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IN THE WATER COURT OF THE STATE OF MONTANA

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**

MOTION AND MEMORANDUM IN SUPPORT OF THE CROW TRIBE, THE STATE OF MONTANA AND THE UNITED STATES OF AMERICA'S MOTION FOR APPROVAL OF THE CROW TRIBE-MONTANA COMPACT AND FOR SUMMARY JUDGMENT DISMISSING OBJECTIONS

For the reasons set forth herein, the Crow Tribe, the State of Montana and the United States of America (collectively the "Settling Parties"), respectfully move the Court: (1) to approve the Crow Tribe-Montana Compact ("Compact") pursuant to Mont. Code Ann.

§§ 85-2-233(6) and 85-2-702(3) (2013), 43 U.S.C. § 666 (2014), and Article VII.B of the Compact; and (2) to grant summary judgment in favor of the Settling Parties dismissing the two sets of materially identical objections filed in this matter by attorney Scott Green, one on behalf of 40 Mile Colony (the "40 Mile Colony Objection") and the other on behalf of the following individuals or entities: the Abel Family Limited Partnership; Nolan P. Barrett and Deanna L. Barrett; Lyndon S. Coburn, Jr.; C. Allen Graham, Susan C. Graham, Gary J. Graham, and Allan and Susan Graham Trust and the Gary Graham Trust; William S. Green and Esther W. Green; Greenwalt Ag Services, Inc.; Heidema Ranch Ltd. Partnership; Montana Sulphur and Chemical Co.; Ryan F. Rigler, Heather L. Rigler and Franklin J. Rigler; Howard W. Sniveley and Shirley D. Sniveley; RU Lazy Two Land & Cattle Co.; Torske Land and Livestock Co.; Wald Ranch, Inc.; and Tim Watts and Shirlene Watts (the "Group Objection"). For convenience, these two objections will generally be referred to as the "Green Objections" and the objectors who filed them as the "Green Objectors," except where discussion of an objection or an objector individually is warranted.

For the reasons set forth below, the Compact is "fair, reasonable and adequate… [and] conform[s] to all applicable law." *See Order Approving Bison Range Compact*, Case WC-2011-01 at 4 (filed July 30, 2014) ("*Bison Range Order*"). It was entered into only after good faith, arms-length negotiations and approval by the Montana Legislature, the United States Congress, and a referendum of members of the Crow Tribe. Therefore, it is entitled to a presumption of validity. *See Memorandum Opinion, Chippewa Cree Tribe-Montana Compact*, Case WC-2001-01 at 15 (filed June 12, 2002) ("*Chippewa Cree Opinion*"). The Green Objectors therefore bear the heavy burden of proving that the Compact is so manifestly unreasonable and unfair to them that the Court must reject it, which they cannot do. Indeed, the Green objectors

cannot even show that the Compact materially injures them in any way. The Settling Parties therefore respectfully request the Court to approve the Compact and to enter the Tribal Water Right[1] set forth in it as a Final Decree.

As there are no genuine issues of material fact pertaining to the Green Objections, and as none of the Green Objectors can meet their burden to show material injury and such manifest unfairness in the Compact that the Court must reject it, the Settling Parties respectfully request the Court to grant them summary judgment against the Green Objectors and to dismiss their objections accordingly.

I. INTRODUCTION

Pursuant to its statutory mandate, *see* Mont. Code Ann. §§ 85-2-701, *et seq.*, the Montana Reserved Water Rights Compact Commission ("Commission") invited the Crow Tribe ("Tribe") to enter into negotiations to settle the Tribe's claims to federal reserved water rights in October of 1979. *Affidavit of Chris D. Tweeten* ("*Tweeten Aff.*") at ¶2, attached hereto as Exhibit 1. The Tribe accepted the invitation, thereby tolling its obligation to file claims in Montana's general stream adjudication during the pendency of the negotiations. *See* Mont. Code Ann. § 85-2-217.[2] While there were a few negotiating sessions during the 1980s, the negotiations became much more active in 1993. *Tweeten Aff. at* ¶3; *Crow Staff Report, Crow Tribe-Montana Compact*, prepared by the Montana Reserved Water Rights Compact Commission, November 1, 2010 ("*Staff Report*"), at 2, attached hereto as Exhibit 2; *Affidavit of Richard K. Aldrich* ("*Aldrich*

[1] The Compact defines the "Tribal Water Right" as "the right of the Crow Tribe, including any Tribal member, to divert, use, or store water as described in Article III of [the] Compact." Mont. Code Ann. § 85-20-901 (Article II.29).

[2] The federal court suit filed by the United States on behalf of the Tribe regarding its water rights, *United States v. Big Horn Low Line Canal Company, et al.*, No. CIV-75-34-BLG (filed April 17, 1975), was held in abeyance to allow for the negotiations and the Montana General Stream Adjudication to proceed.

Aff.") at ¶6, attached hereto as Exhibit 3. For the next five years, the State and the Tribe collected and exchanged the technical and legal data that underpin the settlement, and developed relationships among the negotiators, lawyers, technical staff and consultants for the three sovereigns that facilitated the negotiating process. *Tweeten Aff. at* ¶3; *Affidavit of Arthur T. Alden* ("*Alden Aff.*") at ¶ 2-5, attached hereto as Exhibit 4; *Aldrich Aff.* at ¶6; *Staff Report* at 2, 13-22, and 43. The pace of negotiations accelerated in the fall of 1998, when the Tribe approached the State about combining the water rights negotiations with discussions to resolve other outstanding issues between the State and the Tribe. *Tweeten Aff.* at ¶4-5; *Staff Report* at 2-4; *Aldrich Aff.* at ¶6. Subsequently, the Tribe and the State agreed to proceed on parallel tracks to try to reach settlement on issues requiring legislative approval (including a water rights settlement) in time for the 1999 session of the Montana Legislature. *Tweeten Aff.* at ¶5; *Staff Report* at 2-3; *Aldrich Aff.* at ¶6.

The Tribe presented the Commission with its initial water rights settlement proposal on December 7, 1998. *Staff Report* at 5 and n.16. Thereafter, the Commission, the Tribe and the United States convened negotiating sessions in Billings, Montana, on January 21, 1999, February 17, 1999, and March 11, 1999. Each session was widely noticed, through the publication of information in local newspapers and on the Commission's website and also through the mailing of personal notice to the Commission's 500-plus person mailing list for the Compact negotiations. In addition, Commission staff met informally with interested water users in January of 1999 as well. *Tweeten Aff.* at ¶8; *Staff Report* at 5; *Aldrich Aff.* at ¶7 and 14.

The State and the Tribe had significant difference of opinion concerning the appropriate quantification of the Tribe's water rights and the conditions that should be attached to their use. *Alden Aff.* at ¶5-7; *Aldrich Aff.* at ¶7; *Tweeten Aff.* at ¶19. But by March of 1999, compact drafts

had been prepared and circulated and the pace of negotiations and the concomitant public involvement process ramped up further. On March 19, 1999, in advance of public information sessions scheduled for March 29, 1999, in Billings and Crow Agency, Montana, and for March 30, 1999, in Lodge Grass and Hardin, Montana, the Commission posted notice of the meetings on its website and mailed notice to its entire mailing list as well as to over 1000 water users whose water rights could potentially be affected by the Tribal Water Right. *Tweeten Aff.* at ¶9-10; *Staff Report* at 5.[3] There was extensive public comment at each of those meetings. During the first two weeks of April, 1999, Commission staff, as well as personnel from the Montana Department of Natural Resources and Conservation (DNRC) also met with interested water users on and off the Crow Indian Reservation ("Reservation"). *Tweeten Aff.* at ¶9-10; *Staff Report* at 5; *Aldrich Aff.* at ¶14. The Tribe hosted public meetings on the Reservation concerning the negotiations as well. *Aldrich Aff.* at ¶14.

Ultimately, the Commission and the Tribe reached tentative agreement on a proposed Compact, and on April 7, 1999, the Commission voted unanimously to seek approval of the proposed Compact during the waning days of the 1999 Regular Session of the Montana Legislature. *Tweeten Aff.* at ¶10; *Staff Report* at 5. On April 10, 1999, the Crow Tribal Council approved a resolution urging the Legislature to ratify the proposed Compact. *Staff Report* at 5-6. In light of some commenters' concerns that there had not been enough time for the public and the legislature to evaluate the proposed settlement, then-Governor Marc Racicot decided against

[3] Among those water users are nearly all of the Green Objectors who reside on the Crow Indian Reservation, or their predecessors in interest, several of which objectors actually attended one or more of the public meetings as well. Affidavit of Sonja Hoeglund ("*Hoeglund Aff.*") at ¶6, attached hereto as Exhibit 5.

presenting the proposed Compact to the Regular Session.[4] *Tweeten Aff.* at ¶11; *Staff Report* at 6. Instead, he asked the Legislature to convene a joint subcommittee consisting of members of the Environmental Quality Committee and the Law, Justice & Indian Affairs Committee, and for that joint subcommittee to conduct public outreach and solicit public comment before making a recommendation to the Governor on whether he should call a Special Session of the Legislature to consider the proposed Compact. *Tweeten Aff.* at ¶11; *Staff Report* at 6.

The Legislature did as the Governor requested, and the joint subcommittee met with the Commission and conducted two extensively noticed public meetings in Billings and Hardin, Montana, on May 18, 1999. Governor Racicot and Attorney General Mazurek both attended and spoke at the Billings meeting. The joint subcommittee subsequently voted 17-2 to recommend that Governor Racicot call a Special Session of the Montana Legislature to consider the proposed Compact, if Governor Racicot and Attorney General Mazurek were comfortable that the public meetings had adequately addressed the outstanding questions regarding it. Governor Racicot called the Special Session. *Tweeten Aff.* at ¶12-13; *Staff Report* at 6. A Special Session was duly convened, during which a joint hearing on the proposed Compact was conducted by the House and Senate Natural Resources Committees. Extensive public comment was received at that joint hearing. The Compact was ratified by an 81-17 vote in the House and a 45-5 vote in the Senate on June 16, 1999, and the appropriations bill authorizing the State's $15 million contribution to the settlement passed by an 80-18 vote in the House and a 49-0 vote in the Senate. Governor Racicot signed both bills on June 17, 1999. *Tweeten Aff.* at ¶14-16; *Staff Report* at 6-7.

Subsequently, the Tribe and State worked with the United States to negotiate federal legislation to ratify the Compact. After a bill to ratify the settlement was introduced during the

[4] As noted above, by statute the Commission negotiates on behalf of the governor. Mont. Code Ann. § 2-15-212.

110th Congress by Senator Jon Tester on July 29, 2008, the Senate Committee on Indian Affairs heard the bill in a publicly noticed hearing on September 11, 2008. *Tweeten Aff.* at ¶17. Although Congress did not act on the bill by the conclusion of the 110th Congress, Senator Tester re-introduced the bill on February 4, 2009, the same date that then-Representative Denny Rehberg introduced a companion bill in the House. The Subcommittee on Water and Power of the House Committee on Natural Resources held a publicly noticed hearing on the bill on September 22, 2009. Public comment was accepted at both hearings. *Id.* Congress passed the Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064, on November 30, 2010, which included the ratification of the Crow Compact as Title IV of the bill, and President Barack Obama signed the Claims Resolution Act on December 8, 2010. *Id.* A copy of the Claims Resolution Act is attached hereto as Exhibit 6.

On March 19, 2011, the Tribe held a ratification vote and the Compact was approved by a vote of 2,323 to 938. On April 13, 2011, Bureau of Indian Affairs Regional Director Ed Parisian certified the vote. *See Letter of April 13, 2011, from Ed Parisian to Cedric Black Eagle,* attached hereto as Exhibit 7. The Compact was executed by then-Secretary of the Interior Ken Salazar, then-Tribal Chairman Cedric Black Eagle and then-Governor Brian Schweitzer on April 27, 2012. Section 415 of the federal approval legislation provides that the federal approval shall be repealed if, by March 31, 2016, the Secretary of the Interior has not published a finding in the Federal Register that certain conditions have occurred. Under Section 410 of the federal approval legislation, one of those conditions is the entry of a final decree by this Court approving the Compact.

II. PROCEDURAL HISTORY

After approval by the State, the Tribe, and the United States, the Compact became

effective on April 27, 2012. Consistent with Article VII.B of the Compact, the Settling Parties moved the Court on October 25, 2012, to incorporate the Compact into preliminary and final decrees and to hold a consolidated hearing on any objections to the preliminary decree. On December 17, 2012, the Settling Parties moved the Court for approval of procedures noticing the public regarding the availability of the preliminary decree and the opportunity to object to the decree. On December 21, 2012, the Court entered the preliminary decree and an order regarding the provision of notice.

Pursuant to that order, the DNRC mailed notice of the availability of the preliminary decree and the opportunity to object to it to 16,199 individual owners of 28,748 water rights in the basins that intersect a boundary of the Reservation (basins 42A, 42B, 42KJ, 43D, 43N, 43O, 43P and 43Q). *See* Affidavit of John Peterson ("*Peterson Aff.*") at ¶3 and 4, attached hereto as Exhibit 8. Including extensions, the objection period ran until December 23, 2013. Approximately 125 objections were filed. All but the Green Objections have now been withdrawn or dismissed by the Court or have consensual resolutions pending Court approval. In the instant motion, the Settling Parties request the Court to approve the Compact in accordance with Mont. Code Ann. §§ 85-2-234 and -702(3) and 85-20-901 (Art. VII.B), and to dismiss the remaining objections.

III. JURISDICTION AND STANDARD OF REVIEW

A. Jurisdiction

No one disputes this Court's jurisdiction to review the Compact and to decree the water rights quantified in it. The McCarran Amendment, 43 U.S.C. § 666, has waived the sovereign immunity of tribes and the United States as to state court adjudications of their water rights. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564 (1983), *reh. denied,* 464 U.S. 874

(1983); *State ex. rel. Greeley v. Confederated Salish & Kootenai Tribes of Flathead Reservation* ("*Greely II*"), 219 Mont. 76, 89, 712 P.2d 754, 762 (1985). Montana Code Annotated § 85-2-231 plainly authorized the Court to enter a preliminary decree based on the Compact, and Mont. Code Ann. § 85-2-234 authorizes the Court to enter a final decree. In addition, Article VII.B of the Compact, approved by the State, the Tribe and the United States, expressly contemplates judicial review in this Court. This Court must apply federal law in reviewing the reserved water rights settled in the Compact. *Greely II,* 219 Mont. at 99, 712 P.2d at 768; *see also San Carlos Apache v. Arizona,* 463 U.S. at 571.

B. Standard of Review

Under Montana law, the Court may only approve the Compact or declare it void. Mont. Code Ann. § 85-2-233. *See also Bison Range* Order at 3. In making this determination, the Court applies a standard similar to the review of a consent decree. *See Bison Range Order* at 3-4; *USDA Forest Service-Montana Compact Decision,* Case WC-2007-03 at 6 (filed October 31, 2012); *Chippewa Cree Opinion* at 4-5; *Memorandum and Order Approving Fort Peck-Montana Compact,* Cause No. WC-92-1 at 4-5 (filed August 10, 2001) ("*Fort Peck Memorandum*"). The Court must be satisfied that the Compact "is at least fundamentally fair, adequate and reasonable," *United States v. Oregon,* 913 F.2d 576, 580 (9th Cir. 1990) (citations omitted), and that it "conforms to applicable laws." *Id. See also Bison Range Order* at 4; *Fort Peck Memorandum* at 6. The Settling Parties bear the initial burden on this issue, but once the Court is satisfied that the Compact "was the product of good faith, arms-length negotiations, [the Compact] should be *presumptively* valid...." *Fort Peck Memorandum* at 7 (emphasis in original). At that point, the burden shifts to the objecting parties, and their burden is far heavier: an "objecting party then has a heavy burden of demonstrating that the [Compact] is

unreasonable." *Id.* (internal quotations omitted).

"Ultimately, the purpose underlying this judicial review is not to ensure that the settlement, or Compact, is fair as between the negotiating parties, but rather to ensure that other unrepresented parties and the public interest are treated fairly by the terms and process." *Bison Range Order* at 4 (citations omitted). "[W]hile the settlement must be in the public interest, it need not be in the public's *best* interest, if it is otherwise reasonable." *Id.* (emphasis in original). If an objector can demonstrate material injury to a water right, the Court's scrutiny of the reasonableness of the Compact should be commensurate to the degree of injury the objector can establish by a preponderance of the evidence. *Fort Peck Memorandum* at 7-8; *see also Chippewa Cree Opinion* at 6. If an objector cannot meet this threshold, the Court's inquiry should be limited to whether the Compact is "fundamentally fair, adequate and reasonable and conforms to applicable law." *Fort Peck Memorandum* at 8.

IV. THE COMPACT SHOULD BE APPROVED BECAUSE IT IS FAIR, ADEQUATE AND REASONABLE AND CONSISTENT WITH APPLICABLE LAW

The Green Objectors cannot establish any material injury to any of their water rights. Thus, the Court's inquiry should be limited to whether the Compact is fundamentally fair, adequate and reasonable and conforms to applicable law. The Settling Parties submit that the Compact easily satisfies that test as shown below.

A. The Compact is Entitled to a Presumption of Validity

The Compact represents the settlement of water rights litigation and is the product of good faith, arms-length negotiations among the authorized representatives of the State, the Tribe, and the United States. The negotiators for all three sovereigns had personal experience with the issues involved in the negotiations and were able to rely upon skilled teams of technical and legal advisers. *Alden Aff.* at ¶4; *Aldrich Aff.* at ¶5 and 7; *Tweeten Aff.* at ¶3. The negotiations were

grounded in extensive technical and legal work, *Alden Aff.* at ¶4, *Aldrich Aff.* at ¶6-8, *Tweeten Aff.* at ¶3 and ex. 19 thereto, and their open and public nature provided an additional check on the negotiations. *Tweeten Aff.* at ¶3. There was significant give-and-take among the parties during the course of the negotiations. *See id.* at ¶18-20; *Alden Aff.* at ¶6-8 and 10; *Aldrich Aff.* at ¶7.

Moreover, after the terms of the Compact were agreed to, they underwent extensive, public review by each sovereign prior to being presented to this Court. As discussed in section I, there was an extraordinary process of legislative involvement even before the Compact was introduced during the 1999 Special Session of the Montana Legislature. Then the Compact was the subject of open hearing, testimony and debate before the Montana Legislature before it was approved by State legislative and executive authorities. *Tweeten Aff.* at ¶9, and 11-16; *see also* Mont. Code Ann. §§ 85-20-901 to -905. The Compact was also the subject of public hearings in the United States House and Senate before it was enacted into law as part of the Claims Resolution Act. *Tweeten Aff.* at ¶7.

In short, all of the evidence demonstrates that the Compact is the product of good faith, arms-length negotiations and should be presumed valid. Even were that presumption not to be applied, however, the Court should still approve the Compact. As is shown below, it is fair, adequate and reasonable and conforms to all applicable law.

B. The Compact is Fair

In evaluating the fairness of a settlement, courts may look to factors relating to both procedural and substantive fairness. *See, e.g., Officers for Justice v. Civil Service Commission of the City and County of San Francisco,* 688 F.2d 615, 625 (9th Cir. 1982) ("*Officers for Justice*"); *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 86-89 (1st Cir. 1990) ("*Cannons*"); *Ft. Peck Memorandum* at 6-7 (quoting *Officers for Justice).* The Compact is both

procedurally and substantively fair.

1. The Compact is Procedurally Fair

In determining whether a settlement is procedurally fair, courts evaluate such factors as whether the negotiations were open and forthright, whether the negotiations were adversarial and conducted at arms' length, whether the settlement was negotiated in good faith by people knowledgeable about the issues involved and competent to negotiate resolutions of such issues, whether governmental participants were involved in the negotiations, and the reaction of interested parties to the settlement. *See Cannons,* 899 F.2d at 86-88; *Officers for Justice,* 688 F2d at 625; *Ft. Peck Memorandum* at 39. Each of those factors demonstrates that the Compact is procedurally fair.

As has been explained above and shown in the attached affidavits, the Compact was negotiated at arms' length among governmental entities by competent professionals experienced in the field of federal reserved water rights and water rights quantification. *Alden Aff.* at ¶2-4; *Aldrich Aff.* at ¶7; *Tweeten Aff.* at ¶3. The negotiators were advised by competent specialists with expertise in various aspects of water and natural resources analysis and water and Indian law. *Alden Aff.* at ¶4; *Aldrich Aff.* at ¶7; *Tweeten Aff.* at ¶21. Extensive public notice was provided during the negotiating process and the public was afforded repeated opportunities to comment on the proposed settlement during both the negotiation and political approval processes. *Aldrich Aff.* at ¶7 and 14; *Tweeten Aff.* at ¶3, 6-10, 13-15 and 17. During the State approval process immediately before and during the 1999 Special Session of the Montana Legislature, the Compact was supported by a wide array of groups, including representatives providing oral and/or written comment on behalf of the Montana Farm Bureau, the Big Horn County Livestock Association, the Montana Stockgrowers Association, the Big Horn

Conservation District, the Treasure Conservation District, the Yellowstone Conservation District, the Crow Leaseholders Association, the Huntley Irrigation Project, the Big Horn Low Line Ditch Co., the Two Leggins Water Users Association – Two Leggins Irrigation Company, the Sinclair Oil Corporation dba Sunlight Ranches, the Farmers Ditch Company, the Victory Ditch Company, Trout Unlimited, and the Yellowstone Irrigation District. Many individual landowners, farmers and ranchers also provided comment in support of the Compact. *Tweeten Aff.* at ¶15.

Although, as will be discussed in greater detail below, the Green Objectors claim that the Compact violates their due process rights because they were afforded insufficient and too-late opportunities to weigh in on the proposed settlement, they adduce absolutely no evidence to support their allegations. Nor could they, as the Compact is the product of an open and transparent negotiating process that complied with and exceeded the minimum requirements of all Montana laws regarding public notice, open meetings and opportunities for comment. *Tweeten Aff.* at ¶6-9, 13-15 and 23. The Compact is procedurally fair.

2. The Compact is Substantively Fair

When considering the substantive fairness of a settlement, courts look at whether the issues involved in the settlement were resolved based upon reasonable standards and whether litigation risks are taken into account in the settlement. *See, e.g., Cannons,* 899 F.2d at 87-89; *Officers for Justice,* 688 F.2d at 625; *Fort Peck Memorandum* at 6-7.

The Tribe's claims to water that are resolved by the Compact are grounded in the federal reserved water rights doctrine first articulated in *Winters v. United States*, 207 U.S. 564 (1908). As this Court has recognized, "the Reserved Water Rights Doctrine is vague and open-ended and has been construed both broadly and narrowly by subsequent federal and state courts." *Fort*

Peck Memorandum at 12. It is, therefore, a doctrine that provides ample scope for litigation – or for compromise. As the Court has explained: "[i]n the absence of clear federal authority prohibiting the various Compact provisions and in the absence of demonstrated injury to Objectors by these provisions, the Compacting Parties are within their authority to craft creative solutions to the difficult problems caused by ambiguous standards." *Id.* at 15. The substance of the Compact demonstrates that the Settling Parties have done exactly that.

The quantification of the Tribal Water Right in the Compact was the product of extensive negotiations over the Settling Parties' positions, particularly regarding their respective views of the amount of Practicably Irrigable Acreage (PIA)[5] within the various basins on the Reservation. *Alden Aff.* at ¶4-7 and 10; *Aldrich Aff.* at ¶8-10; *Tweeten Aff.* at ¶18-19. In the Bighorn River Basin, the quantification of a natural flow water right of 500,000 acre-feet per year (AFY) coupled with an allocation from the Bureau of Reclamation's water right for Big Horn Lake reflects a significant compromise on all sides, providing the Tribe with a quantified right while also including conditions that protect water rights Recognized Under State Law (as that term is defined in the Compact[6]). *See Tweeten Aff.* at ¶ 19.a.i and b-d; *Staff Report* at 12-15 and 35-40.

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[5] The PIA quantification standard measures the quantity of water reserved for Indian use by determining that amount sufficient to irrigate all the practically irrigable acreage of the reservation. *See Arizona v. California*, 460 U.S. 605 (1983). It is not the only standard that has been used to achieve quantifications of federal reserved water rights. *See, e.g., In re Gen. Adjudication of All Rights to the Use of Water in the Gila River Sys. & Source*, 35 P.3d 68, 74 (Ariz. 2001); *Avondale Irrigation District v. North Idaho Properties*, 577 P.2d 9 (Idaho 1978). *See also Fort Peck Memorandum* at 15; *In the Matter of the Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation within the State of Montana in Basins 42A, 42B, 42C, 42KJ, & 43P*, No WC-93-1, Mem. Op. (Mont. Water Court August 3, 1995).

[6] The Compact defines "Recognized Under State Law" to mean "a water right arising under Montana law or a water right held by a nonmember of the Tribe on land not held in trust by the United States for the Tribe or a Tribal Member." Mont. Code Ann. § 85-20-901 (Art. II.19).

Significant technical data and legal analysis underpins the ultimate quantification. *See Aldrich Aff.* at ¶10; *Tweeten Aff.* at ¶19.a.i; *Staff Report* at 12-25. The inclusion of a storage component is consistent with the balance of compromises included in other water rights settlements with Indian tribes both in Montana and nationally. *See* Mont. Code Ann. § 85-20-201 (Art. III.F. and I) (Fort Peck); § 85-20-301 (Art. II.a.2.b) (Northern Cheyenne); § 85-20-601 (Art. III.C.6) (Chippewa Cree); *Aldrich Aff.* at ¶11-12. And the Compact's protections for water rights Recognized Under State Law are substantial, including in times of shortage. *Tweeten Aff.* at ¶19.b and d; Mont. Code Ann. § 85-20-901 (Art. III.A.1 and 6).

For the remainder of the basins on the Reservation, the Settling Parties agreed that the limited availability of water made a volumetric quantification unnecessary. *See Staff Report* at 43; Mont. Code Ann. § 85-20-901 (Art. III.B.1 and 6; C.1 and 6; D.1 and 6; and E.1 and 6). Consequently, the Compact simply quantifies all the water in those basins as being part of the Tribal Water Right, subject to the protections for water rights Recognized Under State Law.[7] *Aldrich Aff.* at ¶10; *Tweeten Aff.* at ¶19.a.ii; *Staff Report* at 43 and 45-52.

The quantification of the Tribal Water Right on the Ceded Strip (as that term is defined by the Compact[8]) posed unique factual and legal issues. *Tweeten Aff.* at ¶19.a.iii; *Staff Report* at 52-54. Nevertheless, after evaluating the complexities presented, the Settling Parties agreed to

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[7] Art. III.B.6, C.6, D.6 and E.6 of the Compact are materially identical to Art. III.A.6 of the Compact discussed above. Mont. Code Ann. § 85-20-901. Subsection 1 of each of these provisions of Article III differ only in being basin specific. The protections for water rights Recognized Under State Law are the same in each subsection 6. *See* Art. III.B.6, C.6, D.6 and E.6.

[8] The Compact defines the "Ceded Strip" as "the area covered by Article III of the Act of April 27, 1904 (33 Stat. 352), as depicted on the map attached [to the Compact] as Appendix 5." Mont. Code Ann. § 85-20-901 (Art. II.7). That map is attached hereto as Exhibit 9. *See also Staff Report* at 9-10.

use a general PIA-like approach to quantify the water right for trust lands in the Ceded Strip. Technical work performed by Commission staff indicated that a use rate of three acre-feet per acre would be a reasonable guideline for determining an appropriate volume for the Tribal Water Right on the Ceded Strip. *Staff Report* at 53; *see also Tweeten Aff.* at ¶19.a.iii. Consequently, a volume of 47,000 AFY was agreed to for the roughly 15,500 acres of trust land located within the Ceded Strip. Mont. Code Ann. § 85-20-901 (Art. III.F.1). *See also Staff Report* at 53; *Tweeten Aff.* at ¶19.a.iii; *Aldrich Aff.* at ¶10. Along with the same protections for water rights Recognized Under State Law discussed above,[9] additional conditions were included to minimize potential conflicts between the State and Tribe on one hand and the State of Wyoming on the other regarding the Yellowstone River Compact. Mont. Code Ann. § 85-20-901 (Art. III.F.1.a.(2)); *see also Staff Report* at 53-54.

In light of the foregoing, the quantification of the Tribal Water Right set forth in the Compact is substantively fair. Existing users, whether of water rights Recognized Under State Law or of the Tribal Water Right, are given some protections with respect to future development of the Tribal Water Right, and the Tribe is entitled to reasonable amounts of water for future use. It is important to bear in mind that:

> 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

[9] Article III.F.6 of the Compact is materially identical to Art. III.B.6, C.6, D.6 and E.6 of the Compact. Mont. Code Ann. § 85-20-901. Subsection 1 of Article III.F also differs from subsection 1 of each of Article III.A-E only in being basin specific. Again, the protections for water rights Recognized Under State Law are the same. Mont. Code Ann. § 85-20-901; *see also* note 7, *supra*.

public policy decisions is for the legislature to decide, not the Water Court. *Fort Peck Memorandum* at 15. The compact is substantively fair because of the extensive protections for all existing water users and because the Compact's quantifications are the result of significant bargaining and are supported by extensive technical work.

C. The Compact is Adequate and Reasonable

When considering the adequacy and reasonableness of a settlement, courts look at whether the settlement adequately and effectively resolves the issues involved in the settlement in light of alternative approaches considered. *See, e.g., Cannons,* 899 F.2d at 89-90; *Officers for Justice,* 688 F.2d at 625; *Fort Peck Memorandum* at 6-8.

The Compact's quantification provisions reflect the Settling Parties' efforts to achieve an equitable quantification agreement that protects existing uses of the Tribal Water Right and water for the Tribe's future needs, while minimizing or eliminating effects on water rights Recognized Under State Law. To strike this balance, as described above, the Settling Parties had to evaluate and bargain over the water rights sought by the Tribe and the protections sought by the State in basins both on and off the Reservation. In addition to the quantification itself, the Settling Parties had to address questions regarding jurisdiction over water use on the Reservation and the Ceded Strip and how to ensure that the balance of compromises reflected in the settlement could be effectively implemented. Consequently, the Settling Parties ultimately included administration provisions in the Compact, both to ensure that the sovereignty of both the Tribe and the State is fully respected and to facilitate the practical implementation of the Compact in a manner that, among other things, provides for certainty going forward and for predictable and efficient dispute resolution.

Under the Compact, therefore, the Tribe exercises control over the authorization of new

developments and changes in use of the Tribal Water Right, while DNRC's regulatory jurisdiction over new permitting and changes of state law-based water rights under the Montana Water Use Act of 1973, generally known as Mont. Code Ann. Title 85, Chapter 2, parts 2-4 ("MWUA"), is unchanged. Mont. Code Ann. § 85-20-901 (Art. IV.A.2 and 3). The Compact also specifically includes sections identifying how the State and Tribe are to collaborate to implement the Compact's shortage sharing provisions during times of shortage, Mont. Code Ann. § 85-20-901 (Art. IV.A.4), and delineates a process to ensure that the grant of a right to develop a new use of water by one sovereign, or the grant of an authorization to change an existing use, will not adversely affect the right of another to use water under color of the other sovereign's laws. Mont. Code Ann. § 85-20-901 (Art. IV.C and D). The Compact further creates a Compact Board and empowers it to resolve disputes over the right to use water as between users of the Tribal Water Right and users of water rights Recognized Under State Law. Mont. Code Ann. § 85-20-901 (Art. IV.F).

All of these provisions resolve otherwise unresolved questions of law surrounding the Tribe's federal reserved water rights, and are integral parts of the settlement. While the quantification provisions are, as they must be, specific to the unique circumstances of the Tribe, many of the administration and implementation provisions reflect approaches that have been employed in other water rights settlements between the State and other Indian tribes that have been approved by this Court. For example, each of the Fort Peck-Montana, Northern Cheyenne Tribe-Montana, and Chippewa Cree-Tribe-Montana Compacts include a similar balancing between State and Tribal jurisdiction, a similar recognition but conditioning of a tribe's right to use or lease water off its reservation, and specifically describe dispute resolution provisions that include compact boards. *See* Mont. Code Ann. § 85-20-201 (Art. V and VI); § 85-20-301 (Art.

III and IV); § 85-20-601 (Art. IV); *Aldrich Aff.* at ¶11. Therefore, especially in light of the challenging nature of the quantification of federal reserved water rights, *Fort Peck Memorandum* at 12, 15, and the other issues considered by the State, the Tribe, and the United States during the course of the negotiations, the Compact is eminently adequate and reasonable. The Compact provides certainty to the Settling Parties and all Montana water users and ensures a reasonable and adequate distribution of water, and at the same time avoids expensive litigation and reasonably resolves disagreements that would otherwise create uncertainty during the long period necessary to resolve them.

D. The Compact is Consistent with State and Federal Law and Policy

The Compact advances the State policy set forth in Mont. Code Ann. § 85-2-701, *et seq.*, in which the Montana Legislature directs the Commission to negotiate equitable quantification agreements with the Indian tribes and federal agencies claiming federal reserved water rights in Montana. The Montana Legislature specifically reaffirmed this policy in the legislation ratifying the Crow Compact. *See* Mont. Code Ann. § 85-20-901(1) ("It is the policy of the state of Montana to seek negotiated settlements of federal and Indian reserved water rights claims in Montana..."). As the Compact was expressly enacted into State law, there can be no dispute that it is consistent with State law and policy.

There can likewise be no dispute that the Compact is consistent with federal law and policy. The Compact was enacted as federal law by Congress and signed by the President. The federal legislation approving the Compact included a provision authorizing the Secretary of the Interior to execute the Compact, provided that nothing in the Compact conflicted with the terms of the federal ratification legislation. As noted above, then-Secretary Ken Salazar executed the Compact on April 27, 2012. Therefore, the Compact is plainly consistent with federal law and

policy.

E. Conclusion

As set forth above, the Compact is fair, adequate and reasonable, and comports with all applicable law. Accordingly, the Court should approve the Compact and enter a final judgment and decree confirming the water rights recognized therein.

V. THE SETTLING PARTIES ARE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE GREEN OBJECTIONS

Concomitant with the request for the Court to approve the Compact, the Settling Parties move for summary judgment against the Green Objectors. As demonstrated below, the Green Objections present no genuine issues of material fact and are thus susceptible to summary resolution.

A. Standard of Review for Summary Judgment

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). Although all reasonable inferences must be drawn in the light most favorable to the party opposing summary judgment, *Fossen v. Fossen*, 2013 MT 299, ¶ 7, 372 Mont. 175, 311 P.3d 743 (citing *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 38, 345 Mont. 12, 192 P.3d 186), the facts presented to oppose summary judgment must be of a substantial and material nature. *Sherrard v. Prewett*, 2001 MT 228, ¶ 17, 306 Mont. 511, 36 P.3d 378 (quoting *Montana Metal Buildings Inc. v. Shapiro*, 283 Mont. 471, 474, 942 P.2d 694, 696 (1997)). Consequently, speculation or conclusory allegations devoid of any support in the record is insufficient to raise a genuine issue of material fact. *Styren Farms Inc. v. Roos*, 2011 MT 299, ¶ 10, 363 Mont. 41, 44, 265 P.3d 1230, 1233. And without affirmative evidence to defeat the motion, the motion is properly

granted. *Chippewa Cree Opinion* at 42 (citing *Estate of Lien*, 270 Mont. 295, 306 (1995)); *see also Arnold v. Yellowstone Mountain Club, LLC*, 2004 MT 284, ¶ 26, 323 Mont. 295, 100 P.3d 137.

B. The Green Objections Have No Legal Basis and Must Be Denied as a Matter of Law

Except for the names of the individual objectors, the Green Objections are identical. They contain no allegations of material injury, or even any particularized harm, to water rights or other interests in the use of water. They make no assertion that the Compact is the product of fraud, collusion or overreaching. Rather the Green Objectors simply allege that the Compact should be rejected because: (1) the entire Montana compacting process violates the Montana Constitution; (2) the negotiations that led to the development and ultimate political approval of the Compact did not afford them due process under the U.S. and Montana Constitutions, and these Compact review proceedings in the Water Court constitute an ineffective "post-deprivation" hearing; and (3) ratification of the Compact "effectively transferred to the Crow Tribe" the "water rights of the objectors." As will be shown below, taking these arguments in reverse order, the objections are baseless.

Beyond the Green Objectors' failure to allege material injury or any deficiency in the negotiation of the Compact itself, the Green Objectors' constitutional and process based allegations are all deficient. First, compacts to settle Indian reserved water rights do not inherently transfer state law-based rights to Indians – the suggestion is as offensive as it is illogical. Moreover, here, there is nothing in the Compact that necessarily or inherently results in any loss of water or water rights by any of the Green Objectors, and they do not even attempt to identify, much less prove, any such material injury. Second, not only did the Green Objectors have ample opportunity to participate in the pre-ratification consideration of the Compact, but

the Compact itself does not bind the Green Objectors until after it is entered into the Final Decree, so these proceedings themselves afford the Green Objectors due process. Third, nothing in the Montana Constitution supports the Green Objectors' preposterous notion that entering into reasonable, fair settlements of contested reserved water rights claims is a power denied to the State.

1. The Crow Compact Does Not Inherently Deprive Objectors of Water or Water Rights, and They Fail to Allege or Show Injury

The Green Objectors claim that "the giving of rights to the Crow Tribe through negotiations was a taking of rights from the objectors… [and] the objectors' state appropriate rights were effectively transferred to the Crow Tribe without due process of law…." *40 Mile Colony Objection* at 10-11; *Group Objection* at 13. Not only is this false (and offensive) as a general matter, but they utterly fail to identify any adverse effect on their property rights that could flow from the Compact. It is true in the abstract that, to the extent they share the same source,[10] their rights might in theory be adverse to the Tribal Water Right quantified in the Compact. *See Application for Beneficial Water Use Permit by Harms Livestock*, 2000 ML 6000, 2000 Mont. Water LEXIS 2 at *3-4 (citing *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 305, 62 P.2d 206 (1936)). But that is not enough. *Fort Peck Memorandum* at 7-8; *see also Chippewa Cree Opinion* at 6. The Green Objectors fail to explain how the recognition of the Tribal Water Right in the Compact has effected a legal *taking* of their own water rights. For that reason alone their objections must be dismissed.

Nevertheless, it bears noting that the Green Objectors could not in any event meet their

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[10] The water rights of Objectors Abel Family Limited Partnership, William S. and Esther W. Green, RU Lazy Two Land & Cattle Co., and Tim and Shirlene Watts share no sources with the Tribe. *See Affidavit of Richard H. Schilf* ("*Schilf Aff.*") at ¶8-10, and exhibit 2 thereto, all attached hereto as Exhibit 10.

burden of demonstrating material injury or adverse effect to their water rights, which may well explain why they never tried to do so in their objections. Each of the Green Objectors' identified water rights continues to appear in the DNRC water rights database. Peterson Aff. at ¶5. Nothing in the Compact transfers, extinguishes, or otherwise adversely affects their water rights, as the Compact specifically recognizes and protects water rights Recognized Under State Law. *See* Mont. Code Ann. § 85-20-901 (Art. II.19 and Art. III.A.6, B.6, C.6, D.6, E.6 and F.6). All of the Green Objectors' water rights located within the Reservation or the Ceded Strip[11] are protected as water rights Recognized Under State Law, as they are either reflected in claims filed in the Montana General Stream Adjudication, are permits issued by the DNRC, are for rights exempted by Mont. Code Ann. § 85-2-222 from the filings requirements of the MWUA, or are for rights excepted by Mont. Code Ann. § 85-2-306 from the MWUA's permitting requirements. *See Schilf Aff.* at ¶10, and exhibit 2 thereto (Table 1); Mont. Code Ann. § 85-20-901 (Article III.A.6.b; B.6.b; C.6.b; D.6.b; E.6.b; and F.6.b). The water rights of the Green Objectors whose rights are located outside the Reservation or the Ceded Strip[12] are so hydrologically attenuated from the Tribal Water Right as to render them wholly unaffected by the Compact, *Schilf Aff.* at ¶10, and exhibit 2 thereto. As a result, far from being deprived of their property, the Green Objectors are in fact made better off by the Compact.

The Green Objectors ignore that the Compact will provide benefits to them and many

[11] These rights include all of the Green Objectors' water rights except those belonging to Objectors Abel Family Limited Partnership, William S. and Esther W. Green, Montana Sulphur & Chemical Co., RU Lazy Two Land & Cattle Co., and Tim and Shirlene Watts. *See Schilf Aff.* at ¶8-10, and exhibit 2 thereto (at page 3 and Table 1).

[12] These include the rights belonging to Objectors Abel Family Limited Partnership, William S. and Esther W. Green, Montana Sulphur & Chemical Co., RU Lazy Two Land & Cattle Co., and Tim and Shirlene Watts. *See Schilf Aff.* at ¶8-10, and exhibit 2 thereto (at Table 1).

other water users. Quantifying the Tribe's reserved water rights provides certainty that benefits all state law-based users by finally resolving all the Tribe's potential claims to water. *See* Mont. Code Ann. §85-20-901 (Art. VII.C); Claims Resolution Act, at Sec. 409. Moreover, each of the Green Objectors' water rights is given a protected status they would not otherwise have, *see* Mont. Code Ann. § 85-20-901 (Article III.A.6.a.(2); B.6.a.(2); C.6.a.(2); D.6.a.(2); E.6.a.(2); and F.6.a.(2)), particularly those objectors whose rights have a priority date after May 7, 1868.[13] *See Schilf Aff.* at ¶8 and exhibit 2 thereto (at Table 1); Mont. Code Ann. § 85-20-901 (Article III.A.2.a and A.6.a.(1); B.2 and B.6.a.(1); C.2 and C.6.a.(1); D.2 and D.6.a.(1); E.2 and E.6.a.(1); and F.2 and F.6.a.(1)). In addition, all of the Green Objectors' water rights benefit from the Compact's administration provisions, which give them procedural protections they would not otherwise have. *See* Mont. Code Ann. § 85-20-901 (Article IV.C.1.a).

Thus, not only do the Green Objectors fail entirely to allege any injury from the Compact, but they ignore its obvious benefits to them. The Green Objectors' allegations, which are simplistic and do not identify any particularized injury, are simply false when they allege that the Compact "effectively transfers" their rights to the Tribe. *See 40 Mile Colony Objection* at 2; *Group Objection* at 5. That false premise is the foundation for all the Green Objections, and thus all must be rejected as a matter of law.

The Green Objections' takings argument is also subject to summary dismissal because a takings claim lies outside the subject matter jurisdiction of this Court, which extends only to "all matters relating to the determination of existing water rights within the boundaries of the state of Montana." Mont. Code Ann. § 3-7-224. A takings claim, even one asserting the taking of a

[13] Only objectors Lyndon S. Coburn, Jr., Ryan F. Rigler, Heather L. Rigler, Franklin J. Rigler, Howard W. Sniveley, Shirlene D. Sniveley, and Wald Ranch Inc. have one or more water rights claims asserting a priority date of May 7, 1868. *See Schilf Aff.* at ¶8 and exhibit 2 thereto (at Table 1).

water right, does not relate to the determination of a water right. For as the Montana Supreme Court has explained, "[f]inancial compensation is the sole remedy for a permanent taking of property." *Burley v. Burlington N. & Santa Fe Ry. Co.*, 2012 MT 28, § 24, 364 Mont. 77, 86, 273 P.3d 825, 830. Therefore, even assuming arguendo that the Compact in fact has taken any of Green Objectors' property – which it of course has not – the Water Court is not the proper forum in which to address any such deprivation.

2. These Proceedings and the Pre-Ratification Proceedings Provide Due Process

The Objectors further allege that they were afforded inadequate opportunity to be heard before the Compact was ratified by the three sovereigns, and that the current review proceedings do not suffice for due process because they occur after ratification. *See 40 Mile Colony Objection* at 11-12, 14; *Group Objection* at 14, 16-17. These allegations are not substantiated in law or fact.

First, the Compact review process is not a "post-deprivation" review, because the Green Objectors are not parties to the Compact and their rights remain untouched while the Compact has not been entered in a final Decree.[14] Ratification binds only the parties to the Compact. *See* Mont. Code Ann. § 85-2-702(2). The whole purpose of these proceedings is to give all objectors an opportunity to allege and prove injury before the Compact is entered as a final Decree, which the Green Objectors failed to do in their objections.

Second, the pre-ratification proceedings alone satisfied whatever due process rights the Green Objectors have. Through public hearings and the legislative process, the Green Objectors had ample opportunity, over many years, to be heard before the Compact was ratified. Indeed

[14] It is also, of course, not a post-deprivation review because, as discussed above, the Green Objectors have not been deprived of any property.

objectors Nolan P. Barrett, Deanna L. Barrett, Lyndon S. Coburn, Jr., C. Allen Graham, Susan C. Graham, Gary J. Graham, Allan and Susan Graham Trust, Gary Graham Trust, Greenwalt Ag Services, Inc. (formerly known as Greenwalt Farms), Heidema Ranch Ltd. Partnership, Ryan F. Rigler, Heather L. Rigler, Franklin J. Rigler, Howard W. Sniveley, Shirley D. Sniveley, Byron Stimpson, and Wald Ranch or their predecessors in interest were each *personally* mailed notice of Commission meetings regarding the Compact prior to the Montana Legislature's consideration of the Compact in 1999. *Hoeglund Aff.* at ¶4a.-m. Objectors Byron Stimpson, Ronald Wald, C. Allen Graham, Gary Graham, Susan Graham and Doug Greenwalt even personally attended various of those public meetings. *Hoeglund Aff.* at ¶6. In addition, water right number 43Q 30013922, owned by objectors Tim and Shirlene Watts, has a priority date of January 31, 2005, meaning the Watts' took their right subject to the stream conditions as they found them, conditions which included the Tribal Water Right quantified in the Compact. *See, e.g., Quigley v. McIntosh*, 110 Mont. 495, 505, 103 P.2d 1067, 1072 (1940) ("subsequent appropriators of water take with notice of the conditions existing at the time they make their appropriations"). One of the major goals of the compacting process is to negotiate settlement of both the quantity and priority of the Tribe's water rights, to establish certainty that benefits all. The Watts' benefitted from this certainty – they were not harmed by it.

In support of their objections, the Green Objectors rely heavily on selective excerpts from a March 29, 1999, negotiating session held at Crow Agency, Montana. But those excerpts merely illustrate that there were public concerns regarding whether there had been adequate time to digest the proposed settlement. *See 40 Mile Colony Objection* at 12-13; *Group Objection* at 15-16. As discussed above, the events following on from that negotiating session demonstrate that these concerns were not ignored, as the Green Objectors imply, but rather were heeded. It is

precisely because of concerns such as these that Governor Racicot declined to seek introduction of the Compact during the 1999 Regular Session of the Montana Legislature, *Tweeten Aff.* at ¶11, and that the Legislature took the extraordinary step of forming a joint subcommittee to address those concerns more directly. *Id.* at ¶12-13. Only after additional public meetings was the decision made to proceed with a Special Session to consider the Compact. And even during that Special Session, there were additional opportunities for public comment. *Id.* at ¶14. It is telling that even now the Green Objectors cannot identify any concrete harm they suffer as a result of the Compact. It is therefore impossible to take seriously their arguments that they simply did not have enough time to make their concerns known before ratification.

As the Montana Supreme Court has explained, "[t]he fundamental requirements for due process are notice and opportunity for hearing appropriate to the nature of the case." *Kulstad v. Maniaci*, 2010 MT 248, ¶41, 358 Mont. 230, 240-41, 244 P.3d 722, 730 (internal quotations and citations omitted). Beyond the conclusory allegations in their objections, the Green Objectors have provided no evidence of how they were deprived of either notice or the opportunity to be heard. Nor could they, as they were afforded process far above and beyond the bare minimum required by the law.

3. Nothing in the Compacting Process Violates the Montana Constitution's Protection of Existing Water Rights

The Green Objections attack the compacting process and the authority of the State of Montana, acting through the Commission, to negotiate the Compact and to enter into it. In general, the Green Objectors claim that the compacting process is unconstitutional because it violates the protection of existing water rights set forth in Article IX, Section 3 of Montana's Constitution. They argue the Montana Constitution does not allow the State to enter into settlements with Indian tribes over water rights, but rather requires the State arrive at the one true

and correct result in any such dispute. They argue that the State must "Require the Proper Determination of the Nature and Extent of Federal Indian Reserved Water Rights." *40 Mile Colony Objection* at 4; *Group Objection* at 6. They argue that because the MWUA allows and encourages settlements, the compacting process is "a non-judicial negotiation process" that "is not subject to any enforceable legal, factual, or evidentiary standards and effectively transfers the appropriative rights of affected state holders to the tribe." *40 Mile Colony Objection* at 2; *Group Objection* at 5.

On its face, this attack on the compacting process relies on the pure fantasy that there is a single correct result under federal law which the State is bound to determine and impose. The Green Objectors ignore their own concession that "quantification of a tribe's water rights is difficult" and subject to multiple possible standards. *40 Mile Colony Objection* at 7; *Group Objection* at 9. The Constitution only "recognize[s] and confirm[s]" "existing rights to the use of any waters." It does not declare that such rights are inherently free from controversy, nor does it "establish that pre-1973 water rights are immune from sovereign powers." *In re the Adjudication of the Yellowstone River*, 253 Mont. 167, 174, 832 P.2d 1210, 1214 (1992). Rather, "consistent with Article IX, Section 3(1), of the Montana Constitution, the State Legislature may enact constitutionally sound regulations" to govern existing rights. *Id.* Thus it certainly does not prohibit the State from entering into settlements to resolve previously unquantified existing rights.[15] Well may it be said here, as it was in *Castillo v. Kunneman,* 197 Mont. 190, 199, 642 P.2d 1019, 1025 (1982), "[t]he subject provision of the [Water Use] Act does not destroy the right to use water, thus violating the constitutional provision. Rather, the Act establishes a procedure for review."

[15] Indian reserved rights are indisputably also existing rights protected by Article IX, Section 3 of the Montana Constitution. *Greely II*, 219 Mont. at 91, 712 P.2d at 763.

The Green Objectors' further constitutional attacks fare no better. They assert that the compact process as set forth in the MWUA "does not include an opportunity for affected state appropriators to be heard or to evaluate the facts, assumption, and evidence upon which the parties rely." *40 Mile Colony Objection* at 9; *Group Objection* at 11. In addition, they allege that the compacting provisions of the MWUA lack "any standards for determining the factual and legal basis of a tribe's asserted reserved water rights" and that the compacting provisions fail to "provide any protections to state appropriative water rights holders or provide them with an opportunity to be heard." *40 Mile Colony Objection* at 9; *Group Objection* at 12. In addition, the Green Objectors assert a constitutional violation in the fact that under Montana law, "Indian tribes need not adjudicate their water rights individually but instead negotiate for the tribe's rights in lump sum." *Id.* But there is no constitutional infirmity in the MWUA's compacting provisions. These arguments mischaracterize the compacting process, misperceive the nature of Indian reserved water rights, and fail to demonstrate any due process violation.

The MWUA assigns responsibility for negotiating compacts for the quantification of Indian and federal reserved water rights claims to the Commission. *See* Mont. Code Ann. § 85-2-701 *et seq.* The Commission, created pursuant to Mont. Code Ann. § 2-15-212, is a public body and is subject to all of Montana's open meetings and public records laws. *Tweeten Aff.* at ¶6 and 23; Mont. Code Ann. §§ 2-3-101, *et seq.* and 2-6-101, *et seq.* Thus, the statutory scheme plainly provides ample opportunity for the public to be heard and to review and evaluate the information in the possession of the Commission.

Moreover, the MWUA provides that, to become effective, each compact negotiated by the Commission with an Indian tribe or federal agency must be ratified by the Montana Legislature. *See* Mont. Code Ann. §§ 85-2-702(2) and §703. The Legislature's rules ensure the

opportunity for both public notice and the opportunity to be heard during the process of the consideration of bills that come before that body. *See, e.g.*, Mont. Leg. S. R. S30-80 (1999); Mont. Leg. H. R. H30-40(4) and H30-60(1) and (2) (1999); Mont. Leg. S. R. S30-90 (2001); Mont. Leg. H. R. H30-40(4) and H30-60(1) and (2) (2001); Mont. Leg. S. R. S30-60, S30-80 and S30-120 (2003); Mont. Leg. H. R. H30-40(4) and H30-60(1) and (2) (2003); Mont. Leg. S. R. S30-60, S30-80 and S30-120 (2005); Mont. Leg. H. R. H30-40(4) and H30-60(1) and (2) (2005); Mont. Leg. S. R. S30-60, S30-80 and S30-120 (2007); Mont. Leg. H. R. H30-40(4) and H30-60(1) and (2) (2007); Mont. Leg. S. R. S30-60 and S30-80 (2009); Mont. Leg. H. R. H30-40(4) and H30-60(1) and (2) (2009); Mont. Leg. S. R. S30-60 and S30-80 (2011); Mont. Leg. H. R. H30-40(4) and H30-60(1) and (2) (2011); Mont. Leg. S. R. S30-60 and S30-80 (2013); Mont. Leg. H. R. H30-40(4) and H30-60(1) and (2) (2013). Consequently, there is simply no plausible basis for the Green Objectors' assertion that the compacting provisions of the MWUA facially provide inadequate opportunity to be heard or to evaluate the basis for the State's decision-making during the compacting process.

The Green Objectors' allegation that the compacting provisions of the MWUA are unconstitutional because they lack standards is no better grounded. To the extent this assertion is directed exclusively at the work of the Commission, it is in error because it mistakenly tries to treat the Commission as though it were an administrative agency with independent decision-making authority and to which the provisions of the Montana Administrative Procedures Act (Mont. Code Ann. §§ 2-4-101 *et seq.*) apply. As discussed above, however, only the Legislature can give legal force and effect to any compact negotiated by the Commission. Thus, the Commission is not an entity "authorized by law to make rules, determine contested cases, or enter into contracts" nor does it make rules, or issue or deny licenses, contracts or the equivalent.

Mont. Code Ann. § 2-3-102; *see also* Mont. Code Ann. § 2-4-102(2)(a). The Green Objectors' attempt to analogize the Commission to a state regulatory body (*see 40 Mile Colony Objection* at 13-14; *Group Objection* at 16) is therefore mistaken. And in any event, the MWUA does in fact provide a standard to govern the negotiations. Montana Code Annotated § 85-2-701 specifically expresses the Legislature's direction that compact negotiations are intended to bring about "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." Thus "equitable division and apportionment" is the standard that governs the negotiation of compacts.

At least as importantly, and as this Court has long recognized, the Legislature has broad authority to agree to compact terms. *See Chippewa Cree Opinion* at 9-10. Indeed, "[i]n 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." *Id.* at 10. As the Green Objectors cannot demonstrate any material injury, this Court should, consequently, reject the Green Objectors' invitation to intrude into the Legislature's considered policy choices in ratifying the Compact. Nor can the fact that the MWUA may not provide for detailed criteria to address every issue that might come up during the negotiating process possibly rise to the level of a constitutional problem. As this Court has explained:

> 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.

Fort Peck Memorandum at 41-42. This state of affairs makes "equitable division and apportionment" an eminently reasonable standard for Montana to apply to the negotiation of compacts, not a constitutionally suspect one.

The foregoing also illustrates why the Green Objectors' contention that Montana's compacting process fails to protect existing water users should be rejected. As discussed above, there are multiple opportunities during the negotiating and ratification process of each compact for any water user – or anyone else – to make their views heard on any compact under negotiation or brought to the Legislature for ratification. Existing water users are further protected by the public political approval process that allows full consideration of whether a settlement is appropriately equitable. Indeed, consistent with the MWUA's statutory scheme, every compact that the Commission has negotiated has been presented to the Legislature and been subject to public hearings prior to the Legislature taking action on ratification legislation. *See Tweeten Aff.* at ¶7. The Green Objectors essentially seek the conversion of Montana's compacting process – which is a unique and highly successful alternative dispute resolution mechanism with both political and legal backstops – into a purely judicial one. While Montana could have chosen to do so – as Wyoming has done with its multi-decade litigation over water rights, including those belonging to the tribes of the Wind River Reservation, in the Big Horn River Basin, *see Aldrich Aff.* at ¶4 and 8 – that is not the direction the State of Montana has chosen, and there is nothing constitutionally improper in that decision.

Nor, contrary to the Green Objectors' claim, are there constitutional problems with the fact that Montana has created a different pathway for the resolution of Indian reserved water rights claims than the one for resolving other claims for existing water rights. As the Montana Supreme Court has recognized, Montana is free to enact "state classifications based on tribal membership if those classifications can rationally be tied to the fulfillment of the unique federal, and consequent state, obligations toward Indians." *State v. Shook*, 2002 MT 347, ¶ 14, 313 Mont. 347, 352, 67 P.3d 863, 866. As is implicit in the Montana Supreme Court's ruling in

Greely II, the compacting process is a paradigmatic example of just such a rational effort to fulfill the unique federal and state obligations toward Indians. 219 Mont. at 91, 95, 712 P.2d at 763, 765-766.

For all these reasons, the Green Objectors' challenge to the Montana compacting process must fail.

VI. CONCLUSION

As this Court explained in approving a prior tribal compact, "[i]n exchange for saving the cost and inevitable risk of litigation, the parties each gave up something they might have won in trial at the Montana Water Court. In the settlement process, the parties resolved to their own satisfaction all of the remaining issues of fact and law. It is not for [this] Court to re-negotiate those disputes or rule on their merits." *Fort Peck Memorandum* at 42. As demonstrated above, the Compact is fair, adequate and reasonable, and is consistent with applicable law. Moreover, the objections have no merit. Accordingly, this Court should approve the Tribal Water Right in the Compact, enter summary judgment dismissing the Green Objections and enter the Compact as a 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 14th day of October, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing **Settling Parties' Motion and Memorandum In Support For Approval of Compact and Summary Judgment** was served via U.S. mail, postage pre-paid to:

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