

**IN THE WATER COURT OF THE STATE OF MONTANA
CONFEDERATED SALISH AND KOOTENAI TRIBES –
MONTANA – UNITED STATES COMPACT
CASE NO. WC-0001-C-2021**

**ATTACHED STATEMENT OF OBJECTIONS & REQUEST FOR HEARING OF
OBJECTOR WESTERN CONSTITUTIONAL RIGHTS PROTECTION, LLC
AND ITS INDIVIDUAL OBJECTING MEMBERS**

I. INTRODUCTION

Objector Western Constitutional Rights Protection, LLC, is a domestic limited liability company formed under the laws of the State of Montana (“Objector” or “WCRP”) comprised of individual Members who are persons owning agricultural and wildlife habitat lands, including apportioned allotments, with water rights on the former Flathead Reservation (representing also “similarly situated” persons). Objector and its Members, respectfully submit this Statement of Objections to the Montana Water Court’s Notice of Preliminary Decree. Objector and its Members also respectfully submit(s) a Request for Hearing pursuant to MCA § 85-2-223(1)(a)(iii).

Objector and its Members are quite surprised that the State of Montana is actually seeking to implement and enforce the Confederated Salish and Kootenai Tribes Water Rights Compact (“Compact” or “CSKT Compact”),¹ the Unitary Administration and Management Ordinance (“UAMO”),² and the Federal Montana Water Rights Protection Act” (“MWRPA” or “Settlement

¹ The Compact is **codified at the State level** at Montana Code Annotated (“MCA”) § 85-20-1901.

² The UAMO is **codified at the State level** at MCA § 85-20-1902. The UAMO is identified in Compact Article II.45 as “the substantive provisions of Appendix 4”, “adopted by the [CSKT] pursuant to Tribal approval of the CSKT Compact [...] to effectuate Unitary Administration and Management on the Flathead Indian Reservation”, and which “shall govern all water rights [...] and shall control all aspects of water use [...] and all aspects of enforcement within the exterior boundaries of the Flathead Indian Reservation.” The UAMO Sec. 1-1-101 para. 2 states that “This Ordinance and the parallel Tribal legislation [adopted] are contingently effective; neither operates with the force and effect of law without the other.” UAMO Sec. 1-1-101 para. 3 states that, “Upon the Effective Date of the Compact, **this Ordinance shall govern all water rights**, whether derived from tribal, state, or federal law, and **shall control all aspects of water use, including all permitting of new uses, changes of existing uses, enforcement of water calls and all aspects**

Act”³ described in the Montana Water Court Preliminary Decree (“Decree”) (Jun. 9, 2022). Objector and its Members are quite surprised because the United States Supreme Court set the standard of tribal jurisdiction over non-Indians in *Montana v. United States*, 450 U.S. 544 (1981). This path marking case is still the law and has led to many more United States Supreme Court decisions limiting the jurisdiction of Indian Tribes over non-Indians. As stated in *Montana*, “implicit in the Supreme Court's decision of *Oliphant v. Suquamish Tribes*, 435 U.S. 191, is the recognition that Indian tribes do **not** have the power, nor do they have the authority, to regulate non-Indians unless so granted by an act of Congress.” *Montana* 450 U.S. at 549. (emphasis added). The Compact, UAMO, and Settlement Act are very likely to be found **unconstitutional**, considering the Supreme Court’s recent opinion in *Oklahoma v. Castro Huerta*, (Dkt. No. 21-429) (Jun. 29, 2022), and the Court’s likely rulings in two cases now pending before it – *Brackeen v. Haaland* (Cons. Dkts. No. 21-380, 21-376, 21-377, 21-378) (argued November 9, 2022), and *Arizona v. Navajo Nation* (Cons. Dkts. No. 21-1484, 22-51) (oral argument scheduled for March 20, 2023).

Objector and its Members challenge the constitutionality of the Compact, UAMO, and Settlement Act *inter alia* because these documents evidence the illegal Federal commandeering of State governmental offices, agencies, and departments and their respective officials, thereby resulting in the **deprivation of procedural due process**, in the **racially discriminatory treatment** of water use rights owners/holders residing on and off the former Flathead Reservation, **and** in the **uncompensated “taking”/deprivation of the water use rights of nontribal Members owned/held**

of enforcement within the exterior boundaries of the Flathead Indian Reservation.” (emphasis added).

³ The Settlement Act is **codified at the Federal level**, at Division DD of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, 3008-3038 et seq. (Dec. 27, 2020).

validly under Montana’s State law of appropriation, in violation of the Fifth, Tenth, and Fourteenth Amendments to the United States Constitution and in violation of the corresponding provisions of the Montana State Constitution.⁴

The received “Notice of Entry of the Confederated Salish and Kootenai Tribes of the Flathead Reservation-State of Montana-United States Compact Preliminary Decree and Notice of Availability” (“Notice of Entry”) was issued on June 9, 2022. It reveals that this Decree, Compact, UAMO, and Settlement Act, and their respective appendices contain sweeping and unprecedented claims for water rights, many of which are not quantified and bear a priority date of time immemorial for a reservation that was completely disestablished by Congress in 1904. *See* Act of April 23, 1904, 33 Stat. 302. In addition, none of the Indian tribes that occupied or still occupy the former reservation were farmers or ever irrigated the land they occupied. Irrigation did not begin until Swiss Catholic priests began works for irrigating the land.

The received Notice of Entry also reveals that this Decree, Compact, UAMO, and Settlement Act, and their respective appendices reflect the United States’ exercise of pre-constitutional territorial war powers to displace Montana State sovereignty by establishing a new multi-governmental water rights administration body and a new law of water rights administration that: (a) displace Montana State-based water appropriations law with an unconstitutional tribal regulation (UAMO) on the former Flathead Reservation; (b) displace the exclusive jurisdiction of the Montana Water Court to adjudicate final water rights claims and related disputes surrounding the Compact, UAMO, and Settlement Act, thereby allowing the conversion of privately

⁴ Objector and its Members are also contemplating filing a Federal Civil Rights action seeking compensation against the United States, the State of Montana, and their respective officials and employees, as well as against private persons in Montana who assisted them in violating Objector’s Members’ civil and constitutional rights, under the Reconstruction Era Civil Rights Laws.

owned/held State-based appropriated water rights into so-called Tribal water rights from Federal reserved water rights; (c) displace the jurisdiction of the Montana Department of Natural Resources and Conservation (“DNRC”) to assess and quantify water rights claim applications; and (d) displace the jurisdiction of State executive offices to oppose the Compact, UAMO, and Settlement Act to protect the constitutional and civil rights of Montana citizens residing on and off the former Reservation.

These laws together conspire to treat all non-Indian residents on the former Flathead Reservation to deprive all constitutional rights of citizenship in the State of Montana and the United States, subjecting them to being lesser wards of the United States than are the members of the Indian tribes that will now be regulating their water rights to live and conduct business on their own fee property. The Constitution of the United States does not give Congress the power to remove citizenship from any non-Indian persons or to treat them as being removed from all constitutional law by being subjected to the jurisdiction of Indian tribes that are not subject to the Constitution. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

In addition, the received Notice of Entry reveals that this Decree, Compact, UAMO, and Settlement Act, and their respective appendices deprive private water use right owners/holders of their water use rights validly obtained and held under Montana State appropriations law by: (a) taking their water use rights for a purported public purpose without payment of just compensation therefor; (b) depriving such water use right owners/holders equal protection under the laws by discriminating in favor of the Tribes, their members and allottees on the basis of race; (c) depriving such water rights owners/holders of the procedural due process of law to contest these and other deprivations of their rights; and (d) depriving such water rights owners/holders who reside in the State of Montana and who are persons born or naturalized in the United States and subject to the

jurisdiction thereof, of their inalienable right to Federal and State citizenship and of all the protections they are due under the United States Constitution and the Constitution of the State of Montana.

This Statement of Objection is generally directed at all portions of the Compact, UAMO, Settlement Act, and Decree inclusive of their respective appendices, as many of the grounds for objection raised herein apply generally to all components. However, Objector and its Members are fully prepared to provide this Court with additional specific objections relating to specific Compact, UAMO, and Settlement Act provisions and appendices.

A. Law Applicable to Review of Federal-State-Indian Compacts

1. Objector incorporates the preceding paragraphs as if fully restated herein.

2. Objector and its Members were not a party to either the Compact between the CSKT and the State and Federal governments, or the UAMO drafted by the CSKT and approved by the State and Federal governments. When reviewing the non-party objections of Objector and its Members the Court must first assess the Compact's, UAMO's, Settlement Act's and Decree's presumptive validity by determining whether they are "fundamentally fair, adequate and reasonable" and "conform[] to applicable laws." See *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770, *18 (Mont. Dec. 9, 2020).

3. To determine whether the Compact, UAMO, Settlement Act, and Decree are "fundamentally fair," the Court must evaluate whether the "agreement is ... the product of **fraud or overreaching by, or collusion between the negotiating parties.**" (emphasis added). See *In re Adjudication of Existing and Reserved Rights of Chippewa Cree Tribe*, 2002 Mont. Water LEXIS 1, *7 (Mont. June 12, 2002). To determine whether the Compact, UAMO, Settlement Act, and

Decree “conforms to applicable laws,” the Court must consider whether their “quantification provisions (and the administrative procedures used to implement such provisions) violate or are prohibited by applicable law.” *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770 *24.

4. The Court must also assess whether the Compact, UAMO, Settlement Act, and Decree were “the product of good faith, arms-length negotiations.” *Id.* at *18-19.

5. Should the Court still presume these documents are legally valid after analyzing their reasonableness, negotiation process, and congruence with applicable law, Objector and its Members bear the burden of “prov[ing] the compact [UAMO, Settlement Act, and Decree are] unreasonable and their ‘interests are materially injured by [their] operation.’” *Id.* at *25. (citations omitted). A Compact is deemed to be “unreasonable” when it “follows an approach to quantify and allocate water rights that departs from existing law.” *Id.* at *33. Objector and its Members may demonstrate “material injury” by objecting to: (a) “the process used to reach consensus in the Compact, [UAMO, Settlement Act, and Decree];” (b) the quantification of water rights within the Compact, UAMO, Settlement Act, and Decree, (c) “any substantive term of the Compact, [UAMO, Settlement Act, and Decree;” (d) priority dates; (e) the legal validity of the Tribal/Federal reserved water rights jurisprudence;” (f) any “vague or ambiguous” provisions; (g) the lack of good faith with which the documents were prepared; or the failure of the documents “to reflect the public interest.” *Id.* at * 25-33.

6. For all the reasons stated above, this Court should **not** presume the Compact, UAMO, Settlement Act, and Decree are legally valid, because, as Objector and its Members allege, these documents are a product of **fraud or overreaching by, or collusion between the negotiating parties**, and are **fundamentally unfair** because of the magnitude and extent of their **unconstitutional overreach**.

7. Indeed, the Compact, UAMO and Settlement Act reveal the fraudulent claim of the United States of the existence of a bona fide Federal-Tribal trust relationship with the CSKT that serves as the foundation for the United States' use of the fraudulent unification theory to convert private state-based appropriated water use rights owned/held by Objector's Members and those similarly situated into unquantified on-Reservation *Winters* doctrine Federal reserved water rights with a time-immemorial priority date.

8. For all the reasons stated above, this Court should **not** presume the Compact, UAMO, Settlement Act, and Decree are legally valid, because, as Objector and its Members allege, their terms violate the Fifth,⁵ Tenth, and Fourteenth⁶ Amendments to the United States Constitution and the corresponding provisions of the Constitution of the State of Montana.

9. Should this Court, nevertheless, still determine the Compact, UAMO, Settlement Act, and Decree are presumptively legally valid, Objector and its Members wish to reassure the Court that it will be able to demonstrate that they are both "unreasonable" and "materially

⁵ The U.S. Constitution's Fifth Amendment applies **only to the Federal government**. It states that "No person shall be [...] deprived of life, liberty, or property, without due process of law..." Amdt. 5, Cl. 4. Although the Fifth Amendment does not expressly contain an express guarantee of equal protection, the U.S. Supreme Court has held that it contains an implicit guarantee of equal protection by incorporating the more explicit Equal Protection Clause of the Fourteenth Amendment via the doctrine of reverse incorporation. *See Adarand Constructors v. Peña*, 515 U.S. 200, 215, 217-218 (1995). In *United States v. Vaello Madero*, (Dkt. No. 20-303) (Apr. 21, 2022), the U.S. Supreme Court reaffirmed its holding in *Adarand*, noting that it "now maintain[s] that the 'equal protection obligations imposed by the Fifth and Fourteenth Amendments [are] indistinguishable.'" (Thomas, J. concur. at 5) (quoting *Adarand*, 515 U.S. at 217) and (citing *Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1686, n.1 (2017) (noting because federal law was involved, that "the applicable equality guarantee is not the Fourteenth Amendment's explicit Equal Protection Clause; it is the guarantee implicit in the Fifth Amendment's Due Process Clause").

⁶ The U.S. Constitution's Fourteenth Amendment **applies to both Federal and State governments**. It states that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Amdt. 14, Sec. 1, Cl.1. The Fourteenth Amendment also states that "[...] nor shall any state [...] deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, Sec. 1, Cl. 4.

injurious” to Objector’s and their Members’ interests. Objector and its Members will be able to demonstrate “unreasonableness” because these documents employ administrative procedures to transform private water rights into Tribal water rights from Federal reserved water rights, when the constitutionality of the Federal reserved water rights doctrine has been questioned by the United States Supreme Court, because it departs from and contravenes Federal and State civil and constitutional law. *Id.* at * 25, *33. And Objector and its Members will be able to demonstrate “material injury” because the substantive terms of the Compact, UAMO, Settlement Act, and Decree injure Objector’s Members’ State-based water rights and Federal and State-recognized constitutional rights. *Id.*

B. Identification of Objector Member Water Rights Which Will be Materially Injured by the Compact, UAMO, Settlement Act and Decree

10. Objector incorporates the preceding paragraphs as if fully restated herein.

11. This Statement of Objections broadly covers **all** of Objector’s Members, **all** similarly situated land and water use right owners/holders, including Flathead Irrigation Project irrigators who are members of the Flathead, Mission, and Jocko Irrigation Districts and who reside on the former Flathead Reservation.

12. For example, Objector’s Members, and those similarly situated, who are owners/holders of land and water rights located in Basin 76L in Lake, Sanders, and Missoula Counties, Montana within the exterior boundaries of the former Flathead Reservation. The water rights owned/held by these Objector Members were initiated under State-based appropriations law in the mid-1800’s and in the early 1900’s and have been beneficially used since that time. These Objector Members have hay crops, livestock, and/or wildlife habitat, camping and fishing operations, and use water for irrigation, stock, and domestic purposes. The water rights of these

Objector Members include Secretarial Water Rights from the mid-to-late 1800's acquired from Indian allottees and other water rights dating back to the early 1900's. These Objector Members include, but are not limited to, Gene Erb, Dean Brockway, Delbert Palmer, and Randy Doty.

Objector's Members also include land and water use right owners/holders who are owners of land and water rights located in Basin 76LJ, partly in Lake and Flathead Counties in Montana, beyond the exterior boundaries of and upstream from the former Flathead Reservation. The water rights of these Objector Members also were initiated under State-based appropriations law and have been beneficially used since that time. These Objector Members also have hay crop and wildlife habitat operations, and use water for irrigation, stock, and domestic purposes. The priority dates of the water rights of these Members date from 1931 (for irrigation and stock), from 1973-1994 (for domestic), and from 1984 (for wildlife). These Members include, but are not limited to, Lauralee and John O'Neil, and others similarly situated.

II. MATERIAL INJURY TO STATE-BASED WATER RIGHTS

13. Objector incorporates the preceding paragraphs as if fully restated herein.

14. Consistent with MCA § 85-2-233(4), and Rule 5(a) of the Water Court Adjudication Rules ("W.R.Adj.R."), Objector's Members, in their individual capacities, have provided a summary table listing of their water rights either, within the exterior boundaries of the former Flathead Reservation, or beyond the exterior boundaries of the former Flathead Reservation, with citation to specific sections of the Compact, the UAMO, the Settlement Act, and the Preliminary Decree to which each objection is made and the grounds therefore, as set forth in accompanying **Table 1**.

15. Notwithstanding the above, Objector and its Members emphasize that this Statement of Objection serves as a supplement to their individual objections, and that it extends

beyond and is not limited to the contents of Table 1, and it is more broadly focused on the entirety of the Compact, UAMO, Settlement Act, and Decree. Since these documents together implement a novel, legally invalid, and unconstitutional system of water rights and water rights administration, this Court's analysis of the impact of such system on any single water right and water right owner/holder will often implicate multiple portions of the Compact, UAMO, Settlement Act, and Decree, and their respective Appendices. Therefore, many of the grounds for objection raised herein apply to numerous claims or apply generally to all components of the Compact, UAMO, Settlement Act, and Decree.

16. Significantly, the June 9, 2022 Notice of Entry states, on Page 2, that “[t]he Court’s review of a compact is to allow the Court ‘to reach a reasoned judgment that the agreement is **not** the product of fraud or overreaching by, or collusion between the negotiating parties...’” (quoting *Chippewa Cree Tribe Water Compact*, WL 34947007, *3, Case No. WC-2000-01 (Jun. 12, 2002)). (emphasis added). The Notice of Entry additionally states, on Page 2, that “[t]he purpose of this kind of judicial review is [] to ensure that the settlement is [...] fair and reasonable to those parties and the public interest who were not represented in the negotiation, but have interests that could be materially injured by operation of the compact.” *Id.* at *4. Because the Compact, UAMO, Settlement Act, and Decree **are a product of fraud or overreaching by, or collusion between the negotiating parties**, it is **not** possible that the settlement is fair and reasonable to the non-negotiating parties, including Objector and its Members.

III. REQUEST FOR HEARING

17. Objector and its Members incorporate the preceding paragraphs as if fully restated herein.

18. Objector and its Members request a hearing on this Objection Statement and on any

other Objections Objector's Members previously filed individually with this Water Court pursuant to MCA § 85-2-233(1)(a)(iii). The foregoing Objection Statement demonstrates that Objector's Members: (1) are persons within the basin who received notice under MCA § 85-2-232(1); (2) have ownership and economic interests in existing water rights as well as rights to receive water through the Flathead Project; and (3) that these rights and economic interests are materially affected by the Compact, UAMO, and Settlement Act. Accordingly, Objector and its Members have demonstrated "good cause shown" for a hearing pursuant to MCA § 85-2-233(1)(a)(iii) (b).

19. Objector and its Members reserve their respective right to amend their Notice of Objection as additional information becomes available.

IV. CONCLUSION

Based on all the foregoing, this Water Court should find that the Compact, UAMO, and Settlement Act are a product of fraud or overreaching by, or collusion between the negotiating parties, and are fundamentally unfair to the non-parties, including Objector and its Members and those similarly situated, because of the magnitude and extent of their unconstitutional overreach.

Dated: February 9, 2023.