IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 15-0370

IN RE THE CROW WATER COMPACT,

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.

APPEAL FROM: Montana Water Court, Cause No. WC-2012-06
Honorable Russ McElyea, Chief Water Judge

ANSWER BRIEF
OF APPELLEE THE APSAALOOKE (CROW) TRIBE

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STATEMENT OF ISSUES

1. Whether Appellants ("Objectors") have failed to overcome the Crow Water Compact's presumptive validity, where it was negotiated in good faith at arm's length, was subjected to extensive public review and comment, and includes provisions categorically protecting Objectors' rights;
2. Whether the Court should affirm denial of all objections that were not raised in a timely filing, where statute requires that a compact be approved unless a timely filed objection with specific grounds and evidence is sustained;
3. Whether Objectors' late-filed objections failed to show any injury to their rights, any departure from controlling law, or any unreasonableness.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the Water Court's orders approving the Crow Tribe-Montana Water Rights Compact (codified at Mont. Code Ann. § 85-20-901) and denying Objectors' objections to the Compact under Mont. Code Ann. § 85-2-233. The history of the negotiation and ratification of the Crow Tribe-Montana Water Rights Compact was recounted by this Court in a previous, interlocutory appeal and is not repeated here. *In re Crow Water Compact,* No. DA 14-0567, 2015 MT 217, 380 Mont. 168 ("*Crow I*") ¶¶ 5-6.

The 15 Objectors are an assortment of individuals, groups of individuals, and entities who have made their objections and arguments jointly and are represented by joint counsel. Fourteen of the 15 Objectors filed a single joint objection dated June 24, 2013 (Doc. 104) ("Joint Obj."). The other (40 Mile Colony) filed a separate but substantively identical objection the same day (Doc. 106) ("40-Mile Obj.").

Under Mont. Code Ann. § 85-2-702(3), once a compact is ratified, "the terms of a compact must be included in the preliminary decree as provided by 85-2-231, and unless an objection to the compact is sustained under 85-2-233, the terms of the compact must be included in the final decree without alteration." Thus, the question before the Water Court was whether any of the objections filed

by Objectors should be "sustained under 85-2-233." In a series of orders addressing Objectors' arguments, including many arguments not timely identified in their filed objections, the Water Court answered that question in the negative. This appeal is limited to the question of whether the Water Court committed reversible error in so doing.

B. Procedural Background and Disposition in the Water Court

Preliminary Decree and Filed Objections

The Water Court issued a preliminary decree containing the Compact and ordered the service and publication of the statutorily required notices—including the mailing of notice "to over 16,000 individual owners of 28,748 water rights." 5/27/15 Order (Doc. 370) at 2. The deadline for filing was extended twice, to December 23, 2013. *See* 11/6/13 Order (Doc. 217). Over 100 objections were eventually filed, including the two filings by Objectors here. Subsequently, all of the other filed objections have been withdrawn, settled, voluntarily dismissed, or dismissed by the Water Court as affirmed by this Court in *Crow I*.

Objectors' filed objections asserted that the Compact should be rejected for three reasons: (1) "the tribal compact negotiation provisions of the Montana Water Use Act are unconstitutional" (Joint Obj. at 6-12, 40-Mile Obj. at 4-9); (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 that Compact review proceedings in the Water Court constitute an ineffective "post-deprivation" hearing (Joint Obj. at 12-17, 40-Mile Obj. at 14); and (3) ratification of the Compact constitutes a "taking" that "effectively transferred to the Crow Tribe" the "water rights of the objectors," because allowing tribal rights to be negotiated rather than adjudicated, as the Montana Water Use Act does, is akin to an exercise of eminent domain (Joint Obj. at 17-20, 40-Mile Obj. at 14-18).

Summary Judgment

During discovery and proceedings on summary judgment, Objectors added a multitude of new objections not raised in their filed objections, including—for the first time—a challenge to the reasonableness of the quantification of the Tribal Water Right compared to what the Tribe might have secured through litigation over its reserved rights. The Crow Tribe, the State of Montana, and the United States (the "Settling Parties") moved for summary judgment on the three issues Objectors included in their filed objections, *see* Settling Parties' Mot. for SJ (Doc. 303). After Objectors introduced new objections in their response brief (Doc. 315), the Settling Parties argued in reply that the newly raised issues were not only baseless but also "barred by statute" because they were not included in any timely filed objection. *See* Settling Parties' Reply in Support of SJ (Doc. 322) at 2-3, 7, 12, 18.

The Water Court granted summary judgment in part and denied it in part. It granted summary judgment on all three issues originally raised by Objectors in their filed objections. It held that (1) the Water Use Act is not unconstitutional (12/24/14 Order (Doc. 333) at 9); (2) Objectors had not been denied due process (*id.* at 8); and (3) "[t]he recognition of water rights in the Compact does not by itself effectuate a taking of water rights owned by the objectors" (*id.* at 17; *see also id.* at 18 (dismissing the objection "that the Compact effectuated a taking of the objectors' water rights")).

The Water Court addressed on the merits the issues newly raised by Objectors, without addressing the Settling Parties' argument that these issues were barred because they were not included in a timely filed objection. On these issues, the Court granted summary judgment in part, holding: (1) the Legislature's decision to close basins in the Compact does not render the Compact unreasonable; (2) Tribal Water Right quantifications in basins other than the Bighorn River basin are not unreasonable; (3) Objectors have no protectable right to drill unspecified wells at some unspecified point in the future; and (4) cash payments under the Compact do not violate federal criminal law. *Id.* at 18. The Court also held that the Compact was entitled to a presumption of validity because it was negotiated in good faith and at arm's length. *Id.* It held that to prove unreasonableness, Objectors would have the burden of showing at trial that, at a minimum, the

Compact inflicted on them a material injury caused by a departure from controlling law in one or more of the remaining areas at issue (the Bighorn River Basin or the Ceded Strip). *Id.* at 6, 17. The Court held that there were fact issues regarding potential injury in those areas, and thus denied summary judgment and set a hearing.

Prehearing Proceedings

In prehearing proceedings, Objectors continued to raise new arguments. The Court rejected in pretrial orders (1) the argument that the Compact allows the Tribe to divert water from private fee land without the owner's permission (1/23/15 Prehearing Conference Minutes and Order (Doc. 353) at 2) and (2) the argument "that the Compact deprives [Objectors] of the right to have change [in use] applications approved in the future" (1/27/15 Order (Doc. 360) at 2-4).

Hearing

The Water Court held a hearing on the remaining issues on February 2 and 3, 2015. After post-hearing briefing, the Court issued an order on May 27, 2015, approving the Compact, making findings of fact and conclusions of law, and rejecting Objectors' arguments on the remaining issues. The Court addressed each of Objectors' theories of harm and held that Objectors had failed to show any material injury from the Compact. *Id.* at 20-28, 29. It also held that Objectors' analysis of the Tribal Water Right quantification analysis "in the Bighorn [River]

Basin was similar to that of the Settling Parties, and ultimately served to affirm rather than rebut the legitimacy of the Tribe's Bighorn River Right." *Id.* at 29. And it held that Objectors showed "no credible analysis" regarding the quantification for the Ceded Strip. *Id.* The Court stated that Objectors had not shown how the Tribal Water Right recognized in the Compact is inconsistent with the Tribe's reserved rights or the purposes of the treaty creating the Reservation. *Id.* at 28, 29.

STATEMENT OF FACTS

A. The Reservation and the Ceded Strip

The Crow Reservation was created by the Second Treaty of Fort Laramie on May 7, 1868. *See Montana v. United States*, 450 U.S. 544, 548 (1981) (citing 15 Stat. 649). It included approximately 8 million acres, a fraction of the 38.5 million acres recognized as Crow territory in the 1851 First Treaty of Fort Laramie. *See Montana*, 450 U.S. at 547-48 (citing 11 Stat. 749).

Subsequent Congressional acts reduced the Reservation to its size today, just under 2.3 million acres. *See id.* at 548. These subsequent acts included a 1904 Act by which the Crow Tribe "ceded" to the United States approximately 1,137,500 acres on the northern portion of the Reservation, now referred to as the "Ceded Strip." *See Montana v. Crow Tribe of Indians*, 523 U.S. 696, 700 (1998) (citing Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352). In 1958 Congress restored 15,553

acres of surface ownership and 80,423 acres of subsurface mineral ownership on the Ceded Strip to the Tribe. Staff Report[1] at 52. The United States holds these mineral interests in the Ceded Strip in trust for the benefit of the Tribe. *Id.* The Ninth Circuit has held that land and minerals associated with the ownership interests of the Tribe in the Ceded Strip are "a component of the Reservation land itself." *Crow Tribe v. Montana*, 819 F.2d 895, 898 (9th Cir. 1987) (citation omitted), *summarily aff'd*, 484 U.S. 997 (1988).

B. Compact Negotiations Over Reserved Rights

Under *Winters v. United States*, 207 U.S. 564 (1908), the reservation of land by the United States for an Indian tribe includes sufficient water rights to effectuate the purposes of the reservation, but *Winters* did not address how to quantify those rights. Quantification of tribes' *Winters* rights first occurred in *Arizona v. California*, 373 U.S. 546, 600 (1963), which upheld rights "to satisfy the future, as well as the present, needs of the Indian Reservations," quantified based on the practicably irrigable acreage (PIA) within a reservation. Although PIA is one touchstone for quantifying rights for agricultural purposes, Indian reserved water rights may encompass other uses as well. *See State ex rel. Greely v. Confederated*

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[1] Settling Parties' Ex. 21, Montana Reserved Water Rights Compact Commission Staff Report regarding the Crow Compact, September 2014 (admitted in 1/23/15 Order, at 3).

Salish and Kootenai Tribes, 219 Mont. 76, 92-94, 712 P.2d 754, 764-65 (1985); *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 (2001) (holding that in quantifying reserved water rights a court should consider a myriad of factors including cultural considerations, historical use, geography, topography, natural resources, and population). At trial, Objectors acknowledged that these other uses necessary to fulfill the purposes of a reservation are defined fairly broadly and include domestic, stock, religious purposes, commercial ventures, mineral development, and other ordinary uses of water that anybody would make. Feb. 2 Tr. at 117 (Osborne).

During compact negotiations, the Tribe, the United States, and the State disagreed on the extent of PIA within the Crow Reservation. *See* Feb. 2 Tr. at 253:5-254:22 (Tweeten). In fact, the numerical disagreement over the broader category of arable lands was so wide that the parties never got to the point of negotiating a PIA number. *See id.*; Staff Report at 13-15 (noting the parties' estimates ranged from 60,249 to 206,948 acres of arable land in the Bighorn River Basin, and from 145,642 to 532,331 arable acres for the entire Reservation). There were "large discrepancies in the information generated or gathered by the Parties," including information on "soils, potential for irrigation development, and water availability." Staff Report at 25. No full-blown PIA analysis was done by any of

the Settling Parties; indeed, the settlement was structured in part to avoid such expense. *See* Feb. 2 Tr. at 244-254 (Tweeten). The state's Staff Report contains only the State's internal, preliminary analysis of practicably irrigable acreage for a portion of the Reservation (the areas served by the Bighorn River). *See* Staff Report at 15 ("This Staff Report reviews the State's internal evaluation of the quantification of the Tribal Water Right for the Bighorn River basin."); Feb. 2 Tr. at 136:2-138:22 (Osborne).

C. Tribal Water Right

The Compact recognizes and defines a Tribal Water Right in Article III. It is described basin-by-basin: Article III.A. addresses the Bighorn River; III.B. addresses the Little Bighorn River; III.C. addresses Pryor Creek; III.D. addresses Rosebud Creek; III.E. covers an assemblage of miscellaneous other drainages; and III.F. describes the Tribal Water Right in the Ceded Strip (which cuts across several basins and drainages as identified in the Compact). Many of the provisions in each of these subparts are identical or parallel to those in other subparts.

Bighorn River Basin

The Bighorn River Basin (Art. III.A.) includes a 500,000 AFY natural flow right and a 300,000 AFY storage-right allocation from the United States' existing water right for Bighorn Lake, comprised of two 150,000 AFY components. Art.

III.A.1. One of these 150,000 AFY storage allocations is available only in low-flow periods or in years of excess. *See* Art. III.A.1.b.(1).(b).

The storage right was only conditionally granted by the Compact, "[s]ubject to the approval of, and any terms and conditions specified by, Congress." Art. III.A.1.b.(1). Congress granted the right in the Crow Tribe Water Rights Settlement Act, Pub. L. No. 111-291, Tit. IV, 124 Stat. 3097 (2010) ("Settlement Act"). The storage right was a way "to bridge the gap in the Parties' positions about the total quantification of the Tribal Water Right." Staff Report at 28. Private parties such as Objectors have no legally enforceable rights to this water. *See* Feb. 3 Tr. at 105:14-106:23, 137:1-4 (Aldrich); 43 U.S.C. § 485h(e) (Secretary of the Interior has "discretion" whether to enter into contracts for water).

At trial, Objectors' counsel volunteered that "there is not going to be a shortage on the Bighorn River" and that "in the Bighorn [River] Basin, there's more water than the irrigators in that basin can use and more water than my—any of my objectors can use." Feb. 3. Tr. at 46:8-9, 54:17-19.

Other Basins

In basins other than the Bighorn River basin, any numerical quantification of the Tribe's *Winters* rights would have exceeded the available water supply. *See* 12/24/14 Order at 14-15 (undisputed finding). In these basins the Tribal Water Right includes "all surface flow, Groundwater, and storage," except that existing

state law-based rights are "protected" from any assertion of senior priority for a current or future use of the Tribal Water Right, and share equitably with current uses of the Tribal Water Right within the Reservation in times of shortage. Art. III.B.1.a., III.C.1.a., III.D.1., III.E.1.; Art. III.B.6., III.C.6, III.D.6, III.E.6.

Ceded Strip

Disagreements during negotiations included questions of how to quantify water rights for the Ceded Strip, particularly the large mineral interests. *See* Feb. 2 Tr. at 245:21-246:10 (Tweeten). Without resolving these questions, the negotiators agreed on a compromise number of 47,000 AFY, nominally calculated using surface acreage but recognized to be available for development of the mineral interests. *See* Staff Report at 53 & n.205. This right is subject to a number of restrictions on diversion spelled out in the Compact, and diversions in the Bighorn River Basin are counted against the Tribe's Article III.A.1 right to divert water in that basin. *See* Art. III.F.1.a.(1), (2).

D. Streamflow and Lake Level Management Plan

In the Bighorn River Basin, the natural flow right and the storage right are both "subject to . . . the terms and conditions of the streamflow and lake level management plan agreed to in accordance with Section A.7., of Article III." Art. III.A.1.a., III.A.1.b.1. This Plan provides that the Crow Tribe will "dedicate 250,000 AFY of the Tribal Water Right" to remain instream between the

Yellowtail Afterbay Dam and "a point 500 feet upstream from the Two Leggins diversion facility." Settling Parties' Ex. 21 ("Staff Report") at Ex. 1 (Plan 2.A., 1.B., 1.C).

This restriction was agreed to by all the Parties to the Compact because "the Parties have recognized the shared objectives to provide adequate and reliable instream flows in the Bighorn River for the river fisheries and to maintain lake levels for recreation and lake fisheries, consistent with the need to provide water to meet existing and future needs of the Crow Tribe for purposes authorized under the Compact." Plan recitals; *see also* signature attestations ("this management plan shall be considered part of the Compact"). Negotiators compromised to allow the Tribe to divert the water below the fishery but protected existing recreational and wildlife-related uses, taking into consideration available information about appropriate flow rates. *See* Staff Report at 72-73; Feb. 3 Tr. at 112:20-118:23 (Aldrich). Objectors' expert admitted at trial that he failed to take the Plan into account in his analysis. Feb. 2 Tr. at 129:5-130:2, 155:21-156:16.

STANDARD OF REVIEW

In reviewing ratified water compacts, this Court has approved reference to "the established rules for judicial oversight of consent decrees as set out in *Officers for Justice* [*v. Civil Serv. Comm.,* 688 F.2d 615 (9th Cir. 1982)]." *Crow I* ¶ 30. This Court reviews the approval of a consent decree for abuse of discretion. *See*

State ex rel. Dep't of Envtl. Quality v. BNSF Ry. Co., 2010 MT 267, ¶ 24, 358 Mont. 368, 372, 246 P.3d 1037, 1041; *accord United States v. Oregon*, 913 F.2d 576, 580 (1990); *Officers for Justice,* 688 F.2d at 626. The Court "will reverse only upon a *strong* showing that the [trial] court's decision was a *clear* abuse of discretion." *Officers for Justice*, 688 F.2d at 626 (emphasis added). In this review, legal determinations are reviewed de novo and factual findings are reviewed for clear error. *Crow I* at ¶ 19.

Judicial review of the Compact is "limited to Article III and Appendix 1." *Crow I* at ¶ 8 (quoting Mont. Code Ann. § 85-20-901, Art. VII, Sec. B.3); *accord* 12/24/14 Order at 13.

SUMMARY OF ARGUMENT

The Compact is a legislatively approved, statutorily favored settlement of highly complex and uncertain issues that are difficult and expensive to litigate. It is undisputed that the Compact was negotiated in good faith and at arm's length, and it is therefore presumptively valid. It was subjected to extensive public review and comment, Objectors were given many opportunities to be heard, and Objectors have had the chance to raise objections in the Water Court, so their argument that they were deprived of procedural due process has no factual or legal basis.

In analogizing to the standard for review of consent decrees, the Water Court was correct to conclude that Objectors were required to show at least a material

injury resulting from some departure from controlling law. They could not do so, because the Compact was specifically designed to protect their state-based water rights against assertions of senior priority by the Tribe.

Except for their baseless due process argument, none of Objectors' current objections were raised in a timely filed objection, and they are therefore barred by statute.

In any event, Objectors' belated arguments of injury are meritless. They misread or ignore the language of the Compact to conjure up bogeymen. The Compact plainly does not eliminate any state-based rights or grant easements over private fee land. The provisions closing basins to future appropriations do not deprive Objectors of any existing rights and do not exceed the broad authority of the Legislature in such matters. And in any event, the Compact quantifies the Tribe's rights in a reasonable manner that Objectors fail to show is inconsistent with any controlling legal rule.

ARGUMENT

I. THE COMPACT IS ENTITLED TO A PRESUMPTION OF VALIDITY THAT OBJECTORS HAVE NOT OVERCOME

The Water Court correctly held on summary judgment that the Compact was entitled to a presumption of validity because it was negotiated in good faith and at arm's length. Objectors failed to overcome that presumption with any evidence of

injury, and have failed to show that the Tribal Water Right is contrary to any controlling law.

A. The Compact Is Presumptively Valid Because It Was Negotiated in Good Faith and at Arm's Length

"The Compact is a negotiated compromise among the parties, in lieu of settling the water claims of the Crow Tribe and its members in protracted, expensive and uncertain litigation." *Crow I* at ¶ 6. It "was the product of extensive negotiations over a period of years, resulting in a negotiated compromise of interests and claims." *Id.* at ¶ 29. It was previously reviewed and approved "by the Governor, the Legislature, the Department of the Interior, Congress, and the Crow Tribe." *Id.* at ¶ 16.

Because water rights compacts are negotiated, legislatively ratified resolutions of extremely complex disputes that would be difficult and burdensome for courts to resolve, they are expressly favored by statute. The Legislature intends "that the state of Montana proceed . . . in an effort to conclude [State-Tribal] compacts for the equitable division and apportionment of waters" and that the negotiation of such compacts should be the Compact Commission's "highest priority." Mont. Code Ann. § 85-2-701.

Once a compact is ratified, the scope of the Water Court's review is narrow. *Crow I* at ¶¶ 8, 29, 30. "Pursuant to § 85-2-702(3), MCA, the Water Court has limited discretion" in reviewing a compact (*id.* ¶ 8): unless an objection to a

compact is sustained, the final decree of the Water Court must include the rights established by the compact "without alteration." Mont. Code Ann. Section 85-2-702(3).

In *Crow I*, this Court noted with approval that in reviewing objections to compacts, the Water Court has relied here and in other compact cases on "the established rules for judicial oversight of consent decrees as set out in *Officers for Justice* [*v. Civil Serv. Comm.*, 688 F.2d 615, 625 (9th Cir. 1982)]." *Crow I* ¶ 30. "[O]nce the court is satisfied that the decree was the product of good faith, arms-length negotiations, a negotiated decree is presumptively valid and the objecting party has a heavy burden of demonstrating that the decree is unreasonable." *Oregon*, 913 F.2d at 581 (citation omitted); *accord Chippewa Cree Tribe-Montana Compact*, Case WC-2001-01, Mem. Op. at 15 (June 12, 2002); *Fort Peck Compact*, Case WC-1992-01, Mem. Op. at 7 (August 10, 2001).

The Water Court concluded that there was no genuine issue of material fact that the Compact was in fact negotiated at arm's length and in good faith. 12/24/14 Order at 8. Objectors do not challenge that finding on appeal. The Compact therefore is presumptively valid, and Objectors were required below to bear the heavy burden of rebutting that presumption. They failed to do so because, as shown below, the Compact categorically prevents injury to the Objectors.

B. Objectors Cannot Overcome the Compact's Presumption of Validity Without Showing a Material Injury Caused by a Departure from Controlling Law

The Water Court correctly reasoned that a third-party objector cannot overcome the presumption of validity and show that a compact is unreasonable without showing at least some kind of material injury caused by a departure from controlling law. This follows because a good-faith, arm's-length, ratified compact is not only a compromise among the parties like a consent decree, but also has been approved through democratic processes and by elected leaders. If the compromise does not unlawfully harm any third parties, then its reasonableness is a matter for the sound discretion of the political branches that have approved and ratified it.[2]

In their "Standard of Review" section, rather than identify the appellate standards of review in this Court, Objectors make passing criticisms of the Water Court's holding that they must show a material injury. Obj. Br. at 8-10. (They make no argument on this point in the argument section of their brief.) These criticisms confuse the threshold for standing to be heard ("good cause," *see* Mont.

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[2] That is not to say that *any* material injury would suffice to justify the reviewing court exercising the extraordinary remedy of striking down a compact. Rather, Objectors have the burden of establishing that the Compact "taken as a whole" is unreasonable. *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). But injury is a threshold requirement that Objectors have failed to establish here.

Code Ann. § 85-2-233) with the "heavy burden" they must bear to challenge a ratified settlement, *Oregon*, 913 F.2d at 581. And Objectors do not explain how the Water Court can possibly strike down a compact negotiated at arm's length and in good faith, by three sovereign governments, without Objectors showing that they have been materially injured.

C. Objectors Failed to Show Injury Because the Compact Was Specifically Designed to Protect Existing State Law-Based Water Rights

Objectors' failure to bear their burden of showing injury was inevitable, because the Compact was intentionally drafted to protect water rights arising under state law in existence at the time the Compact was ratified by the Montana Legislature, as well as those later-developed small stock and groundwater uses exempted from Montana's permitting requirements by Mont. Code Ann. § 85-2-306.

Future development of the Tribal Water Right can have no adverse effect on those protected water rights. *See* Articles III.A.6 a.(2), III.B.6 a.(2), III.C.6 a.(2), III.D.6.a.(2), III.E.6.a.(2), F.6 a.(2), IV.A.4.b and IV.C.1. Under these provisions, Objectors' water rights are given a protected status they would not otherwise have as to that portion of the Tribal Water Right that was not developed prior to June 22,

1999. There is thus no material injury to Objectors possible from any future development of the Tribal Water Right.[3] *See* 5/27/15 Order at 22-23.

The Compact also provides that current uses of the Tribal Water Right may not be exercised as senior to any pre-ratification or other protected state law-based right. *See* Art. III.A. 6.a.(1), III.B.6.a.(1), III.C.6.a.(1), III.D.6.a.(1), III.E.6.a.(1), III.F.6.a.(1). For those Objectors whose water rights have an asserted priority date of May 8, 1868, this Compact language preserves the status quo but does not alter it. For the remainder of Objectors, who have later priority dates, these provisions materially improve their position because they are not subject to a priority call from the Tribe, as controlling law would otherwise allow them to be. Therefore, neither current nor future uses of the Tribal Water Right can injure Objectors.

Objectors conceded these points at trial. Objectors' counsel conceded that his retained expert, Thomas Osborne, "did say that the current uses by the Crow tribe do not harm the objectors." Feb. 3 Tr. at 41. And Mr. Osborne admitted that "it's very difficult to know" of any harm at all that would be caused to Objectors

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[3] The only Objectors with a post-1999 water right, the Wattses, who have a domestic groundwater well with a priority date of January 31, 2005, and a maximum volume "up to 10 acre-feet" (water right number 43Q 30013922), Obj. Exh. 109, are protected the same as the other Objectors, because this right falls within the categories of state law-based water rights protected by Art. IV.D.1. Moreover, Objectors do not dispute on appeal the Water Court's finding of fact that the possibility of harm to the Wattses is "remote" due to their well's depth and distance from the Reservation. 5/27/15 Order at 19.

by the full implementation of the Tribal Water Right in the future. Feb. 2 Tr. at 119:25-120:4. These concessions were not inadvertent; they were virtually inevitable, because under the Compact, Objectors' water rights are categorically protected. In light of these admissions and the limited nature of the Water Court's review of a ratified compact, the Water Court need not have inquired further.

D. The Compact Does Not Violate Procedural Due Process

Objectors raise a bare-bones allegation that they were deprived of procedural due process because, according to them, public hearings on the Compact were not "meaningful opportunities to be heard" and "did not allow objection to the negotiation or i[n]put into the language of the Compact." Obj. Br. at 29 (emphasis omitted). This characterization of the hearings as inadequate is contrary to uncontested facts found below and has no legal basis. On summary judgment, the Water Court found that "negotiating sessions were open to the public" and were noticed, drafts "were made available for public review in advance," and the Legislature solicited public comments and held public meetings. 12/24/14 Order at 7-8. Those findings are unchallenged. The Water Court concluded that "[t]he objectors' claims that negotiation of the Compact violated their due process rights *have no factual basis*" and that they had "*offered no evidence*" in support of their claim. *Id.* at 8 (emphasis added).

Objectors complain on appeal, without any record support, that the hearings did not include "discussion of closing a basin or . . . the Depletion Halo effect." Obj. Br. at 29. They give no reason why *they* did not attend and raise such issues at the hearings. There can be no due process violation where a party "had an opportunity to be heard but did not avail himself of that opportunity." *Arredondo v. City of Billings Dep't of Police*, 2006 MT 154N, ¶ 23, 143 P.3d 702.

Moreover, the review process in the Water Court has given Objectors ample process while making clear that they are not being deprived of any property interest in any event. This is not a "post-deprivation" review because the Court hears objections *before* entering a final decree. 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. The Water Court procedures in and of themselves have provided more than adequate process, as they were designed by the Legislature to do. Objectors make no argument that the Water Court proceedings have been inadequate, and their due process claim is therefore baseless.

II. OBJECTORS' ARGUMENTS WERE NOT TIMELY RAISED IN THEIR FILED OBJECTIONS

Of all the arguments raised by Objectors on appeal as grounds to invalidate the Compact, only one, the procedural due process argument addressed in the previous section (which was dismissed on summary judgment), was raised in a

timely filed objection that complies with statutory requirements, *see* Joint Obj. at 12-17, 40 Mile Obj. at 14. Therefore, this Court can summarily affirm the Water Court's rejection of all other arguments on the ground that they are not within the statutory scope of the Water Court's or this Court's review of the Compact. "[W]here the conclusion of the district court is correct, it is immaterial, for the purpose of affirmance on appeal, what reasons the district court gives for its conclusion. If we reach the same conclusion as the district court, but on different grounds, we may affirm the district court's judgment." *Johnson Farms, Inc. v. Halland*, 2012 MT 215, ¶ 11, 366 Mont. 299, 303, 291 P.3d 1096, 1101 (citations omitted).

Under Mont. Code Ann. § 85-2-233(2), "[o]bjections must be filed with the water judge within 180 days after entry of the temporary preliminary decree or preliminary decree" except insofar as the time is extended by the Water Court, and objections "must specify the paragraphs and pages containing the findings and conclusions to which objection is made. *The request must state the specific grounds and evidence on which the objections are based.*" Mont. Code Ann. § 85-2-233(4) (emphasis added). When this Court construes statutes, "[b]oth 'shall' and 'must' are mandatory, rather than permissive." *Montco v. Simonich*, 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997) (citation omitted).

By the plain terms of the statute, only an objection that satisfies the mandatory criteria—including a timely filing that identifies specific grounds and evidence—can provide a basis for voiding a compact under Mont. Code Ann. § 85-2-233(8). Absent an order sustaining such a specifically supported and timely objection, the Legislature has specified that the Compact must be included without alteration in the final decree. Mont. Code Ann. § 85-2-702(3); *accord Crow I* ¶ 8. Objectors' additional arguments here are not remotely based on "*specific* grounds and evidence" identified in the objections they filed. Therefore, the Water Court could not have accepted them even if they had had any merit, and this Court should affirm the Water Court's rejection of them.

Objectors' untimely objections and the Water Court's acquiescence in hearing them have already caused undue expense and delay in the enforceability of the Compact, extending litigation that must be completed before the Compact is enforceable (and no later than March 31, 2016).[4] During this time, Objectors have never given any reason they should be exempted from the mandatory statutory requirements for timely objection. The denial of their late objections should be summarily affirmed.

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[4] This Court has already noted in this appeal the March 31, 2016 deadline for completion of all judicial review. *See* Order dated July 23, 2015.

III. THE UNTIMELY GROUNDS RAISED BY OBJECTORS FAIL TO SHOW ANY MATERIAL INJURY CAUSED BY DEPARTURE FROM CONTROLLING LAW

Even if the Court does not summarily affirm for untimeliness, the late arguments raised outside the scope of Objectors' written objections are baseless. Objectors misread the Compact, wander outside the Water Court's scope of review, and rely on improper and unproven attempts to "reach . . . ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute" that the Compact settled, *Officers for Justice,* 688 F.2d at 625. None of these arguments even faintly suggests any infirmity in the ratified Compact.

A. The Compact Protects Existing State-Based Rights in Drainages Outside the Bighorn River Basin

The Objectors admit that in the Bighorn River Basin there is "more than enough water" for "all potential irrigation." Obj. Br. at 19 n.15. With respect to basins other than the Bighorn, they make arguments that reflect a fundamental misreading of the Compact and that center on enforcement provisions of Article IV of the Compact, a portion of the Compact outside the scope of judicial review. *See Crow I* at ¶ 8.

First, they argue that in basins other than the Bighorn, all state-based water users are deprived of all water and that "state-based right[s] no longer exist[]" in these basins. Obj. Br. at 13-15 (Section II.A.). But, as the Water Court recognized, this ignores the plain language of the Compact. Taking the language

for the Little Bighorn River Basin as an example (other basins are similar), the Tribal Water Right includes "all surface flow, Groundwater, and storage within the Little Bighorn Basin, *except as provided for in Sections B.6 , and B.7.A, of Article III* . . . ." (Emphasis added.) The referenced provisions expressly preserve and protect Objectors' state law-based rights from any assertion of senior priority for a current or future use of the Tribal Water Right, and make current uses of the Tribal Water Right subject to equitable shortage sharing. *See* 5/27/15 Order at 18-19. "[S]hortage sharing provisions make it impossible for the Tribe to divert the entirety of the flows in these basins." *Id.* at 21.

Thus, far from being injured, Objectors in fact receive a substantial benefit in these basins. It is undisputed that any numerical quantification of the Tribe's *Winters* rights would have exceeded the available water supply in these basins (a factual finding made by the Water Court that Objectors did not challenge on summary judgment and do not challenge on appeal). *See* 12/24/14 Order at 14. Given the lack of any material disagreement among the Settling Parties that even a low-end assessment of the Tribe's claim for these basins would exceed the available water supply, *see* Staff Report at 43, this would be the outcome whether the Tribe's rights in these basins were quantified through negotiation or litigation. The Compact *protects* Objectors from priority calls they would otherwise be subject to.

In view of the weakness of their argument, Objectors acknowledge these protections and the Water Court's reasoning but claim that, to be effective, these protections "require Tribal administration which does not exist." Obj. Br. at 14. They complain that there is no Tribal Water Resource Department, no Tribal Water Code, and no Crow Compact Board, leaving administration to be done by the Bureau of Indians Affairs (BIA), and that administration is done "strictly for the benefit of the Tribe and its Allottees." *Id.* They also argue that the Compact deprives them of their rights to seek enforcement in court, and does not require that water be administered equitably except in times of shortage.

These arguments go beyond the scope of review specified by the Legislature when it ratified and codified the Compact, which, as this Court has recognized, is "limited to Article III and Appendix 1." *Crow I* at ¶ 8 (quoting Art. VII.B.3); *accord* 12/24/14 Order at 13. Objectors' arguments are directed at administration and enforcement of the Compact, matters covered in Article IV. They relate to the implementation of the Compact, not its validity.

In any event, Objectors badly misread the Compact. Only "the use of *the Tribal Water Right*" is administered by the Tribe (or by the BIA in its stead). Art. IV.A.2.a. (emphasis added). Indeed, the Compact expressly states that "[t]he Tribe shall *not* administer any water right Recognized Under State Law." Art. IV.A.2.c. (emphasis added). And the Crow Irrigation Project continues to be administered

by the federal government, as it has for over 100 years, unchanged by the Compact. *See* Art. IV.A.2.d. Objectors' rights, as with all other state law-based water rights, remain administered by the DNRC under state law. *See* Art. IVA.2.c., IV.A.3. Moreover, as with the finalization of the Current Use List, the establishment of the Compact Board created by the Compact is a matter of compact enforcement and is not "a prerequisite to the validity of the Compact." *Crow I* ¶ 37.

Objectors raise a similar but conflicting argument later in their brief, claiming that the Compact and the current use list do not quantify the amounts of water that can be used by tribal users, and that "the Tribe or its member can remove more water from the particular drainage than is necessary at a particular diversion or time, leaving insufficient water" for a state-based user even though there is "plenty of water." Obj. Br. at 23-25 (Section III.D.). This argument acknowledges, contrary to their earlier argument, that their state-based rights of course still "exist" under the Compact. And their argument goes again to the enforcement of the Compact, not its validity: the Compact requires equitable sharing among the pre-1999 tribal uses and pre-1999 state-based uses within the Reservation. As the Water Court correctly recognized, "Objectors assert their problems would be solved if water was distributed in accordance with the

Compact, thereby validating the Compact, rather than undermining it." 5/27/15 Order at 25.

B. The Compact Does Not Allow Entry on Private Land Without the Owner's Permission

In another attempt to vitiate the Compact by misinterpreting it, Objectors argue that it must be interpreted as allowing the Crow Tribe to divert water on private fee land without the owner's permission. But this reading was expressly disclaimed by all three of the Settling Parties[5] before being rejected by the Water Court at the Prehearing Conference as well. *See* Prehearing Conference Minutes and Order dated January 23, 2015, at 2 ¶ 5 ("[T]he Compact does not permit the Tribe to divert water from private fee land without the landowner's permission.").

Objectors simply misread the Compact. In Articles III.A.4, III.B.4, III.C.4, III.D.4, and III.E.4, with slight variations in language, the Compact specifies that, "[s]ubject to the terms and conditions in Article IV, the Tribe may divert or permit the diversion of the Tribal Water Right from any place and by any means within the [specified] Basin within the Reservation for use within the Reservation."[6] This

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[5] *See* Order Approving Stipulation and Order Updating Service List (July 24, 2014) (Doc. 282).

[6] Article III.F.4. contains similar language for the Ceded Strip which is not limited to the "Reservation," because the Ceded Strip is not within the defined term "Reservation" in the Compact, notwithstanding its status as a component of the Reservation, *see* Art. II.7; Art. II.21.

language was necessary to clarify that the Compact preserves tribal authority over specifying the places and means of diversion for the use of tribal water within its lands; it does not purport to give the Tribe any new right to enter on private fee land. This is diversion-point language, not easement language. It does not grant a right to divert or permit diversion *irrespective of the property rights of others*. It simply preserves and carries through the tribal authority to administer its reserved right, by making clear that the Tribe retains that authority over the places and means of diversion of the Tribal Water Right. And it is expressly "[s]ubject to" Article IV, which allocates between the Tribe and the State their respective authorities for allowing changes in use. *See* Art. VI.C., D.

To the extent there is any ambiguity on this point, the Compact expressly forbids Objectors' interpretation. "Nothing in this Compact shall be so construed or interpreted . . . [t]o impair, amend, or alter rights under existing state or federal law." Art. V.B.11; *cf. Baxter v. State*, 2009 MT 449, 354 Mont. 234, 224 P.3d 1211 (2009) (constitutional issues should be avoided when statutory interpretation grounds are available).

C. The Decision to Close Basins Is Well Within the Montana Legislature's Powers and Injures No Protectable Right Possessed By Objectors

Objectors argue that the Compact grants the Tribe more water than it could have obtained by litigating its *Winters* rights, and that this has harmed them—not

by depriving them of water they currently use under any existing appropriation (those are all protected under the Compact), but by "allow[ing] the legislature . . . to close the basins" in the Compact. Obj. Br. at 20.

This ignores that the Legislature possesses the sovereign authority to close basins. *See, e.g.*, Mont. Const. Art. IX § 3(4); *Montana Trout Unlimited v. Montana DNRC,* 2006 MT 72, ¶ 8, 331 Mont. 483, 486, 133 P.3d 224, 226 (2006). Nothing in the Compact is outside the Legislature's discretion in the exercise of that power regarding the basins on and adjacent to the Crow Reservation. *See* 12/24/14 Order at 11, 18 ¶ 4.C ("[t]he Legislature had the power to implement basin closures with or without the Compact").

Objectors' reliance on Mont. Code Ann. § 85-2-319 is unavailing. In enacting this statute, the Legislature described the DNRC's authority regarding the closure of basins to the issuance of new permits in relation to the Legislature's authority, but it did not limit what the *Legislature itself* may do. It delegates rule-making authority to the DNRC regarding the processing of permit applications in highly appropriated basins or subbasins; it does not limit the constitutional power of the Legislature to control water rights in Montana. Objectors identify no basis for this Court to substitute its judgment for the Legislature's regarding the basin closures.

Furthermore, Objectors are not harmed. First, Objectors' concerns about changes in use are unfounded: in the Compact, "basin closure applies only to new appropriations not excepted from the permit process," and "is not a limit on change of use or transfers of [state-based] water rights." Art. III.A.8.c., III.B.7.c., III.C.7.c., III.D.8.c., III.E.7.c. Second, the basin closures do not deprive Objectors of anything to which they are legally entitled; they do not have a protectable property interest in any hypothetical future appropriations or change authorizations. As the Water Court recognized, the DNRC has reasonable discretion to approve or deny any new well permit or change application based on the particular facts and circumstances of a given application. *See* Mont. Code Ann. §§ 85-2-311 and 85-2-402; 12/24/14 Order at 15-16; 1/27/15 Order at 2-4. Consequently, Objectors have suffered no legally cognizable injury.

Moreover, even if Objectors had some legally protectable interest in obtaining a future, hypothetical authorization to change their water rights, Objectors misread the Compact when they argue that it creates indefiniteness that presents an obstacle to change applications. Obj. Br. at 22. In processing an application for a change in use, the DNRC is required to assess only the possible adverse effect of the proposed change on the portion of the Tribal Water Right that has actually been developed as of the date the change application is filed, not the total amount. *See* Art. IV.D.2. Thus, Objectors will be able to know exactly what

uses of the Tribal Water Right they might be required to mitigate at the time they seek a given change authorization.[7]

Finally, as shown in the next section, basin closure does not legally harm the Objectors because they failed to show that the quantification of tribal rights in the Compact violates any applicable legal standards.

D. Objectors Did Not Show That the Tribal Water Right Is Unreasonable In Lieu of Litigation over *Winters* Rights

Even if Objectors had shown harm from basin closure, they did not show that the Tribal Water Right is an unreasonable settlement in lieu of protracted litigation over the Tribe's *Winters* rights. The Water Court's rejection of Objectors' attack on the quantification of the Tribal Water Right was not an abuse of discretion. Objectors argue that the Water Court made three errors, but each of these arguments is itself incorrect.

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[7] The example used by Objectors to show indefiniteness undercuts their point. The RU Lazy Two right they refer to, 43Q-112034-00, Obj. Ex. 62, is an instream flow stock water right for stock drinking directly from Blue Creek. The flow rate is not decreed because it is for instream flow. Also, the volume is not numerically decreed because it is based on normal stocking rates at 30 gallons per day per animal unit, and "animal units shall be based on reasonable carrying capacity and historic use of the area service by this water source"—a non-numerical quantification that is not the tidy 1,500 head Objectors refer to (without record support) in their brief. Objectors' claims of uncertainty ring hollow when their own right is not numerically specific.

First, Objectors argue that the 300,000 AFY in storage rights granted to the Tribe from Bighorn Reservoir "make[s] the [Bighorn] basin overallocated, resulting in the closure of the Basin." Obj. Br. at 18. But this confuses the closure of the basin under state law with Congress's disposition of federal property. That is, the storage rights Objectors contest are only allocations from the *United States'* existing water rights, from the United States' prior claimed right to this water for the Bureau of Reclamation, and having the same priority as that BOR right. *See* Settlement Act § 408(a)(1), (2) and Art. III.A.2.b. Thus, this 300,000 AFY allocation is nothing more than a transfer of ownership of an existing claimed water right. And it was *Congress* that determined, in § 408(d)(1) of the Settlement Act, that "Bighorn Lake shall be considered to be fully allocated." Objectors' expert admitted he had only a "limited understanding" of Congress's actions, Feb. 2 Tr. at 124-125, and that he had no basis for contesting Congress's right to take such actions, *id.* at 143. The Court found that Objectors presented "[n]o credible evidence or legal analysis" showing they had any right to the United States' water in the Reservoir, 5/27/15 Order at 22, and they likewise offer none on appeal. The record shows they had no such right. *See* Feb. 3 Tr. at 105:14-106:23, 137:1-4 (Aldrich); 43 U.S.C. § 485h(e).

Second, Objectors argue that the Tribal Water Right should be "477,000 AFY" and then discounted by 47% because, according to them, "47% of the PIA is

owned by non-Tribal owners." Obj. Br. at 18. Objectors' cursory analysis ignores the complexity of contested issues in negotiations of the Compact and impermissibly assumes that they would have been resolved in a manner that favors Objectors' position here. These arguments are outside the scope of review because they assume "ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute." *Officers for Justice*, 688 F.2d at 625. The Staff Report notes a "contentious" dispute and "much uncertainty regarding land ownership" within the Reservation, including "unresolved [Crow Allotment Act] § 2 issues that may have title implications," "delays of transfers of Tribally owned fee land and Indian-owned fee land into trust status," and the unavailability of reliable tribal rolls. *See* Staff Report at 35-36. The Staff Report concludes, "Exact status of land and water rights within the Crow Reservation is not available and was not available to the negotiators." *Id.* Mr. Osborne's cursory analysis ignored these considerations while not disputing them. *See* Feb. 2 Tr. at 152:12-154:10 (Osborne); *id.* at 152:6-10 ("I was mostly concerned with our objectors and their land status, but I don't have any reason to dispute the fact that there would have been questions about the exact status of land and water rights, possibly across the reservation as a whole."). Given such admitted uncertainty and controversy, the Water Court was not at liberty to substitute a hydrologist's analysis of complex land-ownership issues for the compromise reached by the negotiators.

As part of this argument, Objectors attack as erroneous the Water Court's conclusion that Objectors' analysis resulted in similar PIA numbers as the amounts allocated by the Compact. But Mr. Osborne's own trial testimony supported the Water Court's conclusion:

> Q: [I]f I'm understanding your potentially irrigable acreage analysis, [then] you agreed, roughly, with the 500,000 acre-foot number as articulated by the Staff Report as a PIA analysis, that a PIA analysis yielding a 500,000 acre-foot per year result is basically the right result in the Bighorn River Basin, right?
>
> A: My number, as I mentioned, was about 480,000, slightly more, but that included the transbasin diversion to the Little Bighorn River, which I had questioned.

Feb. 2 Tr. at 137-138 (Osborne). Thus, in the end, the only qualm Mr. Osborne expressed was with the transbasin diversion, and as the Water Court found, whatever questions Mr. Osborne may have had about a diversion, he "*did not analyze the feasibility* of such diversions himself." 5/27/15 Order at 22 n.5 (emphasis added); *see* Feb. 2 Tr. at 156-158 (Osborne). Thus, the Water Court's conclusion is supported in the record.

Objectors' third allegation of error is that return flows should have been taken into account and should have resulted in a reduction in the Tribal Water Right. Obj. Br. at 18. This makes no sense: positive return flows only improve the availability of water downstream; they do not reduce a tribe's *Winters* rights. A tribe is not entitled to *less* water when *more* of the water it diverts returns to the

stream. Return flows actually undercut Objectors' arguments because they show that Objectors will have sufficient water for their own diversions. *See* Staff Report at 22.

Objectors also fault the Water Court's comments about their failure to provide an analysis of the purposes of the Crow Treaty or introduce it into evidence. *See* Obj. Br. 26-28 (Section III.F.). No doubt it was unnecessary to formally introduce the Treaty into evidence, but the fact remains that Objectors never referred to the text of the Treaty or presented any compelling analysis of why the Tribal Water Right is an unreasonable settlement in light of the *Winters* rights of the Tribe pursuant to the Treaty. For example, although Mr. Osborne admitted that industrial uses are within the Tribe's *Winters* rights here, *see* Feb. 2 Tr. at 117, he failed to analyze the range of reasonable potential industrial uses of water by the Tribe on a Reservation rich with coal. *See* Feb. 2 Tr. at 164; *id.* at 144-148. Thus, the Court was correct to note Objectors' failure to show any inconsistency between the Tribal Water Right and the purposes of the relevant treaty. *See also Greely*, 219 Mont. at 91 ("An Indian reservation will be defined to protect any preexisting possessory rights of the Indians unless a contrary intent clearly appears in the document or statute that created the reservation.").

E. Protection of Fish Is Not a Grant of Water and Is Not Against the Public Interest

Objectors argue that the Compact is "overreaching" because the State protected fish through the Streamflow and Lake Level Management Plan. Under that Plan, the Tribe agrees to dedicate 250,000 AFY of the 650,000 AFY combined Natural Flow and Storage Tribal Water Right in the Bighorn Basin for instream flow in the Bighorn River for much of its length within the Reservation. Staff Report at 72 and Plan at 2.A. The Plan does not restrict the rights of third parties to divert water from the Bighorn River pursuant to their valid water rights. *See* Feb. 3 Tr. at 55:4-8 (Objectors' counsel).

Objectors perversely mischaracterize this limitation as "250,000 [AFY] extra water" for the Tribe. Obj. Br. at 19. As the Water Court noted, this error undermines their objections. *See* 5/27/15 Order at 20-21. Further, it is strange for Objectors to claim that the protection of fish as part of the compromises made in the Compact is somehow against the public interest. The Legislature has declared that "[t]he water resources of the state must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life." Mont. Code Ann. § 85-1-101(5). Recreational uses such as the fishery are within "[t]he definition of 'beneficial use' in the [Montana Water Use] Act," which "recognizes nonconsumptive and instream uses for fish and wildlife." *Greely*, 219 Mont. 76 at 91, 712 P.2d at 763 (citing Mont. Code Ann.

§ 85-2-102(2)). Objectors (who admit that there is an abundance of water in the Bighorn River Basin, *see* Obj. Br. at 19 n.15) not only misread the Compact and the Plan but also ignore the relevant statutory law.

F. Objectors Showed No Harm or Illegality in the Compact's Quantification of the Tribal Water Right for the Ceded Strip

Objectors incorrectly read the Compact as allowing the Tribe to call for 47,000 acre-feet for the Ceded Strip with senior priority and thus potentially forcing Objectors to discontinue their uses of water. Yet under Article III.F.6.a., *all* "water rights Recognized Under State Law"—whether they are on the Reservation or not—that are "affected by the exercise of the Tribal Water Right in the Ceded Strip . . . are protected from . . . an assertion of senior priority in the exercise of current uses of the Tribal Water Right," and have priority over "[n]ew development of the Tribal Water Right." The Compact therefore plainly prohibits the calls that Objectors claim would injure them.

Other limitations on the Tribe's use of the 47,000 AFY allocated to the Ceded Strip further protect Objectors. Only 2,500 AFY may be diverted upstream of the confluence of the Yellowstone and Bighorn Rivers, *see* Art. III.F.1.a.(2).(a), which is the only reach in the Ceded Strip where any of Objectors' water rights are located, *see* Feb. 2 Tr. at 148-149 (Osborne). Moreover, as Objectors' expert testified at trial, 2,500 AFY represents 0.09% of the minimum annual flow in that area. *See* Feb. 2 Tr. 149:3-10 (Osborne). Therefore there is no prospect of the

Tribe depriving Objectors of water through the development of upstream diversions on the Ceded Strip.

Furthermore, Objectors failed to show that the Tribal Water Right for the Ceded Strip is either more than what the Tribe could have obtained in litigation or is unreasonable. They argue only that the manner in which it was calculated was arbitrary. But they fail to recognize that the negotiated manner in which it was calculated reflected the depth of disagreement between the negotiating parties over the proper methodology for quantifying the Tribe's water rights in the Ceded Strip. There was a dispute over whether mineral development should be used in quantification and, as a result, there was an impasse over which side would move first to propose a quantification number. *See* Staff Report at 53. Most of the Tribe's Ceded Strip interests are mineral interests, with a large quantity of coal. Feb. 2 Tr. at 147 (Osborne); *id.* at 233-234 (Aldrich). It is "widely known that the Crow tribe has been looking for years at opportunities for joint ventures" that would include not only coal mines but facilities to convert coal to other forms of energy, including coal-fired power plants. Feb. 3 Tr. at 94-95, 104 (Aldrich). A single coal-fired power plant could use 40,000 AFY. *See* Feb. 2 Tr. at 144-145 (Osborne). The negotiated resolution accommodated these uses while basing the calculation of the allocation on surface acreage.

Objectors not only failed to acknowledge this conflict but failed to analyze the well-known potential for coal-fired power generation on the Ceded Strip. *See* Feb. 2 Tr. at 146:14-20, 148:1-17 (Osborne). Objectors also failed to conduct a PIA analysis for the Tribe's Ceded Strip lands. *See id.* at 147:20-25 (Osborne). The Water Court's findings on these points are unchallenged on appeal. *See* 5/27/15 Order at 23-24. Particularly in light of the evidence showing that a single coal-fired power plant could use the bulk of the allocation, Objectors failed to show that the quantification for the Ceded Strip is anything other than a reasonable and permissible resolution of a disputed issue.

IV. OBJECTORS ARE NOT ENTITLED TO ATTORNEYS' FEES

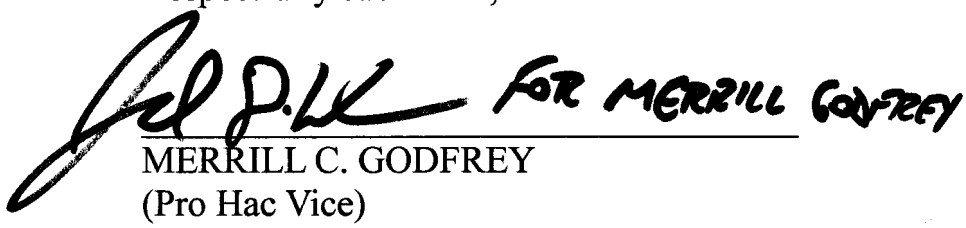
Objectors are not entitled to attorneys' fees because the Water Court's orders should be affirmed. In any event, Objectors merely cite authorities setting out the legal standard for fees, and do not explain how they satisfy those standards. Moreover, particularly in light of the Compact's presumption of validity, Objectors cannot possibly demonstrate that they satisfy the applicable three-part test for an award of attorneys' fees under the private attorney general doctrine. *See Montanans for Responsible Use of the School Trust v. State ex rel. Land Board*, 1999 MT 263, ¶ 66, 296 Mont. 402, 421-22, 989 P.2d 800, 811-812 (1999). Objectors have not even shown that they themselves are materially injured by the

Compact, so it is impossible for them to show that they are protecting the public. Their argument is also non-compliant with Mont. R. Civ. P. 54(d)(2)(B).

CONCLUSION

For the foregoing reasons, this Court should promptly affirm the Water Court's approval of the Crow Compact.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 8th day of September 2015, a copy of the foregoing document was served by first-class mail or hand-delivery on each of the parties' counsel of record as listed below.

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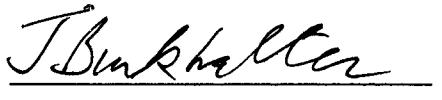

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is

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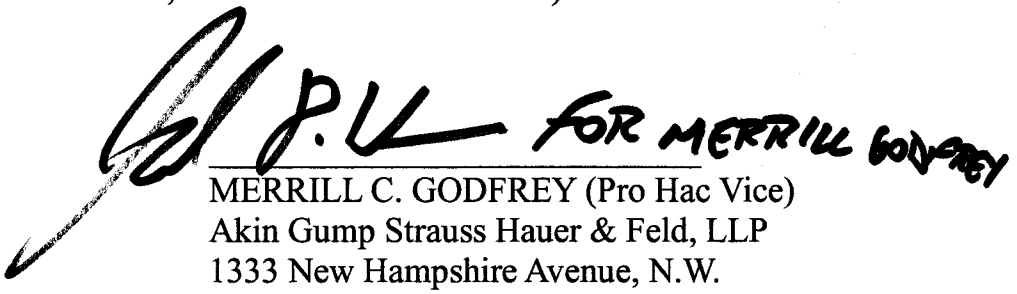
- contains 9,689 words (excluding the table of contents, table of citations, signature block, and certificates of counsel).



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