IN THE WATER COURT OF THE STATE OF MONTANA

CONFEDERATED SALISH AND KOOTENAI TRIBES – MONTANA – UNITED STATES COMPACT

CASE NO. WC-0001-C-2021

ATTACHMENT TO NOTICE OF OBJECTION AND REQUEST FOR HEARING

RICK AND NANCY JORE

SUMMARY Of OBJECTION

Objectors Rick and Nancy Jore "have interests that could be materially injured by operation of the compact." As taxpaying residents and citizens of the State of Montana, owning and residing on private fee patented property in Lake County, a political subdivision of the State of Montana, they expect and are to be afforded the benefits and protections of the Montana Constitution. Those benefits and protections include the right of Equal Protection of the Laws, the Right of Due Process, the Right of Property, and the Right of Representation in the State Government to which they pay taxes, including full representation in the Administration of their water rights, all of which are violated by the Confederated Salish and Kootenai Tribes – Montana – United States Compact.

Considering historical and factual misrepresentations within the Compact, the court cannot possibly "reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties."

SPECIFIC GROUNDS AND EVIDENCE OF OBJECTION

Objectors Rick and Nancy Jore provide the following information in support of their Notice of Objection to the settlement of the Confederated Salish and Kootenai Tribes Water Rights Compact, codified at Mont. Code Ann. § 85-20-1901, and Request for Hearing pursuant to Mont. Code Ann. § 85-2-233(1)(a)(iii).

We reside at 30488 Mount Harding Lane, Ronan MT 59864. Our home is on 160 acres of property we own at that address. The legal description of the property is SE1/4 of Section 27, Township 20 North, Range 19 West of the Montana Meridian, Montana. First and original owner Joseph C. Meingassner was granted a Land Patent on the property dated January 10, 1920, from the United States of America. The Patent Number is 726673.

Our property is in Basin 76L. The granted patent included "any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights…" We have DNRC issued water rights #'s 76L 128897 00 (1962 priority date) and 76L 40286 00 (1981 priority date).

While our property is located within the exterior boundaries of what is generally called the Flathead Indian Reservation, it has been legally withdrawn from reservation status. History and legal documents defend that assertion.

HISTORY

The 1855 Hellgate Treaty established the Flathead Indian Reservation. In Art. I of the Treaty, the "said confederated tribes of Indians **hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them..."** The United States then created the reservation as expressed in Art. II of the Treaty: **"There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington..."** This "reservation" of land by the United States established the background for "federal reserved water rights" under the Winters Doctrine for the Flathead reservation. It also disproves the first claimed assumption within the Compact that **"...the Confederated Salish and Kootenai tribes reserved the Flathead Indian Reservation..."**

Congress passed the 1889 Enabling Act on February 22, 1889, which permitted the entrance of Montana into the United States of America. The Enabling Act contained language addressing the status of Indian lands: **"...all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States...until revoked by the consent of the United States and the people of Montana."** This Enabling Act language was incorporated into Art. I of the Montana Constitution.

Art. VI of the Hellgate Treaty anticipated and authorized "allotment" of parcels of land to individual Indians and, after allotment, sale of "the residue" of land. (Attached.) The Congress acted on this provision of the treaty with the passage of the Flathead Indian Reservation Allotment Act of 1904: **"An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment."**

In 1934, the United States Congress passed the Indian Reorganization Act, sometimes called "The Wheeler/Howard Act." This act changed federal Indian policy when it established "That hereafter no land of any Indian reservation...shall be allotted in severalty to any Indian." The Act also authorized the Sec. Of Interior "...to **restore** to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened..." (These lands had to be **"restored"** to tribal ownership because, by virtue of such acts of Congress as the Flathead Allotment Act, they had been removed from tribal ownership and subject to allotment or sale.) However, Sec. 3 of the Act is clear insofar as lands previously withdrawn from reservation status when it states: **"Provided, however, that valid rights or claims of any persons to any lands so withdrawn...shall not be affected by this Act..."**

This history and Congressional Acts indicate a clear intent to extinguish federal and tribal title on lands allotted to Indians and lands sold to non-Indians within the boundaries of the original Flathead reservation. The CKST compact disregards this fact when it defines "Flathead Indian Reservation" as **"All land within the exterior boundaries of the Indian Reservation established under the July 16, 1855 Treaty of Hellgate (12 Stat. 975), notwithstanding the issuance of any patent, and including rights-of-way running through the Reservation."**

In short, the reservation is legally diminished and title to private land within the boundaries is justified and valid because those lands have been withdrawn from the reservation. **The State of Montana affirms this diminishment by exercise of state jurisdiction over state citizens on private and state-owned land, including rights-of-way, within the exterior boundaries of the reservation; thereby**

confirming these lands are not "under the absolute jurisdiction and control of the Congress..." and therefore, not "owned or held by any Indian or Indian tribes." The United States and the CSKT affirm this diminishment by concession of jurisdictional authority of the State of Montana within the boundaries, including authority to levy taxes.

THE CSKT COMPACT VIOLATES ARTICLE II SEC. 1 AND ART. II SEC. 2 OF THE MONTANA CONSTITUTION

Art. II Sec. 1 of the Montana Constitution states: **Popular sovereignty. "All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."** Art. II Sec. 2 states: **Self-government. "The people have the exclusive right of governing themselves as a free, sovereign, and independent state."**

The compact is assumed to be implemented by a "Law of Administration" or "Unitary Administration and Management Ordinance" that is dependent upon action by both the State and the CSKT. The compact defines both terms as **"the body of laws enacted by both the State and the Tribes to provide for the administration of surface water and Groundwater within the Reservation..."**

A "Flathead Reservation Water Management Board" is established under the Unitary Management Ordinance. The ordinance states: "The Board shall be the **exclusive regulatory body** on the Reservation for the issuance of Appropriation Rights and authorizations for Changes of Use of Appropriation Rights and Existing Uses, and for the administration and enforcement of all Appropriation Rights and Existing Uses. **The Board shall also have exclusive jurisdiction to resolve any controversy over the meaning and interpretation of the Compact** on the Reservation, and any controversy over the right to the use of water as between the Parties or between or among holders of Appropriations Rights and Existing uses on the Reservation..."

By acquiescing to the UAMO and Law of Administration provisions of the compact, the State of Montana is assuming that its constitutional duty and obligation to "provide for the administration of water rights" is dependent upon the will and actions of a separate (assumed) "sovereign," namely the CSKT. It is denying that "all political power is vested in and derived from the people" of the State, that "all government of right originates with the people," and "is founded upon their will only." It is forfeiting the "exclusive right" of "the people" to "govern[ing] themselves as a free, sovereign, and independent state."

THE CSKT COMPACT VIOLATES THE "EQUAL PROTECTION OF THE LAW" PROVISIONS IN ARTICLE II SEC. 4 OF THE MONTANA CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; INCLUDING THE RIGHT OF FULL REPRESENTATION FOR ART. IX SEC. 3 MONTANA CONSTITUTION ADMINISTRATION OF WATER RIGHTS

Art. II Sec. 4 of the Montana Constitution establishes a state duty to secure "equal protection" to each citizen: "I**ndividual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws."** The Fourteenth Amendment to the Constitution for the United States also secures the right of "equal protection" to these same citizens: **"No state shall...deny to any person within its jurisdiction the equal protection of the laws."** The Montana Constitution Article IX, Section 3(4), states that **"[t]he legislature shall provide for the administration, control, and regulation of water rights..."**

The Montana legislature created the Reserved Water Rights Compact Commission in 1979 to negotiate Federal Reserved Water Rights stemming from the "Winters Doctrine" emanating from a 1908 Supreme

Court decision recognizing the **implied** water rights "necessary to fulfill the purpose of any federal reservation of land."

At a public meeting of the Compact Commission on August 2, 2012, Commission Chairman Chris Tweeten conveyed to the commission members, and the public, what he called "The Grand Bargain." He stated: "...*the response is to remind the tribes about the Grand Bargain, and the fact that we agreed to do this* ***extraordinary thing****, frankly, with respect to* ***agreeing to subject or to remove non-Indian rights on the reservation from the jurisdiction and control of the state****, and place that somewhere else at the tribe's request…."*

Mr. Tweeten's words are unequivocal. He and the Commission should have understood the implications of this "extraordinary thing." The UMO/Law of Administration and the formation of the "Flathead Indian Reservation Water Management Board" are incompatible with the Art. IX Sec. 3 constitutional duty of the State. Mr. Tweeten clearly expressed what any logical and common-sense person would conclude; **the State was "agreeing to...remove non-Indian rights on the reservation from the jurisdiction and control of the state" and thereby, by "overreach" and "collusion between the negotiating parties," (if not outright "fraud") violate the constitutionally secured "equal protection" rights of taxpaying Montana citizens within the reservation.** Legislators who supported the Compact likewise should have understood this "extraordinary thing" was not at all consistent with their oath to uphold the Montana and United States Constitutions.

Members of the RWRCC and legislators also should have known this "extraordinary thing" was contrary to the State's earlier stated position regarding water rights administration within the Reservation when it exhibited a more stringent will to follow the requirements of the State Constitution. In a 1981 case filed in the United States District Court in Missoula, *Confederated Salish and Kootenai Tribes of the Flathead Reservation, et al vs. The State of Montana, et al,* the CSKT made much the same claims on which the Compact is based. The State rejected the claims of the tribes as applied to non-tribal member property owners and water right holders within the reservation.

In the "Defendants' Brief in Opposition to Application for Preliminary Injunction" in that case, the State conveyed **"The defendants do not in any way assert jurisdiction over the Tribes, or over the property of individual members of the Tribes owned by them or their Reservation. <u>The defendants do however assert jurisdiction pursuant to the Montana Water Use Act over the SURPLUS WATERS flowing through and touching upon the Reservation.</u>"** Additionally, the State declared **"All individuals who either claim rights existing as of July 1, 1973, pursuant to the Montana Water Use Act, or claim water rights through permits granted by the Montana Department of Natural Resources and Conservation as provided by Montana law have <u>valuable property rights.</u>"**

In a letter to then Montana Attorney General Tim Fox, Attorney Richard A. Simms, New Mexico Board Certified Specialist in Water Law, summed up his arguments that the Compact violated Art. IX Sec. (3)4 thusly: **"The blind assertion that the ratification of the CSKT Compact would "provide for the administration of water rights pursuant to Art. IX of the Montana Constitution" is dead wrong under both federal and state water law. In sum, the "Law of Administration" obliterates Art. IX of the Montana Constitution and all of the Montana law enacted pursuant thereto by the Montana legislature. To conclude that the ratification of the CSKT Compact would "provide for the administration, control, and regulation of water rights" in Montana is completely inane."**

THE CSKT COMPACT VIOLATES ART. III SEC. 1 OF THE MONTANA CONSTITUTION

All legitimate State governmental power in Montana is contained in one of the three branches created by Art. III Sec. 1 of the Montana Constitution, which says: **Separation of powers. "The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."**

There is contention that the "Flathead Reservation Water Management Board" is "a state created board" that somehow fulfills the requirements of Art. IX Sec. 3. Legislators and others that supported the compact struggle to define the board when asked and we have yet to receive a cogent answer from any of them. One State Senator, for example, offered an apparent guess: "I would say it is a state authorized board." However, by the terms of the compact, it is no less a "tribal authorized board," since existence of the board depends on Tribal Council passage of the UMO/Law of Administration and Tribal Council appointments to the board.

One Board member described the Board and its assumed authority in this way: **"This is neither a state system nor a tribal system. We are really creating a new independent system."** Another Board member deferred to DNRC staff member and Compact Implementation Program Manager Arne Wick when asked to define the board. Mr. Wick then contacted us by phone to address our questions. He verbally confirmed that he agrees the Board is "independent" of both the State and the Tribes. Mr. Wick also confirmed that Board members were under no obligation of allegiance to the Montana Constitution by oath, as that was not a requirement within the legislation.

The Board itself paid a Montana law firm to "**attempt** to define the classification of the Board" with an answer to this specific question: **"What is the Flathead Reservation Management Board (the "Board") and how is the Board classified for jurisdiction and authority purposes?"** The law firm issued a Memorandum to the Board and the Office of the Engineer employed by the Board on Nov. 16, 2022. The memorandum states, **"The Board is neither a state nor tribal governmental entity; rather it is an amalgamate of both" and eventually concluded that the Flathead Reservation Water Management Board was to be called "a government instrumentality."**

If the Board is not a "state board" and **"The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial,"** obviously it is not exercising Montana Constitution ordained authority. **If it is indeed an independent "government instrumentality" with no Constitutional sanction and no Constitutional allegiance, it is without legitimate authority over Montana citizens.** Additionally, it is apparent that the Board exercises legislative, executive, and judicial authority which, if one makes the claim that this is a "state board"—even if in an "amalgamated" way—the assumed legislative, executive, and judicial authority is a violation of "separation of powers." Either way, the Compact must be declared repugnant to Art. III Sec. 1 of the Montana Constitution and therefore void.

THE COMPACT VIOLATES ART. II SEC. 17 AND ART. II SEC. 26 OF THE MONTANA CONSTITUTION

The Montana Constitution secures the right of "Due process of law" and "Trial by jury" to each individual citizen. Art. II Sec. 17: **Due process of law. "No person shall be deprived of life, liberty, or property without due process of law."** Art. II Sec. 26: **Trial by jury. The right of trial by jury is secured to all and shall remain inviolate.**

Although the Compact states that an individual "dissatisfied with a decision of the Board...may appeal that decision by filing a petition for judicial review with a Court of Competent Jurisdiction," the Compact later clarifies that such a court need not be in the Montana judiciary. In the Compact, a "Court of Competent

Jurisdiction" is defined as **"a State or Tribal court that otherwise has jurisdiction over the matter so long as the parties to the dispute to be submitted to that court consent to its exercise of jurisdiction, but if no such court exists, a federal court."**

Under the Compact, the water rights of non-tribal Montanans within the boundaries of the Reservation are adjudicated by the Board. If parties to a conflict do not consent to Montana district court jurisdiction, a ruling by the Board could be appealed to the Federal judiciary. In such cases, Montana citizens like us would be deprived of the typical "due process" procedures afforded all other Montana citizens, including a right of trial by a jury of their peers within the State of Montana and within the standard Montana judiciary process.

THE COMPACT VIOLATES ART. II SEC. 28 AND THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The United States assumed to "ratify" the CSKT water compact by passage of a Sen. Daines sponsored bill, S 3019, titled "The Montana Water Rights Protection Act." To gain passage, the bill was attached to H.R. 133, called the "Consolidated Appropriations Act, 2021." The MWRPA did not have a committee hearing in the House of Representatives, did not have a "stand alone" vote in either the House or the Senate, and was "passed" by attachment to the Omnibus Spending bill during a lame duck session of Congress on Dec. 27, 2020. Additionally, **MWRPA contains significant provisions that were not included in SB 262, the bill passed by the MT Legislature as "ratification" of the compact.**

One significant provision of MWRPA is the implementation of "land exchange" provisions that **require** both **state and private land** within the exterior boundaries of the Reservation be exchanged for public (federal) land elsewhere within the State of Montana. Once exchanged, those state and private lands will be given to the tribes and, by the terms of MWRPA, "become part of the reservation."

MWRPA requires no less than "**the value of the surface estate of the approximately 36,808 acres of State trust land"** within the boundaries of the reservation be exchanged and then transferred to the tribes. If the totality of the approximately 36,808 acres of State trust land within the boundaries is not exchanged and transferred to the tribes within "the 5-year period beginning on the date of enactment" of MWRPA, a **"private land exchange program"** is initiated and **"The Tribes shall assist in obtaining prospective willing parties to exchange private land within the Reservation for public land within the State."**

The Montana DNRC has publicly conveyed that up to 29,200 acres of State trust land within the boundaries of the reservation is eligible for exchange. If the entirety of that amount of State trust land is exchanged, which is unlikely in our view, then no less than approx. 7,600 acres of private land would be required to be exchanged and transferred to the Tribes. The "exchange" of private land and its eventual transfer to tribal trust status removes the property from the tax base of local political subdivisions of the State.

The impact of these land exchanges will be significant to both the value and tax liability of remaining private property within the boundaries of the reservation. In addition to land value diminishment caused by uncertainty of State jurisdictional authority (except regarding State taxation, apparently), the already present "tax shift" concerns, especially in Lake County, will be exacerbated.

A legislative interim committee study during the 2019-2021 interim, stemming from passage of HJ 35 in the 2019 legislative session, indicated that 81% of property tax revenue in Lake County was derived from Residential property taxes, the highest percentage of all 56 Montana Counties and approximately double the average of all counties. Lake County had the fourth highest Residential property tax when measured on a per capita basis. These numbers are confirmation of significant "tax shift" caused primarily by non-taxed land in tribal trust status. There is no doubt this "tax shift" will be exacerbated by MWRPA.

The Compact contains jurisdictional transfer provisions from the State to the Tribes. The "land exchange" provisions of MWRPA are a not-so-subtle repatriation effort that necessarily assumes the Flathead Allotment Act of 1904 was illegitimate and that non-Indian owned private property within the reservation boundaries is, at best, less valid as private property outside the boundaries, at worst, "stolen land." (It must be noted that this very presupposition has been stated publicly to myself and others, including elected officials, by tribal members and supporters with this contention: "You are living on stolen land." A serious and disconcerting accusation, to say the least.)

The Compact, including the provisions of MWRPA, is public policy that logically and certainly impacts market forces negatively and which devalues private property within the Flathead Indian Reservation and is therefore a **"taking of private property for public use without just compensation."**

CONCLUSION

Rick and Nancy Jore are Montana citizens, property owners, and taxpayers who have defrauded no one of their rights or property and therefore have a right of claim to full citizenship under the Montana Constitution, the governing document of this State. We do not concede to taxation without representation.

Article VI, Hellgate Treaty

ARTICLE VI. The President may from time to time, at his discretion, cause the whole, or said portion of such reservation as he may think proper, to be surveyed into lots, and assign the same as such individuals of families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE 6. Omaha Treaty (Applicable)

The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to

each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. ***And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States.*** No State legislature shall remove the restrictions herein provided for, without the consent of Congress.