and was previously filed on and taken, without any reasoning or compensation for lost income from the lack of hay production, requiring the purchase of additional hay from other sources to feed livestock. We have no guarantee that our previously filed and legal water will be honored to provide us with sufficient water other than the arbitrary statements in the Preliminary Decree set before this Court and requesting adjudication.

The Treaty of October 17, 1855, Article 3, states that off reservation lands:

"shall be a common hunting-ground for ninety-nine years. where all nations. tribes and bands of Indians. parties to this treatv. may enioy equal and uninterrupted privileges of hunting. fishing, and gathering fruit, grazinq animals, curing meat and dressing robes" ...

According to the very terms of the Treaty. there is no support for the unprecedented overreaching off reservation that they are proposing. The Tribe is claiming "aboriginal" (senior) water rights to be held co-jointly with Fish, Wildlife & Parks on Instream flows on off reservation waterways. including the Blackfoot River, Clark Fork River, and Swan & Seely Lake waters, as well as many other streams and tributaries. The Tribe's water rights will trump FW&P and enable them to set minimum Instream flows on off reservation waters with insufficient recourse to challenge such actions, and inappropriate protections for those adversely affected and particularly those without Tribal affiliation, of which we are not Tribal Members and are adversely affected.

B. The United States Constitution

Fifth Amendment - The takings clause in the Fifth Amendment strikes a balance between the rights of private property owners and the right of the government to take that property for a purpose that benefits the public at large. The current water rights claims set forth in the Preliminary Decree clearly result in fee lands, including our land, suffering partial if not total loss of value without water rights. Irrigated lands with water rights are more valuable than irrigable fee lands with no water rights. Any restriction on the free flow of water, either via well use or irrigation, would significantly reduce the value of our property.

The Treaty of 1908, which allotted lands to the Indians by fee patent, provided the fee owner of the land, whether Indian or the successor in interest of an Indian allottee, the right to the use of such an amount of water "as may be required to irrigate such land" and that right was conveyed with the land. The Preliminary Decree is not only a taking of the documented and quantified right to irrigation, stock water, & well water, which is appurtenant to the land, but a taking of the land itself.

Tenth Amendment - The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Granting the Federal Government, through the Tribes, ownership rights as to the Irrigation waters of the Flathead Irrigation Project is a taking and an illegal action.

The Preliminary Decree is based on language of the Compact which states that the CSKT 'reserved [its] water rights" under the Hellgate Treaty of 1855, which is an incorrect statement of Federal Law. Reserved water rights for tribal entities, again, arose from the U.S. Supreme Court case of *Winters v. United States*, 207 U.S. 564 (1908). Federal reserved water rights are tied to the reservation(s). And in *United States v. Adair*, 478 F. Supp. 336, 345 (D.Or. 1979), the Court stated that the Government impliedly reserves appurtenant unappropriated water to the extent needed to fulfill the purposes of the reservation. Further in *United States v. Adair*, 723 F.2d 1394, 1419 (9th Cir. 1983), the Court stated that "the purpose of the federal reservation of land defines the scope and nature of impliedly reserved water rights." The Water Court is a state court with a 'solemn obligation to follow federal law", In re *Blackfeet Tribal Compact*, 2020 Mont. Water LEXIS 770 at 16 (quoting *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983)). The formulation of Winters water rights as federal reserved rights is still the law in the 9th Circuit, and was reiterated recently in *Navajo Nation v. U.S*. DOI, 26 F.4th 794,801 (9th Cir. 2022), ..the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation" (emphasis added) (citation omitted). The Court in *Adair*, 723 F.2d at 1415, specifically states that On-reservation Federal reserved water rights under *Winters* have a priority date as of the date of the creation of the Reservation, because they were reserved by the United States upon the creation of the Reservation.

The Federal Government, through the Tribes, should be granted water rights based on the quantification of their water rights, which is adjudication of water according to what they put to beneficial use. This is the jurisdiction of the Water Court, and the responsibility of the Water Court after weighing the rights presented. Neither the Tribes, nor the Federal Government which, under the Compact, ergo, the Preliminary Decree, purports to hold their water rights "in trust". should be granted a water right or water rights that are not properly based on quantification of their water rights. Only in this way can each and every citizen, whether Tribal or Non-Tribal, be assured that their individual rights to water, as granted through t e transactions documented as to property ownership, are protected and free from illegal usurpation.