**SAM HIRSCH**
**Acting Assistant Attorney General**
**DAVID W. HARDER**
**Indian Resources Section, Assistant Section Chief**
**United States Dept. of Justice**
**Envt. and Nat'l Res. Div.**
**999 18th Street**
**South Terrace, Suite 370**
**Denver, Colorado 80202**
**(303) 844-1372**

**TIMOTHY C. FOX**
**Attorney General**
**JEREMIAH D. WEINER**
**Assistant Attorney General**
**215 North Sanders**
**P.O. Box 201401**
**Helena, Montana 59620-1401**
**(406) 444-2026**

**NATHAN A. ESPELAND**
**Espeland Law Office PLLC**
**Attorney for Crow Tribe**
**P.O. Box 1470**
**Columbus, MT 59019**
**(406) 322-9877**
**(Additional counsel listed in Signature Block)**

**IN THE WATER COURT OF THE STATE OF MONTANA**

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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 CROW TRIBE OF INDIANS OF THE STATE OF MONTANA | ) | **CASE NO. WC-2012-06** |

**REPLY IN SUPPORT OF MOTION BY THE CROW TRIBE, THE STATE OF MONTANA AND THE UNITED STATES OF AMERICA FOR APPROVAL OF THE CROW TRIBE-MONTANA COMPACT AND FOR SUMMARY JUDGMENT DISMISSING OBJECTIONS**

The Crow Tribe, the State of Montana, and the United States of America (collectively the "Settling Parties") submit this reply in support of their motion for approval of the Crow Tribe-Montana Compact ("Compact") and for summary judgment dismissing the objections of the

Green Objectors. The Green Objectors have failed to identify any genuine issue of material fact sufficient to preclude the summary dismissal of their objections and have raised no legally sufficient ground to carry their heavy burden to justify the voiding of the Compact.

In their response ("Resp.") to the Settling Parties' motion ("Mot."), the Green Objectors fail to rebut the presumption of reasonableness. They advocate for and apply the wrong standard of review for heightened review (a good cause standard rather than material injury), and their challenges to the reasonableness and lawfulness of the Compact fail as a matter of law. Many of these arguments are cut and pasted verbatim from their objections, without being at all responsive to the arguments in the Settling Parties' motion. The remaining arguments raise entirely new and erroneous points well outside the scope of the objections they filed. The scattershot, shifting, and unsupported nature of the response is, if anything, only confirmation that a presumption of validity for the Compact is well-founded, that the Compact is reasonable and within the authority of the Settling Parties to adopt, and that it should be approved by this Court.

## I. THE COMPACT IS PRESUMPTIVELY VALID, AND THE GREEN OBJECTORS RAISE NO COGNIZABLE ALLEGATION OF FRAUD, OVERREACHING, OR COLLUSION.

The Settling Parties have shown that the Compact was the product of good-faith, arm's-length negotiation, and is therefore presumptively valid. Mot. at 10-11. As a matter of law, nothing the Green Objectors now argue defeats that showing.

The Green Objectors did not allege in their objections that the Compact was the product of fraud, overreaching, or collusion, as required to prevent the presumption from arising. *See Memorandum and Order Approving Fort Peck-Montana Compact*, Cause No. WC-92-1 at 6 (filed August 10, 2001) ("*Fort Peck Memorandum*") (quoting *Officers for Justice v. Civil Service*

*Commission,* 688 F.2d 615, 624-25 (9th Cir. 1982)). Their filed objections were based on due process and takings arguments, which they have largely abandoned. *See* discussion below at section III.B. They now belatedly argue that the Compact is the product of "overreaching." Resp. at 14, 15, 16, 23. Like many other arguments in their brief, this primary argument is barred by statute because it was not specifically raised in their written objections. Under Mont. Code Ann. § 85-2-233(2), "[o]bjections must be filed with the water judge within 180 days after entry of the temporary preliminary decree or preliminary decree" except insofar as the time is extended by the Water Court, and objections "must specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request ***must state the specific grounds*** and evidence on which the objections are based." Mont. Code Ann. § 85-2-233(4) (emphasis added). Only an objection that satisfies these mandatory criteria can provide a basis for voiding a compact under Mont. Code Ann. § 85-2-233(8). From these statutory requirements that objections seeking to void a compact must be timely filed and "must state the specific grounds" on which they are based, it follows that objectors are not free to raise entirely new objections in later briefing. The Green Objectors' belated central argument must be rejected summarily.

In any event, their spurious assertion of "overreaching" is legally inadequate because they misconstrue the term. The Green Objectors take the reference to "overreaching" in *Fort Peck* and *Officers for Justice* to mean that the Court must void a Compact that is adjudged to be *too favorable* to one party. They argue that there is "overreaching by the Tribe in the amount of water it has reserved." Resp. at 15. And after offering their expert's opinion that the Compact provides "an average annual excess of 236,144 AFY that cannot be used by the Tribe," they then argue that this "makes the Compact overreaching." Resp. at 15-16. This argument demonstrates

a fundamental misunderstanding of what overreaching is. It is "[t]he act or an instance of *taking unfair commercial advantage* of another, esp[ecially] by fraudulent means." "Overreaching," *Black's Law Dictionary* (9th ed. 2009) (emphasis added). As a term referring to unethical (and especially fraudulent) acts, it keeps company with "fraud" and "collusion" in the phrase "fraud or overreaching by, or collusion between the negotiating parties." The Green Objectors did not allege any such impropriety in their objections and have not shown any in their response brief.

To allege overreaching, it simply is not enough, as a matter of law or even simple semantics, for an objector to challenge the quantification of a tribal water right as too generous to the Tribe; there must be some credible allegation of impropriety or fraud. To hold otherwise would denigrate the Montana legislature's broad powers to settle disputes over reserved water rights and, in so doing, would contravene this Court's precedents. Although the quantification in the Compact is well within the range of potential litigation outcomes[1], it need not be to enjoy the presumption of validity. Under the *Fort Peck* standard:

> As long as the State acts within the parameters of the State and federal constitutions, Montana has broad authority over the administration, control and regulation of the water within the State boundaries. Accordingly, if the State negotiates, approves, and ratifies a compact that grants *more* water to a reserved water right entity than that entity might have obtained under a strict adherence to the 'limits' of the Reserved Water Right Doctrine through litigation and does so without injuring other existing water users, the State is effectively allocating and distributing surplus state waters to that entity to resolve a dispute. In the absence of material injury to existing water users, the merits of such public policy decisions is for the legislature to decide, *not* the Water Court.

*Fort Peck Memorandum* at 15 (quoted in Mot. at 16-17) (emphases added). It follows from this standard that even a generous quantification, without more, cannot constitute "overreaching" and

[1] As many exhibits (particularly the Alden, Aldrich and Tweeten Affidavits and the Staff Report) attached to the Settling Parties' Motion demonstrate, the Green Objectors' challenges to quantification are also incorrect in addition to being irrelevant. But the Court need not address any of their specific contentions because their theory of overreaching fails as a matter of law.

does not overcome the presumption of validity. Therefore, the Green Objectors' challenges to the quantification, and their expert's opinions on that matter, do not as a matter of law rebut the presumption. The Green Objectors' belated argument fails to allege any legally cognizable ground for denying the Compact the presumption of validity.

## II. THE GREEN OBJECTORS DO NOT MEET THE MATERIAL INJURY STANDARD REQUIRED FOR HEIGHTENED SCRUTINY

### A. The Green Objectors' Challenge To The Material Injury Standard Is Incorrect As A Matter Of Law

In light of the presumption of validity, and in the absence of any allegation of material injury to existing water users, this Court's review is limited to whether the Compact is "fundamentally fair, adequate and reasonable, and conforms to applicable law." *Fort Peck Memorandum* at 15. The Green Objectors nevertheless seek heightened scrutiny of the Compact without satisfying the "material injury" standard. In a brief and misguided attack, they admit it is controlling law in this Court but argue that it "has only been accepted by this Court and no other jurisdiction." Resp. at 5. Not only do they ask to contravene precedent, but they cannot and do not challenge the clear logic underpinning that precedent. If there is no material injury, the Montana legislature is, at most, allocating surplus water and cannot be second-guessed. *Fort Peck Memorandum* at 15. Indeed, the Green Objectors' challenge to this standard is incoherent, because the level of any heightened scrutiny is *dependent upon* the level of injury shown—review is only "commensurate with the degree of injury." *Id.* at 8. Without any showing of material injury, there is nothing for any heightened review to be "commensurate with."[2]

[2] Furthermore, the Green Objectors are wrong to suggest, without support, that the material injury requirement is somehow anomalous. The material injury standard is commonly used in a variety of contexts under the law of prior appropriation. *See, e.g.; Montana v. Wyoming*, 131 S.Ct. 1765, 1772 (2011) ("[S]ubject to the fulfillment of all senior users' existing

Contrary to the Green Objectors' argument that a "good cause" standard is "universally applied," they cite no case using such a standard in these circumstances. Indeed, the term "good cause" does not even appear in the one case they do cite, *United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990), which instead applies the familiar reasonableness test. The "good cause" standard is the lower threshold for standing to object and to be heard under Mont. Code Ann. § 85-2-233. *See* Order dated July 30, 2014, at 15. By contrast, a higher threshold—material injury—must be met to obtain heightened scrutiny. The *Fort Peck* decision makes this distinction clear, holding that the objectors there had standing but nevertheless evaluating only whether the compact was "fundamentally fair, adequate and reasonable, and conforms to applicable law." *Fort Peck Memorandum* at 8. To accept the Green Objectors' argument in favor of a "good cause" standard would effectively eliminate this distinction. Indeed, that is what the Green Objectors explicitly seek. *See* Resp. at 5 (arguing that "establishing standing" to object should be enough to require "heightened" scrutiny). The Green Objectors' challenge to the Court's established standard of review fails and undermines their brief.

### B. The Green Objectors' Arguments for "Good Cause" Are Irrelevant and Meritless

Section VIII of the Green Objectors' arguments contains a grab-bag of arguments as to why they each "have good cause to object to the Compact." Resp. at 16. These arguments all fail on multiple grounds. First, these arguments are irrelevant because, as just discussed, "good cause" is the standard for standing, not heightened scrutiny. The Settling Parties have not disputed the Green Objectors' standing to object, and "good cause" is therefore not at issue.

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rights, under the no-injury rule junior users can prevent senior users from enlarging their rights to the junior users' detriment") (citing 1 W. Hutchins, *Water Rights Laws in the Nineteen Western States* 573 (1971)).

Second, and equally fatal, none of these arguments were specifically raised in a timely objection and all are barred by Mont. Code Ann. § 85-2-233(4).

Further, even if the arguments had been timely and had alleged material injury, each has additional defects that would cause them to fail as a matter of law.

Quantification Within Drainages

The Green Objectors argue (Resp. at 16-18) that the Tribal Water Right should have been further subdivided and numerically quantified for each drainage[3]; they argue that this would favor them because diversion of the Tribal Water Right might otherwise be concentrated in a particular area and leave insufficient water for other users. This argument simply seeks an additional limitation on the Tribal Water Right that is not a prerequisite for validity of the Compact. In a similar vein, the Court has held that "[a]lthough the parties to a Compact might agree to define allottees' right to use of the Tribal reserved water right, such a definition is not required to achieve settlement." July 30, 2014 Order at 17. Therefore, there is no injury from the lack of additional quantification.

The Green Objectors argue (Resp. at 17-18) that two upstream neighbors using a portion of the Tribal Water Right deplete the stream from which Lyle S. Coburn irrigates, and assert that

[3] To the extent that the Green Objectors are attempting to allege that the Compact has failed to quantify the Tribe's water rights for each drainage affected by the Compact – and that this somehow impugns the validity of the Compact – they are simply mistaken. The Compact very clearly quantifies the Tribe's water rights for each relevant drainage. *See* Mont. Code Ann. § 85-20-901 (Art. III.A.1; III.B.1; III.C.1; III.D.1; III.E.1; and III.F.1). The fact that, for several of the drainages, the quantification does not use a specific volume number does not make it any less of a quantification. Indeed, and as the Court is entitled to take judicial notice of, water rights are routinely decreed by this Court without a specific numeric volume associated with them. And many of the Compacts for Indian Tribes and federal water rights use a non-numeric approach. Affidavit of Chris D. Tweeten ("Tweeten Aff.") (attached to Mot. as Ex. 1) at Staff Report (attached to Tweeten Aff. as Ex. 2), pg. 43; Affidavit of Richard K. Aldrich ("Aldrich Aff.") (attached to Mot. as Ex. 3) at 15, 16.

this is "because there is no quantification as to the amount of water which can be diverted . . . to the Tribe or Tribal Member's property." *Id.* at 17.[4] This example in fact shows precisely why their objection is ill-founded. Even if Objector Coburn could establish that he has been unable to date to achieve a resolution of his water distribution issue with his neighbors[5], the Green Objectors baldly assert but do not explain how that could possibly be attributable to the Compact. Again, "[a]lthough the parties to a Compact might agree to define allottees' right to use of the Tribal reserved water right, such a definition is not required to achieve settlement." July 30, 2014 Order at 17. And it bears noting that resolving any such dispute is complicated by the *lack* of a Compact. Without the quantification of the Tribe's rights and the mechanisms for enforcement that the Compact provides, the resolution of disputes like the one between Mr. Coburn and his neighbors would first require an adjudication of their respective rights. Because (at least as Mr. Coburn and the Green Objectors represent it), his neighbors have rights derived from the Tribal Water Right, that would require the full adjudication of those rights before Mr. Coburn would know where his legally protectable uses stand in relation to his neighbors'. Even then, once all rights on the ditch are determined and thereafter a dispute arises, then the aggrieved parties would still need to figure out which court would have jurisdiction over all of them to resolve such a dispute. The Compact fixes these problems because it determines the Tribal Water Right and provides far simpler administrative recourse, through the delineation of a clear enforcement process—including the establishment of a Compact Board for the resolution of

[4] They also contend that this same "injury" is suffered by every on-Reservation water user who does not divert from the Big Horn River. *Id.* at 17-18.

[5] The Settling Parties do not address the Green Objectors' factual allegations regarding the dispute because they are irrelevant as a matter of law to the review of the Compact.

such disputes without the need to go to court. *See* Compact Art. IV.F. The Compact benefits rather than injures Coburn in the context of this alleged dispute.

Current Use List

The Green Objectors also complain about the current use list under the Compact. Resp. at 18. But they ignore that "[a] current use list is not necessary for approval of the Crow Compact," because the current use list is required only by the terms of the Compact itself, and an objector "cannot assert the terms of the Compact must be enforced at the same time they assert it must be declared invalid." July 30, 2014 Order at 19, 18.[6]

Basin Closure

The Green Objectors next contend that the Compact is harmful because of the hypothetical future effects of the basin-closure provisions, *see* Resp. at 18-20, but in so doing they utterly misapprehend Montana law. While it is undisputed that water rights are property rights, no one has a property right to the mere prospective appropriation of water. "An applicant [for a water right permit] does not have a constitutional right to a water right, only a constitutional right to apply for a permit to obtain a water right." *Westmont Developers Inc. v. Department of Natural Resources and Conservation*, Cause No. CDV-2009-823 (Mont. 1st Jud. Dist., 2011) (attached hereto as Exhibit 3). *See also Seven Up Pete Ventures v. Mont.*, 327 Mont. 306, 316 114 P.3d 1009, 1017-18 (2005). Thus, despite the Green Objectors' claim, *see* Resp. at 18, there is no legally cognizable injury to Objector R U Lazy Two from the limitations that the basin-closure provisions within the Compact place on its asserted hypothetical desire to drill a

[6] The arguments against the current use list also grossly misstate the facts. Although these erroneous factual allegations are immaterial as a matter of law, they are so badly wrong that the Settling Parties are including with this brief two affidavits for the record simply as a matter of context. *See* Declaration of John Anevski; Declaration of Kevin Bradley.

2500-foot-deep well of indeterminate (but presumably larger than 35 gallons-per-minute and 10 acre-feet-per-year[7]) volume at some undefined point in the future. Nor are any of the other Green Objectors injured in this way.

Further, contrary to the Green Objectors' claims (Resp. at 19) and the conclusory assertion in the Affidavit of Thomas J. Osborne dated November 19, 2014 ("Osborne Aff.") at ¶15, the Watts Objectors are protected. In their objection, the Wattses identified two water rights, 43Q 42705-00 and 43Q 30013922 ostensibly affected by the Compact. As this Court may judicially notice, and as described by a witness for the Settling Parties, water right claim number 43Q 42705-00 is a groundwater stock right with a priority date of March 23, 1982. *See* "Analysis of the Impact of the Crow Compact …" by Richard H. Schilf ("Schilf Report") at 8 (Table 2) (attached as Ex. 2 to the Affidavit of Richard H. Schilf ("Schilf Aff."), itself attached as Ex. 10 to Mot.). It is clearly a water right Recognized Under State Law, as that term is defined by the Compact, and its priority date is self-evidently before June 22, 1999, the date on which the Montana legislature ratified the Compact. It is therefore protected from any future development of the Tribal Water Right, which may not occur unless it can be shown that it will have no adverse effect on this right. *See* Mont. Code Ann. § 85-20-901 (Art. III. A.6, B.6, C.6, D.6, E.6, F.6 and Art. IV.C). As this Court may also judicially notice, and as noted in the Schilf Report, water right claim number 43Q 30013922 is a groundwater certificate with a priority date of January 31, 2005, entitling the Wattses to divert up to 10 acre-feet of water per year. *See* Schilf Affidavit at 8 (Table 2). While the priority date of this right is after the date the Montana

[7] The exceptions to the basin-closure provisions allow the drilling of wells within these parameters, with no mention of well depth. *See* Mont. Code Ann. § 85-20-901 (Art. III.A.8.a.1; Art. III.B.7.a.1; Art. III.C.7.A.1; Art. III.D.8.a.1; and Art. III.E.7.a.1).

legislature ratified the Compact, the volume of this right is such that it qualifies as a right "exempt from the permit process pursuant to 85-2-306, MCA[.]" Mont. Code Ann. § 85-20-901 (Art. III.F.6.b.). As such, it is entitled to the same protections under the Compact as the Watts' other right. The Green Objectors' disregard of the Compact provisions protecting existing water users cause their arguments to fail.

The Green Objectors' unsupported assertions that the Compact somehow precludes the drilling of replacement wells or the reconstruction of washed out stock ponds that exceed the size of the basin closure exceptions, Resp. at 19, is no better founded. The Compact specifically provides that "[t]he State may authorize a change in use . . . of a water right Recognized Under State Law within the Reservation in accordance with state law, provided that such a change . . . shall not Adversely Affect a use of the Tribal Water Right existing at the time of the application." Mont. Code Ann. § 85-20-901 (Art. IV.D.2). Therefore, Mont. Code. Ann. § 85-2-402 governs changes in use both on and off the Reservation. Certain replacement wells may be drilled without the prior approval of the Montana Department of Natural Resources and Conservation. Mont. Code Ann. § 85-2-402(15). Larger replacement wells are subject to the full change process, which requires a showing of no adverse effect. Mont. Code Ann. § 85-2-402(2)(a). Thus there is no material difference in the burden of proof an applicant for a change in use authorization must meet on or off the Reservation and nothing in the Compact's basin-closure provisions alters that burden. If anything, in fact, the basin-closure provisions make it easier to meet the burden by limiting the potential future uses that must not be adversely affected. Nor does the Compact prohibit the reconstruction of stock ponds. It has long been the law in Montana that the repair of a reservoir, "no matter how substantial, if the reservoir is not made to hold more than" the original right allowed, is not a new appropriation. *Donich v.*

*Johnson*, 77 Mont. 229, 259, 250 P. 963, 972-73 (1926). The Compact therefore causes no harm on either of these fronts.

For these same reasons, the Green Objectors' complaint about the Depletion Halo effect, the possibility of mitigation, de minimis exceptions or how the Compact might have been negotiated had different scientific knowledge been available to the negotiators, *see* Resp. at 19-20, are entirely irrelevant. These hypothetical *future* scenarios do not affect or concern the Green Objectors' *present* property rights and therefore do not establish any basis for heightened scrutiny of the reasonableness of the Compact.

In sum, none of the Green Objectors' arguments regarding "good cause" has any effect on the standard to be applied by this Court.

## III. AS A MATTER OF LAW, THE GREEN OBJECTORS CANNOT SHOW THAT THE COMPACT IS UNREASONABLE, FUNDAMENTALLY UNFAIR, OR CONTRARY TO LAW

### A. The Green Objectors' Challenges to the Reasonableness of the Compact Fail as a Matter of Law

In their effort to paint the Compact as unreasonable (Section VII), the Green Objectors take issue with the Compact's basin-closure provisions and with the quantification of the Tribal Water Right for the Ceded Strip. But their arguments fail, not least because they were not raised in a timely objection and are thus barred by Mont. Code Ann. § 85-2-233(4). They fail for a variety of other reasons detailed below.

#### 1. Basin Closure and Quantification

The Green Objectors' complaints about the basin-closure provisions of the Compact are fundamentally misguided. As a threshold matter, the Green Objectors erroneously describe the basins as having been closed "by DNRC." Resp. at 14. Rather, the relevant basins were all

closed by the Montana legislature as part of its approval of the Compact. There can be no dispute—even the Green Objectors do not contend otherwise—that the legislature possesses the power to close basins in furtherance of its authority under Article IX, Section 3(3) of the Montana Constitution, to "provide for the administration, control, and regulation of water rights[.]" *See also* Mont. Code Ann. § 85-2-319. Indeed, the legislature has repeatedly done so, both as part of its approval of Indian water rights compacts—*see, e.g.*, Mont. Code Ann. § 85-20-301 (Northern Cheyenne Tribe-Montana Compact, Art. II.A.3.e); Mont. Code Ann. § 85-20-601 (Chippewa Cree Tribe-Montana Compact, Art. IV.A.7); Mont. Code Ann. § 85-20-1001 (Ft. Belknap Indian Community-Montana Compact, Art. III.I); Mont. Code Ann. § 85-20-1501 (Blackfeet Tribe-Montana Compact, Art. III.J)—as well as in other situations it has deemed closures appropriate. *See, e.g.*, Mont. Code Ann. §§ 85-2-330 (Teton Basin closure); 85-2-336 (Upper Clark Fork Basin closure); 85-2-341 (Jefferson and Madison Basin closures); 85-2-343 (Upper Missouri River Basin closure); 85-2-344 (Bitterroot River Subbasin temporary closure). And the Water Court has presumed valid and approved two prior compacts (Northern Cheyenne and Chippewa Cree) that include legislatively authorized basin closures. Thus the mere fact that the Crow Compact includes basin-closure provisions cannot possibly make it unreasonable.

There are other flaws to the Green Objectors' basin-closure argument as well. It is essentially bootstrapped to their "overreaching" argument, which fails for the reasons discussed above. *See Resp.* at 15 ("The closure of these basins that [sic] makes the Compact unreasonable. The unreasonableness of the Compact is identified by the overreaching by the Tribe in the amount of water is has reserved"). In addition, their own expert refuses even to assert, much less establish, that the quantification of the tribal right is unreasonable. He states only that the Compact and Staff Report are not specific enough in themselves to "clearly establish[]" or make

"evident" their own reasonableness in various respects.[8] At most he claims that the quantification in the Compact could have been different under different "assumptions." Osborne Aff. at ¶14. The Green Objectors' arguments and their expert's opinions simply cannot satisfy the "heavy burden" to affirmatively show that the Compact is unreasonable. *Fort Peck Memorandum* at 7.

The Green Objectors also make a conclusory assertion that the closure of basins outside the boundaries of the Crow Reservation is inherently unreasonable. Resp. at 15. But that claim entirely ignores that the Compact's basin closure provisions, both on and off the Crow Reservation, were the product of detailed and specific consideration during Compact negotiation, *see* Staff Report at 24, 40-42, 45, 47, 50 and 52, and did not flow mechanistically from the quantifications of the Tribal Water Right.[9]

2. Ceded Strip

The Green Objectors also argue that '[t]he allocation of 47,000 AFY to the ceded strip" is "arbitrary" and therefore "unreasonable," because they believe that the Staff Report does not

[8] As his report relates to the CIR, he states only that (1) the Compact and Staff Report do not themselves "*clearly establish*[]" the reasonableness of the transbasin diversion from the Bighorn River basin to the Little Bighorn River basin (Osborne Aff. at 17); (2) "[i]t is *not evident* from the Compact or Crow Staff Report" that Montana calculated unquantified surface water and groundwater available to the Tribe, which he says is water "effectively committed to" the Tribal Water Right (Osborne Aff. at 14, 17); (3) comparing the first 150,000 AFY allocation to the Tribe from storage for *future* industrial and marketing uses with other industrial uses in the Yellowstone River sub-basins affected by the compact *during the year 2000* "call[s] into question" the basis and reasonableness of that particular component of the Compact (Osborne Aff. at 17); and (4) "the Compact and Crow Staff Report did not identify" how much of the second 150,000 AFY "is primarily providing for the State of Montana's interest in the Blue Ribbon trout fishery on the Bighorn River" and how much is for tribal purposes (Osborne Aff. at 16, 17).

[9] Even if they had, of course, they would still be a reasonable exercise of the Montana legislature's constitutionally granted authority.

explain adequately the basis for this allocation. Resp. at 16. But parties to a compact are not required to effectively litigate to the level of detail the Green Objectors demand before settling on an estimate representing reasonably foreseeable usage. Rather, especially in light of the unique and complicated nature of the issues involved, the approach used here to identify a volume-per-acre is entirely reasonable and common in compacts approved by the Montana legislature and this Court. *See* Tweeten Aff. at 13 and Staff Report at pg. 43; Aldrich Aff. at 15, 16.

The Green Objectors admit, as they must, that the State's quantification approach is based on a 3-AFY estimate of potential usage for each acre of the surface areas of the ceded strip. *See* Resp. at 16; compare Staff Report at 53-54. They do not dispute that this quantification could in fact represent the actual future usage on the Ceded Strip; rather, they fault only the negotiating methods that were used to arrive at the number, arguing that it was not based on a formal PIA calculation. They do not explain how a PIA calculation would have differed in any drastic respect from the rough estimate that was done as a way of *avoiding* extensive litigation over the calculation. Moreover, they ignore that the Ceded Strip is very coal-rich and that the calculations from the federal settlement perspective also considered water usage associated with energy development. Aldrich Aff. at 15.

Similarly, the Green Objectors are wrong to suggest that a compact in order to be valid must limit the timing or location of diversions for the tribal right. Such sub-definition of a tribal right is not requisite for compact validity. As noted above, for example, this Court recently held in dismissing analogous objections by allottees that definition of allottees' rights of usage within the Tribal Water Right "is not required to achieve settlement." July 30, 2014 Order at 17. Whatever uncertainty remains under the Compact regarding diversions under the Tribal Water

Right is far less than there would be without the Compact, and the Compact includes protections for existing state law-based users within the Ceded Strip that would be wholly unavailable as part of any litigated outcome. *See* Mont. Code Ann. § 85-20-901 (Art. III.F.6.)

And in any event, the Green Objectors are simply wrong. They ignore that there are indeed limits on the location and quantity of diversions that further protect them. Article III. F.1.a.(2) (a) specifies that ". . . no more than 2,500 AFY from all water sources including the Yellowstone River may be diverted upstream from the confluence of the Bighorn River and the Yellowstone River." As the Staff Report explains:

> The limits on the amount of water and timing of use of the Tribal Water Right in the Ceded Strip were agreed to in order to minimize impacts to specific areas or during specific periods of time. Of the 47,000 AFY Tribal Water Right for use in the Ceded Strip, no more than 2,500 AFY from all sources including the Yellowstone River can be diverted upstream from the confluence of the Bighorn River and the Yellowstone River.

Staff Report at 58 (citing Article III.F.1.a.(2)(a)) (footnote omitted). This protects the Green Objectors. *See* Schilf Aff. at 7 (showing Green Objector rights on Ceded Strip and above the Big Horn River); *id.* at 21 (2,500 AFY represents 0.09% of the minimum annual flow).[10]

The Green Objectors also lament that in "time of shortage" the Tribe might exercise a prior call for water on the Ceded Strip that would affect them, and that there is no shortage-sharing provision for the Ceded Strip. Resp. at 16. They do not dispute that the Tribe would

[10] Unlike the Green Objectors, who do not mention this limitation in their brief, their expert notes it but contends that it "could conceivably provide a basis for an objection by the Tribe to any future use of water in the Yellowstone River basin or upstream tributaries." Affidavit of Thomas J. Osborne dated November 21, 2014, ("Osborne Supp.") at 3; *see also* Osborne Aff. at 15. It should go without saying that *any* tribal right, no matter how small (even 2,500 AFY) would provide the basis for objections to future use. That is not a defect demonstrating unreasonableness, but an inherent attribute of a water right. Moreover, the argument is legally irrelevant because it concerns hypothetical future attempts by the Green Objectors to obtain additional or changed rights, rather than alleging effects on an existing right.

have a right to make a call for water in a time of shortage even without the Compact, and it follows that preserving this right cannot be unreasonable. That is particularly true given the 2,500 AFY limit in the Compact just discussed. The Green Objectors utterly fail to identify any manner in which the Compact provisions for the Ceded Strip are unreasonable and should be voided.

3. No Relevant Question of Fact

Finally, in a last gasp attempt to forestall summary judgment, the Green Objectors argue that "[t]he issues of reasonableness and overreaching are always a question of fact" and "may not be determined on summary judgment." Resp. at 23. This badly misstates the law; withstanding summary judgment requires a genuine issue of disputed fact that is relevant under the controlling law. The Green Objectors' arguments fail as a matter of law under the controlling law for evaluating reasonableness and overreaching, so summary judgment is appropriate under Mont. R. Civ. P. 56(c).

4. Summary

In sum, the Green Objectors fail to show that the Compact represents an unreasonable settlement in these circumstances, including the unsettled state of the federal law of quantification, *see Fort Peck Memorandum* at 16 ("There is no more contentious issue in Indian water law than the quantification of Indian reserved water rights."). Rather, they argue only that the Compact grants the Tribe more water than they predict the Tribe will use. Even if this false assertion were true, that argument is simply not germane to the scope of this Court's review of the Compact, and must therefore be rejected as a matter of law.

**B. The Green Objectors' Challenges to the Lawfulness of the Compact Fail as a Matter of Law**

The Green Objectors' attempts to show that the Compact is unlawful also fail. They reiterate verbatim a litany of incorrect constitutionality arguments from their objections, without responding to the Settling Parties' briefing refuting those arguments. Sections V, VI, and IX of their response brief—regarding the applicability of federal law, the constitutionality of the Montana Water Use Act, and their due process arguments—are verbatim restatements of portions of their objections, with almost nothing added to respond to the arguments in the Settling Parties' motion. Thus, the Settling Parties' Motion on these points is essentially unrebutted. The only notable addition in these sections is a paragraph in Section IX, the last full paragraph on page 21, arguing that the public hearings on the Compact were not "meaningful opportunities to be heard" because *nobody else* raised their recently hatched theories about basin closure and the "Depletion Halo effect" *for them* at those hearings. Resp. at 21. In other words, the Green Objectors rely on their own dilatoriness in raising these objections as conclusive evidence that the compacting process was unfair. This is preposterous.

In an entirely new argument (Section X), the Green Objectors argue that the Compact violates federal criminal law because it includes payments by Montana to the Crow Tribe. Again, this argument is barred because it was not specifically raised in a timely objection. *See* Mont. Code Ann. § 85-2-233(4). It is also illogical and frivolous. The Compact cannot violate federal criminal law because it was ratified by Congress and signed by the President—it *is* federal law. Crow Tribe Water Rights Settlement Act of 2010, Pub. L. No. 111-291, §§ 402(2), 404 124 Stat. 3097 (codified at 31 U.S.C. § 1101 note). Moreover, the Compact represents the settlement of contested claims, and there is nothing nefarious in the payment of money as part of such a settlement, particularly where the funds are specifically "dedicated to economic development and water and sewer infrastructure within the Crow Reservation." Mont. Code

Ann. § 85-20-901 (Art. VI.A.4). This is especially true in light of the intertwined settlement of a monetary dispute between the Tribe and the State that is specifically mentioned in this same provision, regarding coal severance taxes. *See id* and Mont. Code Ann. §§ 85-20-902, -904, and -905. This kind of bottom-of-the-barrel, contrived argument has no place in this Court.

## CONCLUSION

This Court should approve the Tribal Water Right in the Compact, enter summary judgment dismissing the Green Objections and enter the Compact as a Partial Final Decree and incorporate, unchanged, the rights set forth in the Compact into any Final Decrees for the basins in which the Tribal Water Right is located.

Respectfully submitted this 8th day of December, 2014.

TIMOTHY C. FOX
Montana Attorney General

/s/ Jeremiah Weiner

Jeremiah D. Weiner
Assistant Attorney General
State of Montana
ATTORNEYS FOR THE
STATE OF MONTANA

SAM HIRSCH
Acting Assistant Attorney General

/s/ David Harder

David W. Harder,
Assistant Section Chief
U.S. Department of Justice
Environment & Natural Resources Div.
ATTORNEYS FOR THE
UNITED STATES OF AMERICA

ESPELAND LAW OFFICE PLLC

/s/ Nathan Espeland

Nathan A. Espeland

Merrill C. Godfrey (Pro Hac Vice)
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1564

(202) 887-4000
mgodfrey@akingump.com

ATTORNEYS FOR THE
CROW TRIBE OF MONTANA

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Settling Parties' Reply Brief was served by first class mail to each of the parties set forth below this 8th day of December, 2014.

Jeremiah D. Weiner, Esq.
Assistant Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1401

Nathan A. Espeland, Esq.
Espeland Law Office, PLLC
P.O. Box 1470
Columbus, MT 59019

John Chaffin
U.S. Department of the Interior
Office of the Solicitor
2021 Fourth Avenue North, Suite 112
Billings, MT 59101

W. Scott Green
John M. Van Atta
Patten, Peterman, Bekkedahl & Green, PLLC
2817 Second Ave. North,
Ste. 300
Billings, MT 59101

Claren J. Neal
Attorney at Law
725 Avenue "D"
Billings, MT 59102

Robert F. Soltis
Connie E. Soltis
HC 45 Box 942
Lodge Grass, MT 59050

David A Jarvis by Ellen Rutherford

David A. Jarvis
Paralegal