

2/28/97

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8 IN THE WATER COURTS OF THE STATE OF MONTANA  
9 UPPER AND LOWER MISSOURI RIVER DIVISIONS  
FORT PECK COMPACT SUBBASIN

10

In the Matter of the )  
11 Adjudication of Existing ) Cause No. WC-92-1  
and Reserved Rights to the )  
12 Use of Water, Both Surface )  
and Underground, of the )  
13 Assiniboine and Sioux Tribes )  
of the Fort Peck Indian )  
14 Reservation Within the )  
State of Montana. )

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16 STATE OF MONTANA'S MEMORANDUM IN SUPPORT OF  
17 MOTION TO DISMISS OBJECTIONS AND  
TO APPROVE FORT PECK-MONTANA COMPACT

18

19 The Attorney General of the State of Montana submits the  
20 following memorandum in support of its Motion to Dismiss  
21 Objections and to Approve Fort Peck-Montana Compact, submitted  
22 herewith.

23

24

INTRODUCTION

25

In accordance with Mont. Code Ann. §§ 85-2-701 to -705  
26 (1993), the Montana Reserved Water Rights Compact Commission  
27 reached a compact with the Assiniboine and Sioux Tribes of the

1 Fort Peck Indian Reservation ("Tribes"). Pursuant to Mnt. Code  
2 Ann. § 85-2-702 the Fort Peck-Montana Water Rights Compact  
3 ("Compact") was ratified by the Montana Legislature, 1985 Mont.  
4 Laws, ch. 735, § 1, codified at Mont. Code Ann. § 85-20-201  
5 (1993).

6 The tribal water right ("TWR") recognized in the Compact  
7 is summarized in the Summary Description of Fort Peck Tribal  
8 Water Right, served upon all claimants in the diversionary  
9 basins in accordance with the Court's April 6, 1994 Findings of  
10 Fact, Conclusions of Law, and Order for Commencement of Special  
11 Proceedings for Consideration of Fort Peck-Montana Compact  
12 ("Commencement Order"), and will not be repeated here. The  
13 early history of this case was also set forth in the  
14 Commencement Order and will likewise not be repeated. Pursuant  
15 to the Commencement Order, a Notice of Entry of Fort Peck-  
16 Montana Compact Preliminary Decree and Notice of Availability  
17 was issued and served in accordance with Mont. Code Ann.  
18 § 85-2-233 in all of the basins comprising the Special Fort  
19 Peck Compact Subbasin. The Notice of Availability gave  
20 individuals in those basins until October 3, 1994 to file  
21 objections. On or before that date objections were filed by  
22 three individuals: Gladys Connie Flygt, Jeff D. Weimer, and  
23 Paul Tihista. The State's present motion requests the Court to  
24 dismiss those objections and approve the Compact in accordance  
25 with Mont. Code Ann. §§ 85-2-233(6) and -702(3).

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27

ARGUMENT

I. NONE OF THE OBJECTORS HAVE SHOWN THAT THEY HAVE WATER RIGHTS OR OTHER COGNIZABLE LEGAL INTERESTS THAT ARE HARMED OR ADVERSELY AFFECTED BY THE COMPACT.

A. Paul Tihista Lacks Standing to Challenge the Compact Because He Does Not Have A Water Right and Has Otherwise Failed to Show What Cognizable Legal Interest He Seeks to Vindicate.

Paul Tihista filed an objection to the Compact which can most charitably be described as evidencing general disagreement with the decision in Winters v. United States, 207 U.S. 564 (1908). Apart from the doubtful merit in that position, Mr. Tihista's objection fails primarily because he lacks an "ownership interest" in water or its use that is necessary to give him standing to challenge the Compact.

Montana Code Annotated § 85-2-233(1)(a) provides that "[f]or good cause shown . . . a hearing must be held before the water judge on any objection to a . . . preliminary decree . . ." That same statute goes on to define "good cause" as requiring the objector to provide "a written statement showing that a person has an ownership interest in water or its use that has been affected by the decree." Mont. Code Ann. § 85-2-233(1)(b); see also Water Court Procedural Rule 1.II(7).

The records at the Montana Department of Natural Resources and Conservation indicate that, while Mr. Tihista had originally filed several statements of claim in the adjudication, he has since transferred any interest he has in those claims to another party. (See Affidavit of James E. Kindle ["Kindle Aff.'], Attach. 3.) DNRC's records do not

1 otherwise indicate that Mr. Tihista has any permitted post-73  
2 water rights. (Kindle Aff., ¶ 3.) Mr. Tihista has not  
3 otherwise indicated what "ownership interest" in water he seeks  
4 to vindicate or protect by his objection.<sup>1</sup> Absent such a  
5 written showing he has not established "good cause" for his  
6 objection. See generally Fort Hall Water Users Ass'n v. United  
7 States, 921 P.2d 739, 742 (Idaho, 1996) (non-Indian water users  
8 association that did not file claim in adjudication lacked  
9 standing to object to Fort Hall Indian Water Rights Agreement).  
10 It should accordingly be dismissed.

11  
12 **B. The Remaining Objectors Have Not Shown How Their**  
13 **Ownership Interests In Water Are Affected by The**  
14 **Compact.**

15 Connie Flygt and Jeff Weimer each have statements of claim  
16 on file with DNRC. (See Kindle Aff., ¶ 2.) Mr. Weimer has two  
17 water rights in Basin 40E (Missouri River between Musselshell  
18 River and Fort Peck Dam): a 1965 use right and a 1982  
19 permitted right, both on an unnamed tributary Seven Blackfoot  
20 Creek. (Kindle Aff., Attach. 2.) Both rights are for

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21 <sup>1</sup>The State does not mean to imply that the only "ownership  
22 interest" cognizable under Mont. Code Ann. § 85-2-233(1)(b) is  
23 a private proprietary right to use water. Among other things,  
24 such a construction of § 233(1)(b) would be inconsistent with  
25 Mont. Code Ann. § 85-2-233(1)(a)(I), which provides the State  
26 with standing to object to temporary preliminary and  
27 preliminary decrees in order to protect the public's interest.  
See Mont. Const. Art. IX, § 3(3) ("[a]ll . . . waters within  
the boundaries of the state are the property of the state for  
the use of its people . . ."). However, Mr. Tihista's  
objection does not require the Court to address this question  
since it fails to explain in any manner what interest he seeks  
to vindicate or his right to do so.

1 stockwater purposes and involve small on-stream reservoirs  
2 designed to catch spring runoff. Id. The amount of the 1965  
3 right is 30 gallons per day per animal unit (unspecified), and  
4 the amount of the 1982 right is 8.0 acre feet per year. Id.  
5 Seven Blackfoot Creek, into which this unnamed tributary  
6 drains, flows into Fort Peck Reservoir about halfway between  
7 Fred Robinson Bridge and the Fort Peck Dam.

8 Mrs Flygt's water right is in Basin 40EJ (Missouri River  
9 between Bullwhacker Creek and Musselshell River), and is a 1942  
10 stockwater claim for a system of reservoirs and collection  
11 ditches on an unnamed tributary to Armelles Creek. (Kindle  
12 Aff., Attach. 1.) The claimed flow rate is 160 miners inches  
13 and the claimed volume is 280 acre feet. Id. Armelles Creek,  
14 into which this unnamed tributary drains, flows into the  
15 Missouri River at Fred Robinson Bridge.

16 While Mr. Weimer and Mrs. Flygt have met the initial  
17 requirement in Mont. Code Ann. § 85-2-233(1)(b) of having an  
18 "ownership interest" in water, neither of them go on to make  
19 the additional required showing that their rights are "affected  
20 by the decree" (id.), or to specify the evidence upon which  
21 such alleged adverse affect is based. Mont. Code Ann.  
22 § 85-2-233(3); see also Water Court Procedural Rule 1.II(7).  
23 The threshold "good cause" standard in Mont. Code Ann.  
24 § 85-2-233 and the requirement that objectors specify how they  
25 have been affected and the evidence in support of that  
26 allegation is an integral part of the general adjudication  
27 process and essential to the efficient disposition of claims

1 and objections. The drafters of Mont. Code Ann. § 85-3-233  
2 sought to avoid clogging the adjudication process up with  
3 extensive pretrial motion and discovery practice by requiring  
4 all objectors to specify, up front, certain basic aspects of  
5 their objection. Mr. Weimer and Mrs. Flygt have failed to meet  
6 these basic requirements, and for that reason their objections  
7 should be dismissed.<sup>2</sup>

8  
9 **II. THE COURT SHOULD APPROVE THE COMPACT BECAUSE IT CONFORMS  
10 TO APPLICABLE LAW AND REFLECTS A FAIR, ADEQUATE, AND  
REASONABLE SETTLEMENT OF THE TRIBES' WATER RIGHT CLAIMS.**

11 Under Montana law there are two ways a reserved water  
12 right may be quantified and folded into the adjudication. One  
13 is through the normal adjudication process (Mont. Code Ann.  
14 § 85-2-217) and the other is through compact (Mont. Code Ann.  
15 §§ 85-2-701 to -705.) This is the second water rights compact  
16 to come before this Court for approval. In the first such  
17 proceeding, involving the Northern Cheyenne-Montana Water  
18 Rights Compact (Water Court Cause No. WC-93-1), the Court in  
19 its Memorandum Opinion of August 3, 1995 held that it would  
20 utilize the consent decree standards articulated in United  
21 States v. Oregon, 913 F.2d 576, 580 (9th Cir.), cert. denied  
22 sub nom., Makah Indian Tribe v. United States, 111 S. Ct. 2889  
23 (1991), and like cases to review compacts reached in accordance  
24 with Mont. Code Ann. § 85-2-703.

25  
26 <sup>2</sup>If, in response to this motion, Mr. Weimer and Ms. Flygt  
27 are able to factually allege the manner in which they are  
adversely affected by the Compact, the State reserves the right  
to contest those allegations through discovery and trial.

1           Accordingly, before approving a compact "the court must be  
2 satisfied that [the compact] is at least fundamentally fair,  
3 adequate and reasonable . . . [and that it] conform[s] to  
4 applicable law." (Mem. Op. at 6 (Aug. 3, 1995) No. WC-93-1);  
5 see also Davis v. City and County of San Francisco, 890 F.2d  
6 1438, 1445 (9th Cir. 1989); United States v. City of Miami, 664  
7 F.2d 435, 441 (5th Cir. 1981). The Court also quoted from  
8 Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 625  
9 (9th Cir. 1982), for the proposition that "[t]he relative  
10 degree of importance to be attached to any particular factor  
11 will depend upon, and be dictated by, the nature of the  
12 claim(s) advanced, the type(s) of relief sought, and the unique  
13 facts and circumstances presented by each individual case."

14           From the foregoing the key elements of the Court's review  
15 can be deduced. First, the Court needs to determine that the  
16 Compact was validly entered into in accordance with the  
17 statutory requirements, and that the parties have assented to  
18 it in all material respects. Second, the Court must determine  
19 that there are no serious or patent defects in the Compact or  
20 the manner in which it determines or interprets the Tribal  
21 Water Right. ["TWR"] Finally, the Court should determine that,  
22 at least as a threshold matter, the Compact represents an  
23 "equitable" determination of the TWR which has a basis in law  
24 and fact and which adequately describes it in a manner  
25 consistent with Mont. Code Ann. § 85-2-234(7). As will be  
26 demonstrated below, all of these criteria are satisfied here  
27 and the Compact should be approved.

1           A.   The Compact Was Reached in Accordance With and  
2           Otherwise Conforms to Applicable Law.

3           Montana Code Annotated § 85-2-701 sets out three  
4 conditions precedent to the submission of a water rights  
5 compact to the water court for approval and incorporation into  
6 the adjudication. First § 701(1) requires that negotiations  
7 must be "commenced by the commission." Id. at (1). The  
8 affidavit of Scott Brown establishes that negotiations were  
9 commenced in 1979. (Brown Aff., ¶ 3.) Second, § 701(2)  
10 provides that a compact must be agreed to by the Commission and  
11 the involved tribe, approved by the "appropriate federal  
12 authority," and copies filed with the United States Department  
13 of State, the Secretary of State of Montana, and the Tribe.  
14 The Compact was approved by the Compact Commission on April 5,  
15 1985, and copies thereof have been filed with the required  
16 officials in accordance with that provision. (Brown Aff.,  
17 ¶ 15.) The memoranda in support of this motion which will be  
18 filed by the Tribes and the United States will similarly  
19 establish their respective approvals of the Compact. Lastly,  
20 § 701(2) provides that the Compact must be ratified by the  
21 Montana Legislature. As discussed earlier, the Compact was  
22 ratified by the Montana Legislature in 1985. 1985 Mont. Laws,  
23 Ch. 735, § 1. All of the conditions precedent enumerated in  
24 Mont. Code Ann. § 85-2-701 have been met.



1        **B. The Compact Represents a Fundamentally Fair,**  
2        **Reasonable and Adequate Determination of the**  
3        **Assiniboine and Sioux Tribes' Water Rights.**

4        Mont. Code Ann. § 85-2-235(7) requires that with respect  
5        to a reserved water right a final decree--and by inference a  
6        compact--must state:

- 7        (a) the name and mailing address of the holder of  
8        the right;
- 9        (b) the source or sources of water included in the  
10       right;
- 11       (c) the quantity of water included in the right;  
12       [and]
- 13       (d) the date of priority of the right;
- 14       (e) the purpose for which the water included in the  
15       right is currently used, if at all;
- 16       (f) the place of use and description of the land,  
17       if any, to which the right is appurtenant;
- 18       (g) the place and means of diversion, if any, and  
19       (h) any other information necessary to fully define  
20       the nature and extent of the right, including  
21       the terms of [the] compact[].

22       See also Mont. Code Ann. § 85-2-243(5). The Compact addresses  
23       each of these elements in a manner that has a basis in law and  
24       fact, and which is otherwise reasonable and equitable. Each  
25       element listed in Mont. Code Ann. § 85-2-235(7) will be  
26       addressed briefly below:

27        1.    **Name and mailing address.**    III(A) provides that the  
28       water right recognized in the Compact "is held in trust by the  
29       United States for the Tribes." While the Compact does not  
30       contain a specific mailing address for the United States, that  
31       omission is harmless.

32        2.    **Source or sources of water.**    Article III I. of the  
33       Compact provides that, upon certain specified conditions, the  
34       Tribes may divert water in the exercise of the tribal water  
35       right from the mainstem of the Missouri River, from Fort Peck

1 Reservoir, and from tributaries to the Missouri River that flow  
2 through or adjacent to the Reservation other than the Milk  
3 River. It is not settled whether off-reservation sources may  
4 be used to satisfy on-reservation reserved water rights. See  
5 generally, Conference of Western Attorneys General, American  
6 Indian Law Deskbook at 184-85 (1993 & Supp. 1996); 4 Waters and  
7 Water Rights § 37.02(d) (1996). There is, however, precedent  
8 for the recognition of a non-appurtenant source for a reserved  
9 water right. E.g., Arizona v. California, 373 U.S. 546, 596-98  
10 (1963) (water from source two miles distant from reservation  
11 decreed to tribe). Accordingly, the recognition of a non-  
12 appurtenant source for the TWR in the context of a negotiated  
13 settlement involving a number of interlocking concessions  
14 cannot be seen as unreasonable.

15       3. Quantity of water included in the right. Article  
16 III A. provides that the Tribes have a conditional right to  
17 "the lesser of (I) 1,050,472 acre feet of water, or (ii) the  
18 quantity of water necessary to supply a consumptive use of  
19 525,236 acre feet per year for the uses and purposes set forth  
20 in [the] Compact." The affidavit of Scott Brown explains how  
21 the quantification of the TWR took place and the technical and  
22 factual basis for the ultimate figure reached. (Brown Aff.,  
23 ¶¶ 4-7.) As is clear from that affidavit and the attached  
24 documentation, this quantity was the product of joint technical  
25 work and has a basis in fact. As with any negotiated  
26 settlement, the ultimate amount settled on was a part of the

27

1 overall series of compromises reflected in the Compact. (Brown  
2 Aff., ¶ 15.)

3 4. Priority date of right. The 1888 priority date of  
4 the TWR (see Compact, Art. III A.) was not disputed given the  
5 fact that the Fort Peck Reservation was created by the same  
6 Congressional Act which was held in Winters to give rise to a  
7 reserved water right with an 1888 priority. (See Brown Aff.,  
8 ¶ 8.) The 1888 priority date is well grounded in law and in  
9 fact.

10 5. The purpose of the right. The question of whether an  
11 Indian tribe may use its reserved water right for purposes  
12 other than the original purposes of the reservation has not  
13 been definitively settled. Compare Arizona v. California, 344  
14 U.S. 350 (1963), Report of Special Master at 265-66, with In Re  
15 Big Horn River, 753 P.2d 76, 94-99 (Wyo., 1988); see generally  
16 Indian Law Deskbook at 190-91 (1993 and Supp. 1995)); 4 Waters  
17 & Water Rights § 37.02(a). However, that question was resolved  
18 here by allowing the Tribes to use the Tribal Water Right on  
19 the Reservation without regard to whether that purpose is one  
20 that is considered "beneficial" under state law, and off the  
21 Reservation so long as the use is considered "beneficial" as  
22 that term is defined by state law in effect at the time of the  
23 use. Given the ambiguity of the law in this area, the  
24 resolution of this question is reasonable.

25 6. Place of use and description of the land to which the  
26 right is appurtenant. In addition to using the TWR on the  
27 Reservation the Tribes may, subject to certain conditions,

1 market water off the Reservation from the Missouri River and  
2 Fort Peck Reservoir. The question of whether a tribe may  
3 market its water off-reservation has also not been definitively  
4 settled. See generally Indian Law Deskbook at 190-91; 4 Waters  
5 & Water Rights § 37.02(f). The right to market water off the  
6 reservation was one of the most important points to the tribal  
7 negotiators, who felt that it was necessary to allow the Tribes  
8 to reap some economic benefit from their right. (Brown Aff.,  
9 ¶ 11.) The State's recognition of a tribal marketing right in  
10 exchange for the Tribes' concessions with respect to protecting  
11 non-Indian water users on the Reservation compromised a  
12 significant part of the bargain that resulted in the Compact  
13 and was reasonable.

14 **7. Place and means of diversion.** Article III E.  
15 provides that all persons using the Tribal Water Right must  
16 comply with state law regulating the construction and operation  
17 of facilities using or transporting water off the Reservation.  
18 Article III J. provides that if water is diverted from Fort  
19 Peck reservoir or from the mainstem of the Missouri River below  
20 Fort Peck Dam, the Tribes must provide notice to the State and  
21 sufficient documentation to show that the diversion meets the  
22 criteria listed in the paragraph, which mirror the criteria for  
23 such diversion under state law. If water is diverted from  
24 above Fort Peck Reservoir, the Tribes must comply fully with  
25 state law and, in addition, must secure the approval of the  
26 Montana legislature. Obviously enough, compliance with state

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1 law, or requirements substantially similar to state law, is  
2 reasonable.

3 8. Other information necessary to fully define the  
4 right. Under Article IV of the Compact the exercise of the TWR  
5 is subordinated to certain specified uses of water under state  
6 law occurring on the "north-south tributaries" to the Missouri  
7 River (i.e. Porcupine Creek, Poplar River, Big Muddy Creek,  
8 Little Porcupine Creek, Wolf Creek, Tule Creek and Chelsea  
9 Creek). Given the fact that many of the state-based water  
10 rights in those watersheds had priority dates junior to the  
11 Tribes' reserved water rights, the protection of those rights  
12 was one of the main priorities of the Commission in negotiating  
13 the Compact and was the quid pro quo for concessions made to  
14 the Tribes in the areas of marketing and quantity. (Brown  
15 Aff., ¶¶ 10-11.) Accordingly, an evaluation of those other  
16 elements must include a consideration of this element of the  
17 Compact. The subordination provisions of Article IV evidence  
18 the "give-and-take" nature of the negotiations and are strong  
19 evidence of the overall reasonableness of the Compact.<sup>3</sup>

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22 <sup>3</sup>The Compact also contains other provisions which relate  
23 to the administration of water rights on the Reservation  
24 (Compact, Art. V), and the resolution of disputes between users  
25 of the TWR and users of state water rights. Compact, Art VI.  
26 Since these additional provisions do not strictly relate to the  
27 "determination and interpretation" of the TWR they will not be  
addressed in the memorandum at any length. They do, however,  
provide further evidence of the overall reasonableness of the  
Compact and the parties desire to comprehensively address water  
rights issues on the Reservation.

1           C.    Because the Compact Has Been Legislatively Ratified  
2                    It Is Entitled to a Presumption of Reasonableness.

3           The Compact has been ratified by the legislative bodies of  
4 the State of Montana and the Assiniboine and Sioux Tribes, and  
5 the duly authorized official of the United States government.  
6 While not dispositive of the question of whether the Compact  
7 should be approved, the State submits that such ratification  
8 gives rise to a presumption of reasonableness in favor of the  
9 compact which can be overcome only by a compelling showing to  
10 the contrary.<sup>4</sup>

11           Through the ratification process the Compact was  
12 thoroughly scrutinized by the Montana Legislature and the  
13 Tribes' Business Council, and its ratification by those  
14 entities represents a determination by each involved government  
15 that it represents an appropriate resolution of the Tribes'  
16 reserved water right claims. These findings should accordingly  
17 be recognized and implemented through the adoption of a  
18 presumption of reasonableness with respect to the Compact.

19           Second, a presumption of reasonableness based on

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21           <sup>4</sup> A presumption "is an assumption of fact that the law  
22 requires to be made from another fact or group of facts found  
23 or otherwise established in the action or proceeding." Mont.  
24 R. Evid. 301. It generally has the effect of shifting either  
25 the burden of production or persuasion (or both) to one who  
26 wishes to controvert the presumed fact. See generally Clifford  
27 S. Fishman, Jones on Evidence § 4:4 (1992); Jack B. Weinstein  
& Margaret A. Berger, Weinstein's Evidence § 300[02] (1994).  
A presumption may be created by a court for several reasons,  
including "probability . . . procedural economy, regularity  
[and] convenience, and the implementation of social policy."  
Jones at id. Each of these criteria is present here and  
supports the adoption of such a presumption.

1 legislative ratification is consistent with judicial economy  
2 and convenience. The Montana Legislature, the Fort Peck Tribal  
3 Council, and the United States have already considered the  
4 Compact in great detail. It would serve little purpose for the  
5 Water Court to engage in a detailed review of the same unless  
6 it is necessitated by a substantial objection or a patent  
7 defect in the Compact.

8 Finally, public policy in Montana strongly favors the  
9 negotiated resolution of Indian and federal reserved water  
10 right claims. Mont. Code Ann. § 85-2-701(1) specifically  
11 provides that "it is . . . intended that the state of Montana  
12 proceed under the provisions of [Mont. Code Ann. §§ 85-2-701  
13 to -705] in an effort to conclude compacts for the equitable  
14 division and apportionment of waters." This policy exists not  
15 only in the interests of judicial economy but also because  
16 litigants should be encouraged to determine their respective  
17 rights between themselves. See, e.g., Feder v. Harrington, 58  
18 FRD 171, 174 (S.D.N.Y. 1972) ("In the normal case, there is a  
19 public policy favoring settlement.") Adoption of a presumption  
20 in favor of the reasonableness of a compact adopted and  
21 ratified in accordance with Mont. Code Ann. § 85-2-701 will  
22 effectuate the State's public policy favoring settlement.

23  
24 D. The Objectors Cannot Meet Their Burden To Show How  
25 They Are Harmed And Why The Compact Should Be  
Rejected.

26 The primary effect of the presumption of reasonableness is  
27 to shift the burden to the objectors to show how they are

1 harmed and give reasons why the Compact should be rejected. In  
2 that regard the State assumes that Mr. Weimer and Mrs. Flygt  
3 each will argue that the fact that the Tribes may have the  
4 right to exercise a call upon their water rights constitutes  
5 both an adverse affect and a reason why it should be rejected.  
6 However, even if true, that fact that the Tribes may have the  
7 right to exercise a call on Mr. Weimer's and Mrs. Flygt's water  
8 rights does not rise to the level sufficient to meet the  
9 requirement of Mont. Code Ann. § 85-2-233.

10 The Tribes' potential rights to call Mr. Weimer's and  
11 Mrs. Flygt's water rights<sup>5</sup> stem not from the Compact but rather  
12 from the fact that they possess senior federally-reserved water  
13 rights downstream from them. The Compact does not create the  
14 Tribes' rights, it simply recognizes and quantifies them.  
15 Accordingly, in order to meet the required injury showing in  
16 this context Mr. Weimer and Mrs. Flygt would have to  
17 demonstrate that the rights recognized in the Compact differed  
18 substantively from, or were significantly and arbitrarily  
19 greater than, the rights the Tribes would have been decreed in  
20 litigation.

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23 <sup>5</sup>The State takes no position on the question of whether  
24 such a call could, in fact, occur in light of the "futile call"  
25 doctrine. Given the extremely small size of Mr. Weimer's and  
26 Mrs. Flygt's claims, the odds that the Tribes would bother to  
27 exercise a call against them are extremely small. The fears of  
Mr. Weimer and Mrs Flygt that the Tribes would seek to secure  
water from Dry Armelles Creek and an unnamed tributary of Seven  
Blackfoot Creek, both ephemeral streams, rather than from the  
adjacent Fort Peck Reservoir, are simply illogical.



1 As demonstrated above, each element of the TWR, standing  
2 alone, falls within the range of possible litigation outcomes.  
3 Collectively, the entire Compact reflects careful and reasoned  
4 balancing of the many issues raised by the quantification of  
5 the Tribes' reserved water right claims and integration of  
6 those rights into the existing state water right regime.  
7 Moreover, if Mr. Weimer and Mrs. Flygt were successful in their  
8 objections, the negotiated protections for the numerous state  
9 water right holders on the Milk River and the north-south  
10 tributaries, which would not exist but for the Compact, would  
11 be placed at risk. On balance, the minor concerns they raise  
12 do not outweigh the benefits of the Compact to the Tribes, the  
13 State, and the protected non-Indian water users on the  
14 Reservation. Given the fact that Mr. Weimer and Mrs. Flygt  
15 have not shown that they are put in a worse position by the  
16 Compact than they occupied prior to its ratification, there is  
17 no basis upon which to conclude that it should be rejected.

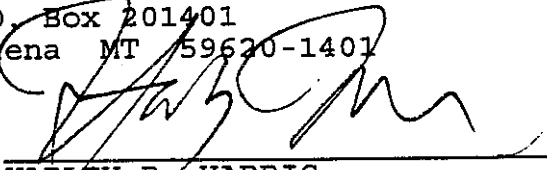
18  
19 CONCLUSION

20 For the reasons set forth above, the State respectfully  
21 requests this Court to enter summary judgment dismissing all of  
22 the objections that have been filed with respect to the Compact  
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24  
25  
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1 and to approve it in accordance with Mont. Code Ann.  
2 §§ 85-2-233(6) and -702(3).

3 DATED this 28<sup>th</sup> day of February, 1997.

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