

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 15-0370

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING AND
RESERVED RIGHTS TO THE USE OF WATER, BOTH SURFACE AND
UNDERGROUND, OF THE CROW TRIBE OF INDIANS
OF THE STATE OF MONTANAANSWERING BRIEF FOR APPELLEES
THE UNITED STATES AND THE STATE OF MONTANAAPPEARANCES

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STATEMENT OF THE ISSUES

Whether, in approving the Crow Tribe-Montana Water Rights Compact, the Montana Water Court properly exercised its discretion in rejecting the Objectors' claims that:

1. the Compact provides the Tribe and allottees excess water for the Crow Reservation and Ceded Strip;
2. the negotiated basin closures are unreasonable;
3. the State acted contrary to the public interest in protecting the Bighorn River blue-ribbon trout fishery;
4. the Compact violated the Objectors' due process rights;
5. the failure to quantify parts of the Tribal Water Right and other Compact terms render the Objectors' water rights unenforceable; and
6. the Compact grants the Tribe easements across private land.

STATEMENT OF THE CASE

A. Nature of the Case

This is the second appeal from proceedings in the Montana Water Court on the Crow Tribe-Montana Water Rights Compact (“Crow Compact”), a settlement of water rights held by the United States for the Crow Reservation and the Apsaalooke (“Crow”) Tribe and individual Indian allottees. The Crow Compact was negotiated under Montana law by a state Compact Commission, *see* Mont. Code Ann. (“MCA”) § 85-2-702, approved by the Montana Legislature, *id.* § 85-20-901, ratified by the Crow Tribe in a vote of its members, and approved by Congress in the Crow Tribe Water Rights Settlement Act of 2010 (“Settlement Act”), Pub. L. No. 111-291, 124 Stat. 3097. Congress’s approval is conditioned, *inter alia*, upon final approval by the Water Court and the resolution of any appeal to this Court. *Id.* §§ 403(7)(A), 410(e)(1)(A)(i), 124 Stat. 3098, 3112.

On July 30, 2014, the Water Court dismissed objections by a group of Indian allottees, whose water rights were determined in the Compact and whose interests were represented by the United States. In an interlocutory appeal by the allottees (DA 14-0567), this Court affirmed. *In re the Crow Water Compact*, 2015 MT 217, ¶ 40.

In the meantime, in February 2015, the Water Court held an evidentiary hearing on the remaining objections by the present Objectors, whose water rights

were not determined in the Compact but whose interests (allegedly) were adversely affected. On May 27, 2015, the Water Court issued an opinion and order rejecting the objections and approving the Crow Compact. The Water Court determined, *inter alia*, that the Compact conforms to applicable law and results in no material injury to the Objectors' interests.

In this appeal, as they did below, the Objectors raise a hodgepodge of objections, including claims that: the Compact provides the Tribe with excessive amounts of water, the agreed-upon basin closures will unfairly injure the Objectors' rights, and the lack of quantification of certain tribal rights and other Compact terms will render the Objectors' water rights unenforceable. These arguments lack merit and the Water Court's decree approving the Compact should be affirmed.

B. Montana Law on Reserved Water Rights Compacts

In 1979, the Montana Legislature enacted Senate Bill 76 ("SB 76") to establish a water court system, *see* MCA §§ 3-7-101, 3-7-102, 3-7-501, and create a process for unified proceedings in the Montana Water Court for the adjudication of all water rights in Montana, *see* MCA §§ 85-2-212, 85-2-214, including federal Indian reserved water rights. MCA § 85-2-701; *see also In re Dep't of Natural Resources and Conservation*, 226 Mont. 221, 228, 740 P.2d 1096, 1100 (1987); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 553-557 (1983).

The United States had earlier consented, through the McCarran Amendment, to being joined as a party defendant in such proceedings. 43 U.S.C. § 666; *see also State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation* (“*Greely*”), 219 Mont. 76, 84, 712 P.2d 754, 759 (1985).

SB 76 also created a Reserved Water Rights Compact Commission (“Compact Commission”), MCA § 2-15-212(1), and directed the Compact Commission to negotiate on the State’s behalf with Indian tribes and the United States, to settle reserved-rights claims in lieu of litigation. *Id.* § 85-2-702(1). The Commission is composed of four members of the Montana Legislature, four appointees of the Governor, and one appointee of the Montana Attorney General. *Id.* § 2-15-212(2). SB 76 directed the Commission to make “an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state,” *id.* § 85-2-701(1), and suspended the adjudication of Indian reserved rights during compact negotiations. *Id.* § 85-2-217.

Under SB 76, a compact is “effective and binding” on all parties upon ratification by the Montana Legislature, the tribe’s governing body, and the appropriate federal authority. *Id.* § 85-2-702(2). The Water Court must include the terms of any ratified compact in a preliminary decree, to be made available by public notice and mailing to all water claimants in the affected water basin. *Id.*

§§ 85-2-231, 85-2-232, 85-2-703(2). After issuing a preliminary decree, the Water Court must provide a hearing on any objection by any person with an “ownership interest in water or its use that has been affected by the decree.” *Id.* § 85-2-233(1). “If the [Water Court] sustains an objection to a compact, it may declare the compact void.” *Id.* § 85-2-233(8). Otherwise, “[t]he terms of a . . . negotiated and ratified [compact] . . . must be included in [a] final decree without alteration.” *Id.* §§ 85-2-234(2); 85-2-702(3).

C. Compact Negotiation and Ratification

The Compact Commission and Crow Tribe initiated preliminary compact negotiations in the early 1980s. *See Appendix to Answering Brief for Appellees the United States and State of Montana (“Gov’t. App.”)* 51. In the early to mid-1990s, the State, Tribe, and United States performed and shared technical reviews. *Id.* The parties began intense negotiations in the fall of 1998. *Id.* The Compact Commission opened negotiations to the public and, in the spring of 1999, published a draft compact online and mailed notice of its availability to more than 1,000 water rights holders in the area of the Crow Reservation. *Gov’t. App.* 54. The Compact Commission also held a series of public informational meetings, attended by hundreds of people, in March and May 1999 in Billings, Lodge Grass, and Hardin. *Gov’t. App.* 54-55. The Montana Legislature ratified the Compact on June 22, 1999. MCA § 85-20-901.

Congress approved the Compact through the 2010 Settlement Act, Pub. L. No. 111-291, 124 Stat. 3097. The Settlement Act authorizes waivers of all water-rights claims by the Crow Tribe and the United States on behalf of the Tribe and allottees, in “return for recognition of the tribal water rights and other benefits . . . set forth in the Compact and [Settlement Act].” *Id.*, § 410(a), 124 Stat. 3109. The waivers are to take effect on the Settlement Act’s “enforceability date,” *id.* § 410(b), 124 Stat. 3111, which is the date the Secretary of the Interior publishes, in the Federal Register, a statement of findings that specified enforceability conditions have been met.¹ *Id.* §§ 403(6), 410(e), 124 Stat. 3098, 3112. Among other enforceability conditions, the Montana Water Court had to issue a final judgment and decree approving the Compact, *id.*, § 410(e)(1)(A), and direct appeals to this Court must be complete. *Id.*, §§ 403(7), 410(e)(1)(A), 124 Stat. 3098, 3112.

D. Water Court Proceedings

In accordance with the requirements of SB 76 and the Settlement Act, and the terms of the Crow Compact, MCA § 85-20-901, Art. VII.B, the Settling Parties (the Tribe, the State, and the United States) submitted the ratified Compact and a

¹ If the requisite findings are not published by March 31, 2016 or an “extended date agreed to by the Tribe and the Secretary, after reasonable notice to the State of Montana,” the waivers are automatically repealed. Pub. L. No. 111-291, § 415, 124 Stat. 3121.

proposed decree to the Water Court for approval. *See* MCA § 85-20-901, Art.

III.H. The Water Court issued a preliminary decree (as proposed) on December 21, 2012, and served and published notice of the decree's availability and rights to object.

In addition to the objections by a group of allottee objectors (now resolved), the Water Court received objections from the present Objectors, a small group of persons and entities who have filed claims in the affected water basins. *See Gov't. App.* 1-39. The Objectors alleged that the Compact would "deprive[] Montana appropriative water rights holders of a property interest without due process of law and take[] that interest for a public use without just compensation" in violation of both the Montana and United States' constitutions. *Gov't. App.* 4, 23.

The Settling Parties moved for summary judgment on these objections and for Compact approval. On December 24, 2014, the Water Court issued an order granting summary judgment in part. *See Objectors' Appendix ("Obj. App.")* 1-20. The Water Court rejected most arguments by the Objectors, including the claim that the Compact effectuated a taking of the Objectors' water rights and arguments that various aspects of the Compact were unreasonable. *Obj. App.* 19. The Court held an evidentiary hearing in February 2015 on remaining objections, and issued a final order approving the Compact on May 27, 2015. *Obj. App.* 53-82. In the

compact-approval order, the Water Court determined, as a matter of law, that the Compact did not materially injure the Objectors' interests. *Obj. App.* 81-82.

STATEMENT OF FACTS

A. Crow Reservation

The Treaty of Fort Laramie of May 7, 1868 reserved a large tract of public land in southeastern Montana to be a homeland for the Crow Tribe. *See Montana v. United States*, 450 U.S. 544, 548 (1981); *United States v. Powers*, 305 U.S. 527, 528 (1939) (citing 15 Stat. 649). The original Crow Reservation encompassed approximately 8 million acres, but subsequent Congressional acts reduced the Reservation to its present size of just under 2.3 million acres. *See Montana*, 450 U.S. at 548. In a 1904 Act, the Tribe “ceded” to the United States approximately 1,137,500 acres on the northern portion of the reservation, now known as the “Ceded Strip.” *See Montana v. Crow Tribe of Indians*, 523 U.S. 696, 700 (1998). The United States holds various mineral and surface interests in the Ceded Strip for the benefit of the Crow Tribe and individual Indians. *Id.*

During the late 18th and early 19th century, a portion of the Crow Reservation's lands were allotted to individual Indians and many allotments were alienated to non-Indian owners. *See Montana*, 450 U.S. at 548; *see also Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 931 (9th Cir. 2008). Congress ended the allotment era with the Indian Reorganization Act (“IRA”) of 1934,

which restored unallotted lands to tribal ownership, 25 U.S.C. § 463, and “extended and continued” all “restrictions on alienation” on Indian lands indefinitely. 25 U.S.C. § 462; *see also Marceau*, 540 F.3d at 932.

This left three primary categories of ownership interspersed within the Reservation: (1) unallotted lands held by the United States in trust for the Tribe; (2) allotments as to which fee patents never issued and that the United States holds in trust for individual Indians; and (3) fee lands that were allotted and patented prior to the IRA and are now mostly owned by non-Indians. *See Montana*, 450 U.S. at 548; *see also Big Horn County Electric Coop., Inc. v. Adams*, 219 F.3d 944, 948 (9th Cir. 2000).

B. Reserved Water Rights

Under federal law, the establishment of an Indian Reservation – *via* treaty, statute, or Executive Order – impliedly reserves “the right to the waters of reservation streams for irrigation and other purposes,” with a priority date no later than the date of reservation. *Lewis v. Hanson*, 124 Mont. 492, 496, 227 P.2d 70, 72 (1951) (citing *Winters v. United States*, 207 U.S. 564 (1908)); *see Greely*, 219 Mont. at 89-90, 712 P.2d at 762-763. The extent of this reserved right depends in part on the purposes of the reservation. *Greely*, 219 Mont. at 92-93, 712 P.2d at 764. “For agricultural purposes, the reserved right is a right to sufficient water to ‘irrigate all the practicably irrigable acreage on the reservation.’” *Id.* (quoting

Arizona v. California, 373 U.S. 546, 600 (1963)). The reserved right also may include sufficient water for present and future domestic and industrial uses, and other uses associated with the reservation as a permanent tribal homeland. *Greely*, 219 Mont. at 92-94, 712 P.2d at 764-65; *see also In re Gila River*, 35 P.3d 68, 77-81 (Ariz. 2001).

When portions of the practicably irrigable acreage (“PIA”) of a reservation have been allotted and conveyed in fee to non-Indians, such lands retain a portion of the reserved irrigation water right with a priority date matching the date of reservation. *See Powers*, 305 U.S. at 532-33; *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 49-51 (9th Cir. 1981). On such lands, the associated (reserved) water rights can be lost, under State law, for nonuse. *Walton*, 647 F.2d at 51; *see also United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984).

Federal reserved rights on Indian trust lands, however, do not depend upon actual appropriation and cannot be lost for nonuse. *Greely*, 219 Mont. at 99, 712 P.2d at 768. Because Indian reservations may encompass large land bases and very senior water rights, the adjudication of Indian reserved rights – and determination of the amount of reserved water that tribes may develop and use in the future – can significantly impact State-law rights acquired after the date of the reservation. The Montana Legislature created the Compact Commission to

facilitate settlements for the “equitable division and apportionment” of State waters between tribes and State-law users. MCA § 85-2-701(1).

C. Crow Compact

In accordance with this Montana statute, and in lieu of litigating the federal reserved right for the Crow Reservation, the Settling Parties reached a negotiated settlement on a “Tribal Water Right” to satisfy the federal reserved right.

Significant aspects of the Crow Compact and Tribal Water Right are as follows.

1. Quantification

The Tribal Water Right includes distinct rights: (a) in the Bighorn River basin, (b) in the basins of the Little Bighorn River, Pryor Creek, and other smaller named streams within the Crow Reservation, and (c) for Tribal interests in the Ceded Strip. *See* MCA § 85-20-901, Art. III. For the Bighorn River, the Crow Compact provides Tribal rights to 500,000 acre feet per year (“AFY”) from the river’s natural flow, *id.* Art. III.A.1.a, plus a storage allocation in Bighorn Lake (*infra*). *Id.*, Art. III.A.1.b. The Compact Commission determined that a 500,000 AFY natural-flow right is reasonable, based, *inter alia*, on the Commission’s estimate of the total acres within the Crow Reservation that are practicably irrigable from the Bighorn River, and in light of Compact provisions protecting

State-law rights (*infra*).² *Gov't. App.* 66-74. When estimating PIA, the Commission considered arable lands within the Bighorn River basin and lands in the Little Bighorn River basin that feasibly might be irrigated from the Bighorn River water, via an interbasin transfer. *Gov't. App.* 68. There is no dispute that Bighorn River flows are sufficient to meet all existing State-law rights and the quantified Tribal Water Right. *Gov't. App.* 72, 144-48.

For the Little Bighorn River, Pryor Creek, and the other named streams, instead of numerically quantifying Tribal rights, the Crow Compact grants the Tribe the right to “all surface flow, [g]roundwater, and storage” within the streams or specified stream segments, *but subject to* provisions (*infra*) fully protecting current State-law rights in such waters. MCA § 85-20-901, Art. III.B.1.a, III.C.1.a, III.D.1.a, III.E.1.a. Unlike the circumstances of the Bighorn River, the Little Bighorn River and Pryor Creek experience shortages for current uses, *Gov't. App.* 92, 95, and the other specified streams have minimal flows and little (if any) potential for new uses. *See Gov't. App.* 170-73, 175. Given these facts and the

² The Compact Commission’s PIA estimate and other positions on the Crow Compact are set out in a Staff Report (*Gov't. App.* 46-128) admitted into evidence at trial. *See Obj. App.* 46 (Order of Jan. 23, 2013). The Staff Report does not necessarily reflect the positions of the United States or the Crow Tribe. The Crow Tribe had a higher estimate of PIA. *Gov't. App.* 19, 139.

Compact's protections for State-law rights, the Compact Commission determined that numerical quantification was unnecessary. *Gov't. App.* 92, 95, 97, 99-100.

For the Ceded Strip, the Tribal Water Right includes rights to divert up to 47,000 AFY from specified segments and drainages of the Yellowstone River basin (sources not otherwise mentioned in the Compact), and/or the Bighorn River, Pryor Creek, or the Little Bighorn River. MCA § 85-20-901, Art. III.F.1.a, III.F.6. Any diversions from sources in the Bighorn River basin for Tribal interests in the Ceded Strip must be deducted from the Bighorn River allocation. *Id.*, Art. III.F.1.a(1). If taken from other sources, such diversions are "in addition" to the Bighorn rights, but limited to a maximum of 7,000 acre feet per month, and a maximum of 2,500 AFY for all sources upstream from the confluence of the Yellowstone and Bighorn Rivers. *Id.*, Art. III.F.1.a(2).

The Settling Parties agreed to the 47,000-AFY cap on all diversions for Tribal interests in the Ceded Strip, based on 3.0 AFY per acre for the 15,533 acres of federal surface ownership for the Tribe and individual Indians. *Gov't. App.* 102. Tribal interests in the Ceded Strip are predominantly subsurface mineral interests. *Id.* The Compact Commission used surface interests and the per-acre computation as an expedient to avoid a more complex and resource-intensive calculation. *Id.*

2. *Basin Closures*

In addition to the negotiated Tribal Water Right, the Crow Compact closes the affected water basins (excluding the Yellowstone River drainages potentially available for Tribal interests in the Ceded Strip) to new water permits under State law. *Id.*, Art. III.A.8, III.B.7, III.C.7, III.D.8, III.E.7. The closures include exemptions for specified stock water ponds and small groundwater wells. *Id.*; *see also id.*, Art. IV.D.1.

3. *Diversion and Use*

The Bureau of Indian Affairs (“BIA”) operates the Crow Irrigation Project (“CIP”) on the Crow Reservation, in several units on the Bighorn River, the Little Bighorn River, and Pryor Creek. CIP diversions constitute a use of the Tribal Water Right. *Id.*, Art. III.A.1.a(3), III.B.1.b, III.C.1.b. Under the Compact, the Tribal Water Right may be developed and used for any purpose allowed under Tribal and federal law, subject to the terms and conditions of the Compact. *Id.*, Art. III.A.5, III.B.5, III.C.5, III.D.5, III.E.5, III.F.5. Because the Tribal Water Right includes future development, the Compact permits diversions, for authorized uses, “from any place and by any means” within the Reservation. *Id.*, Art. III.A.4, III.B.4, III.C.4, III.D.4, III.E.4, III.F.4.

4. *Storage Allocation*

In addition to natural-flow rights in the Bighorn River, the Tribal Water Right includes an allocation of stored water in Bighorn Lake. *Id.*, Art. III.A.1.b; *see also* Pub. L. No. 111-291, § 408(a), 124 Stat. 3106. Bighorn Lake was created by the Yellowtail Dam as part of a federal flood-control, hydroelectric, and conservation project. *Gov't. App.* 77-78. To facilitate settlement, Congress allocated 300,000 AFY of the United States' existing storage right to the Tribal Water Right. Pub. L. No. 111-291, § 408(a), 124 Stat. 3106. Up to 150,000 AFY of the stored water may be used in addition to the 500,000-AFY natural-flow right. MCA § 85-20-901, Art. III.A.1.b(1)(a). The second 150,000 AFY is available only to supplement the natural-flow right in times of shortage. *Id.*, Art. III.A.1.b(1)(b).

5. *Fishery Protection*

Construction of the Yellowtail Dam created a blue-ribbon trout fishery in the tailwater between the Afterbay Dam (which regulates flows from the Yellowtail Dam) and the Two Leggins Diversion. Tr. 2:115.³ Federal and State officials adopted streamflow standards to protect this fishery. Tr. 2:114-118. In the Crow Compact, the Settling Parties agreed to develop a streamflow and lake level management plan ("Streamflow Plan") to memorialize such standards. Tr. 1:112-

³ Trial transcript ("Tr.") citations are to volume and page number, e.g.: "Tr. 2:115" means Transcript day two, page 115.

13; MCA, § 85-20-901, Art. III.A.7. The Tribe's rights in the Bighorn River basin are subject to the terms and conditions of the Streamflow Plan. *Id.*, Art. III.A.1. In the Plan (*Gov't. App.* 129-134), the Tribe agreed, *inter alia*, to permanently dedicate 250,000 AFY of the Tribal Water Right to instream flows. *Gov't. App.* 130.

6. *Protection of State-Law Rights*

Other than the storage allocation,⁴ the Tribal Water Right has a priority date of May 7, 1868, MCA § 85-20-901, Art. III.A.2, III.B.2, III.C.2, III.D.2, III.E.2, III.F.2, the date of the establishment of the Crow Reservation and the most senior right in the Yellowstone River basin. *Gov't. App.* 89. However, the Compact protects all water rights “Recognized Under State Law”⁵ (“State-law rights”) from an “assertion of senior priority” by users of the Tribal Water Right, as long as the State-law right has a priority date before the Montana Legislature’s June 22, 1999 ratification of the Compact (“pre-1999 rights”), or is within the class of rights exempted from basin closure. MCA § 85-20-901, Art. III.A.6.a, III.B.6.a, III.C.6.a, III.D.6.a, III.E.6.a, III.F.6.a. The Compact provides that any new

⁴ The Tribe’s storage allocation in Bighorn Lake has the priority date of the federal storage right for the Yellowtail Dam, MCA § 85-20-901, Art. III.A.2, which is claimed as 1961. *Gov't. App.* 28.

⁵ A right “Recognized Under State Law” is a “water right arising under Montana law or . . . held by a nonmember of the Tribe on land not held in trust by the United States for the Tribe or a Tribal member.” MCA § 85-20-901, Art. II.19.

development of the Tribal Water Right shall be exercised as “junior in priority” to all such protected rights, *id.*, and establishes administrative review procedures to ensure that new developments of the Tribal Water Right “shall not Adversely Affect” protected State-law rights. *Id.*, Art. IV.C.1.

7. *Administration and Shortage Sharing*

When estimating PIA and quantifying the Tribe’s natural-flow right from the Bighorn River, the Compact Commission included fee lands within the Crow Reservation. *See Gov’t. App.* 64-65. Given the Tribe’s long-term goal of reacquiring such lands and returning them to trust status, the Settling Parties structured the Tribal Water Right to account for such potential changes. *Id.* at 16, 55-56. The Compact provides that, if Reservation fee lands are reacquired and returned to trust status, any associated water rights cease to exist as State-law rights and instead “become part of and not in addition to the Tribal Water Right.” MCA § 85-20-901, Art. III.G.1.

The Secretary of the Interior will administer all uses of the Tribal Water Right until the Tribe adopts and the Secretary approves a Tribal Water Code. *Id.*, Art. IV.A.2. At such time, the Tribal Water Resources Department shall assume administration of the Tribal Water Right, *id.*, except that the BIA will continue to administer and distribute CIP water for the irrigation of all lands within CIP units, including fee lands. *Id.*, Art. IV.A.2.d, IV.A.3.c. The State will administer State-

law rights on fee lands within the Reservation but outside of the CIP. *Id.*, Art. IV.A.3.a.

If available water is ever insufficient to satisfy pre-1999 State-law rights on the Crow Reservation and all “current uses” of the Tribal Water Right (uses likewise developed before the Montana Legislature’s 1999 ratification of the Compact),⁶ water distribution between these two groups “shall be on an equitable basis in proportion to the amount of water required” for the respective groups. *Id.*, Art. IV.A.4.a. To implement equitable sharing, the Tribe and the United States agreed to prepare a “current use” list for review and approval by the Montana Department of Natural Resources and Conservation (“DNRC”). *Id.*, Art. IV.E.2.

The Compact also creates a “Crow-Montana Compact Board” (hereinafter, “Compact Board”) with jurisdiction to resolve controversies between users of the Tribal Water Right and users of State-law rights. *Id.*, Art. IV.F.4. Any party to a proceeding before the Compact Board may appeal an adverse decision to a court of competent jurisdiction. *Id.*, Art. IV.F.7.a; *see also id.*, Art. IV.F.8 (waiver of federal and Tribal immunity to enable such enforcement actions).

⁶ If fee lands are reacquired by the Tribe and returned to trust status, any appurtenant water rights also are added to the current use list. *Id.*, Art. III.G.1.

8. *Financial Contributions*

To facilitate settlement, the State and the United States also agreed to make specified financial contributions to rehabilitate and improve the CIP, to improve on-Reservation water delivery, and for similar purposes. *Id.*, Art. VI.A; Pub. L. No. 111-291, § 405-406, 411, 124 Stat. 3100-04, 3113-16.

D. Objectors' Evidence

All but one of the Objectors' rights are pre-1999 rights. *Obj. App.* 71. The lone exception is a small domestic groundwater well. *Id.* All of the Objectors' rights are protected, under the Compact, from an assertion of senior priority by Tribal-Water-Right users. *See* MCA § 85-20-901, Art. III.A.6.a, IV.D.1.a; *see also* *Obj. Ex.* 109 (showing well size).

In the proceedings below, the Objectors principally relied on an expert report and testimony from Thomas Osborne, a professional hydrologist. *See Obj. App.* 83-136). Osborne opined that the overall Tribal Water Right under the Crow Compact, excluding Bighorn Lake storage, amounts to 755,691 AFY. *Tr.* 1:66. Osborne derived this figure by adding together the Bighorn River natural-flow right (500,000 AFY) with the total average annual flows, of the Little Bighorn River (198,512 AFY), Pryor Creek (45,784 AFY), and the other named streams (11,395 AFY), as to which the Tribal Water Right includes "all" water. *Gov't App.* 174. Osborne did not discount for water use under protected State-law rights

that must be deducted from the Tribal Water Right, for the Tribe's inability to use total stream flow from the specified streams due to inability to divert and/or store all flows for beneficial use, or for water that the Tribe agreed not to divert under the Streamflow Plan. *Id.*; *see also Obj. App.* 109 (estimating non-tribal acreage currently irrigated from Little Bighorn River and Pryor Creek).

After estimating the overall Tribal Water Right, Osborne estimated the total amount of water that the Tribe can use on the Crow Reservation, considering PIA and potential future development for livestock, industrial, and domestic uses. *Tr.* 1:66-67. Osborne determined that the Tribe can use up to 480,000 AFY for irrigation and approximately 25,000 AFY for other uses, for a total around 500,000 AFY. *Id.* Contrasting his estimates of the overall Tribal Water Right (755,601 AFY) and potential usage (around 500,000 AFY), Osborne opined that the Tribal Water Right includes at least 251,000 AFY of "excess" water. *Tr.* 67.

Osborne also "questioned" the feasibility of the interbasin transfer considered by the Compact Commission when determining PIA from the Bighorn River (*Gov't. App.* 68) and estimated that, without the transfer, the Tribe could not use an additional 123,000 AFY. *Tr.* 1:50-52. And Osborne testified that approximately 47 percent of the PIA on the Crow Reservation is held in fee (and thus also is unavailable for irrigation under the Tribal Water Right). *Tr.* 1:52. On

cross-examination, however, Osborne could not identify any source for this land-status estimate. Tr. 1:152.

SUMMARY OF ARGUMENT

The Crow Compact does not adjudicate the water right impliedly reserved under federal law upon the establishment of the Crow Reservation on May 7, 1868. Among other things, an adjudicated federal reserved right would have priority – in an amount sufficient for irrigation and the other purposes of the Reservation – over all subsequently acquired State-law rights in common sources. In the Crow Compact, the Tribe and the United States (as trustee for the Tribe and allottees) agreed to *waive* all reserved-rights claims for the Crow Reservation – except to the extent recognized in the negotiated Tribal Water Right – in exchange for the Tribal Water Right and other benefits. Significantly, the negotiated right cannot be asserted as senior in priority to any protected State-law water right (including all pre-1999 rights), and a substantial portion of the negotiated right must be used to maintain the blue-ribbon trout fishery in the Bighorn River. In exchange, the Tribe and allottees receive: (1) the Tribal Water Right, (2) an allocation of the federal storage right in Bighorn Lake to augment/supplement the Tribal Water Right, (3) basin closures that prevent new non-Tribal development of Reservation waters and thus leave any unappropriated waters for Tribal development, and (4) certain financial contributions and other commitments from the State and United States.

Congress and the Montana Legislature acted well within their constitutional authorities when approving this bargain, and the Crow Compact is not, in any regard, unreasonable or unfair to the Objectors' interests. The Objectors' attempts to show that the Tribal Water Right is excessive are methodologically flawed and largely irrelevant, since users of the Tribal Water Right cannot assert senior priority in water use against any pre-Compact and other protected State-law rights. Because the Objectors water rights are fully protected, they cannot show a deprivation of property without due process. Nor have they shown any other material injury or unfairness to their interests. The Water Court's approval of the Crow Compact should be affirmed.

STANDARD OF REVIEW

Because the Crow Compact is akin to a consent decree, the Water Court's approval of the Compact is reviewed for abuse of discretion. *See State ex rel. Dept. of Env. Quality v. BNSF Railway Co.*, 2010 MT 267, ¶ 24, 358 Mont. 368, 372, 246 P.3d 1037, 1041 (2010); *Turtle Island Restoration Network v. U.S. Dept. of Comm.*, 672 F.3d 1160, 1165 (9th Cir. 2012). A trial court abuses its discretion if it rests its approval on an error of law (reviewed *de novo*) or a clearly erroneous finding of fact. *Id.* A reviewing court accords "great weight" to the trial court's determination of the reasonableness and fairness of a consent decree, given the trial court's greater "expos[ure] to the litigants, and their strategies, positions and

proofs.” *Officers for Justice v. Civil Service Com’n of San Francisco*, 688 F.2d 615, 626 (9th Cir. 1982) (quoting *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971)).

ARGUMENT

I. THE WATER COURT DID NOT ABUSE ITS DISCRETION IN ARTICULATING THE STANDARD FOR COMPACT APPROVAL

When granting the Water Court authority to “void” tribal-state water-rights compacts, the Montana Legislature did not specify a standard for the Water Court’s review. *See* MCA § 85-2-233(8). In the absence of legislative guidance, the Water Court adopted and applied the standard applicable to consent decrees. *See Obj. App.* 4-6. Under that standard, a court’s task is not to adjudicate contested issues of fact or law, or judge the settlement “against a hypothetical or speculative measure of what might have been achieved” in litigation. *Officers for Justice*, 688 F.2d at 625. Rather, the court asks whether the decree is the product of good faith negotiation, conforms to applicable laws, and is reasonable and fair to nonparties whose interests might be impacted. *Id.*; *United States v. Oregon*, 913 F.2d 576, 580-81 (9th Cir. 1990).

The Crow Compact, however, is no ordinary consent decree. Once ratified by the Montana Legislature per MCA § 85-2-702, the Crow Compact acquired the force of legislation. *See* MCA § 85-20-901 (ratifying Crow Compact). Courts

generally do not (and cannot) review legislative enactments for “good faith” or “fairness,” except to ensure compliance with constitutional limits. *See, e.g., Walters v. Flathead Concrete Products, Inc.*, 2011 MT 45, ¶¶ 18-21, 359 Mont. 346, 352-54, 249 P.3d 913, 918-19 (2011). When reviewing legislation for compliance with substantive due process, for example, this Court asks only whether the Montana Legislature’s exercise of its police power was “reasonably related to a permissible legislative objective.” *Id.* (quoting *Raisler v. Burlington Northern R.R. Co.*, 219 Mont. 254, 263, 717 P.2d 535, 541 (Mont. 1985)). The Water Court’s review arguably should have been so limited.

In any event, the Water Court’s approval of the Crow Compact under a more exacting reasonableness standard – not limited to constitutional claims – was not an abuse of discretion. Contrary to the Objectors’ argument (*Brief* at 9), the Water Court did not abuse its discretion in requiring a showing of “material injury” as part of its reasonableness inquiry. *See Obj. App.* 7 (Water Court Order). The Objectors acknowledge (*Brief* at 8-9) that the reasonableness inquiry is to be directed toward “those parties and the public interest who were not represented in the negotiation.” The Water Court correctly determined that a water-rights compact cannot be voided as “unreasonable” or “unfair” to individual objectors or similarly-situated members of the public, unless the objectors establish, at a

minimum, some material injury.⁷ *See Obj. App.* 7. Here, the Objectors fail to show any material injury or any measure of unfairness.

II. THE CROW COMPACT IS NOT UNFAIR TO THE OBJECTORS

A. The Tribal Water Right Is Not Excessive

1. *Winters* and its Progeny Do Not Provide the Applicable Standard for Reasonableness of a Compact

The Objectors argue (*Brief* at 5-7, 16-17, 26) that the Crow Compact is unreasonable and fails to conform to applicable law because the overall Tribal Water Right – which the Objectors estimate to be 755,691 AFY (excluding Bighorn Lake storage)⁸ – allegedly exceeds the amount of the federal reserved right for the Crow Reservation under *Winters* and federal law governing the quantification of *Winters* rights. *See Greely*, 219 Mont. at 92-94, 712 P.2d at 764-65 (describing standard). As explained *infra*, the Objectors’ calculation of the total

⁷ The Water Court also determined that the injury must stem from a “departure” from controlling law, which the Water Court understood to mean a departure from the standards for adjudicating federal reserved rights as set out in *Winters* and its progeny. *See Obj. App.* 12-13, 72-81. Because the Crow Compact constitutes a compromise of *Winters* rights claims for the negotiated Tribal Water Right and other commitments that could not be achieved in litigation, federal law governing the quantification of *Winters* rights provides context for judicial review but is not directly controlling. *See pp.* 25-28, *infra*.

⁸ While arguing (*Brief* at 16-17) that the 300,000 AFY storage allocation cannot practicably be used by the Tribe or allottees, the Objectors do not specifically include it as alleged “excess,” presumably because the storage allocation is a grant from Congress, *see Pub. L.* 111-291, § 408, 124 Stat. 3106, and not an approximation of the federal reserved right.

Tribal Water Right is methodologically flawed and the various components of the Tribal Water Right are well within the ballpark of potential litigation outcomes for an adjudicated federal reserved right. But the standards that would apply to the *adjudication* of the federal reserved right do not, in any event, directly control the *negotiated* Tribal Water Right in the Crow Compact.

The adjudication of an Indian reserved right determines, *inter alia*, the amount of water that can be developed and used for an Indian reservation from a specified source *before* any junior State-law user receives any water from that source. Because any use facilitated by such adjudication reduces the amount of water remaining for junior State-law rights, an over-quantification of a federal reserved right – *i.e.*, a quantification in an amount not supported by federal law – could be seen to impair junior State-law rights contrary to law.

Such injury, however, is not possible under the Crow Compact. Under the Crow Compact, no user of the Tribal Water Right can assert senior priority against any State-law water user with a pre-1999 right; *i.e.*, any right developed prior to the Montana Legislature's June 22, 1999 ratification of the Compact. MCA § 85-20-901, Art. III.A.6.a, III.B.6.a, III.C.6.a, III.D.6.a, III.E.6.a, III.F.6.a. Because the Tribal Water Right cannot be exercised ahead of pre-1999 State-law rights, the Crow Compact's quantification of the Tribal Water Right does not reduce the amount of water available to pre-1999 State-law rights. Rather, the alleged over-

quantification of the Tribal Water Right merely limits the acquisition of new State-law rights in any unappropriated waters within the specified basins.⁹

Specifically, except for specified new stock water ponds and groundwater wells, Tribal-Water-Right users have: (a) an exclusive right to develop any unappropriated waters in the Bighorn River basin, up to 500,000 AFY of natural flow as augmented/supplemented by the Tribe's Bighorn lake storage, and (b) an exclusive right to develop all unappropriated water (if any) in the other named water basins. Art. III.A.1.a., III.B.1.a, III.C.1.a, III.D.1.a, III.E.1.a. As the Objectors' acknowledge, these terms have little or no practical effect in addition to the separate (but related) provisions calling for the closure of affected basins to new State-law permits.¹⁰ See Art. III.A.8, III.B.7, III.C.7, III.D.8, III.E.7.

⁹ To be sure, under the Compact, pre-1999 State-law water rights on the Crow Reservation must share equitably with "current" (pre-1999) uses of the Tribal Water Right during times of shortage. *Id.*, Art. IV.A.4.a. But the Objectors do not allege and cannot show that this equitable sharing is injurious to their rights. Absent the Compact, all State-law water rights within the Reservation would either be junior to the federal reserved right, or equal in priority for continuously-used State law rights derived from the federal reserved right, *see Walton*, 647 F.2d at 49-51, and State-law water users with equal priority would have to share with all uses of the reserved right, *whenever developed*. The Compact's sharing provision thus gives all pre-1999 State-law water users greater protection than they would have under an adjudication of the federal reserved right.

¹⁰ The Objectors allege (*Brief* at 19-20) that over-quantification of the Tribal Water Right caused the basin closures, which "make[] the Compact unreasonable."

Further, even if the Tribal Water Right is somehow greater in quantity than the Tribe would receive in litigation of its federal reserved right – a point the Settling Parties do not concede – the alleged excess would be in exchange for the agreement not to exercise the Tribal Water Right ahead of any pre-Compact (pre-1999) State-law rights. Because this agreement makes the negotiated Tribal Water Right fundamentally different from an adjudicated federal reserved right, federal law governing the quantification of *Winters* rights does not specifically limit the Tribal Water Right.

2. *The Allocations for the Tribal Water Right Are Reasonable*

The Objectors also fail to show that the Tribal Water Right is excessive in any respect or that the basin closures are unreasonable. To begin with, although the Crow Compact closes the Little Bighorn River, Pryor Creek, and other specified stream basins to State-law permits and gives the Crow Tribe “all surface water, ground water, and storage” within these basins, *see* MCA § 85-20-901, Art. III.B.1.a, III.B.7, III.C.1.a, III.C.7, III.D.1.a, III.D.8, III.E.1.a, III.E.7, the Objectors err in asserting (*Brief* at 13) that this leaves “no water” for “any state-based rights.” All components of the Tribal Water Right are subject to the Compact terms that protect State-law rights and provide for equitable sharing between pre-1999 uses of the Tribal Water Right and pre-1999 State-law rights on

the Crow Reservation. *See* MCA § 85-20-901, Art. III.A.6, III.B.6, III.C.6, III.D.6, III.E.6, III.F.6, IV.A.4.

This means, for the basins where the Crow Compact provides “all water” to the Tribal Water Right, (a) that the term “all water” means all water not needed for pre-1999 State-law rights (subject to equitable sharing), and (b) that there is *no water* for new uses of the Tribal Water Right during shortages. *Id.* This also means, contrary to the Objectors’ calculations (*Brief* at 6-7), that “total streamflow” cannot reasonably be used to quantify the Tribal Water Right in these basins, even if one assumes that total stream flow can be diverted and/or stored for beneficial use. *See Obj. App.* 103 (explaining method). Under the Compact, the Tribe and allottees are *not* entitled to divert “total streamflow” in any basin where there are protected State-law rights.

Moreover, the Compact Commission determined that the Little Bighorn River and Pryor Creek basins already experience shortages, *Gov’t. App.* 92, 96, and the Objectors acknowledge that there are minimal (if any) opportunities for new water development in the other smaller basins. *See Gov’t. App.* 170-73, 175 (Objectors’ chart). In this context, the Montana Legislature’s closure of the stream basins in which “all water” is dedicated to the Tribal Water Right merely serves to preserve for the Tribe and allottees the limited water-development opportunities that remain within these basins.

As for the Bighorn River basin, the negotiated closure to new State-law permits provides a somewhat different factual circumstance, in light of the undisputed surplus (unappropriated) water within that basin. The Compact Commission acknowledged these circumstances but determined, “[a]fter extensive public review and discussion with legislators,” that basin closure was warranted, given, *inter alia*, the strength of the reserved-water-rights claim for the Crow Reservation, and the agreements by the United States and the Tribe not to assert senior priority of the Tribal Water Right but instead to “extend protection for [State-law] water rights . . . both on and off the Reservation.” *Gov’t. App.* 91.

The Objectors fail to show that this compromise, endorsed by the Montana Legislature via Compact ratification, is unreasonable. *Cf. State v. Shook*, 2002 MT 347, ¶¶13-15, 313 Mont. 347, 352, 67 P.3d 863, 866 (2002). The natural-flow component of the Tribal Water Right in the Bighorn River (500,000 AFY) essentially equals the amount that the Objectors’ expert determined could be beneficially used for irrigation and other uses on the Crow Reservation. *See Tr.* 1:66-67.

The Objectors contend (*Brief* at 5-6, 17) that 123,000 AFY of this amount cannot practicably be used because a potential inter-basin transfer considered by the Compact Commission in the Commission’s estimate of PIA is not feasible. But the Compact Commission determined otherwise, *Gov’t. App.* 68, and it was

not the Settling Parties’ obligation to produce detailed engineering studies to prove PIA. Such a requirement would discourage settlement contrary to legislative policy. *See* MCA § 85-2-702; *see also Durden v. Hydro Flame Corp.*, 1999 MT 186, ¶ 20, 295 Mont. 318, 324, 983 P.2d 943, 947 (1999). In proceedings on a negotiated compact, the objectors are properly charged with the burden to show that the compact is unreasonable (or contrary to constitutional limits). *See Oregon*, 913 F.2d at 581; *cf. Marks v. 71 Ranch, LP*, 2014 MT 250, ¶ 15, 376 Mont. 340, 343-44, 334 P.3d 373, 376 (Mont. 2014) (objector to claim bears burden of proof in decree proceedings). Here, the Objectors presented no evidence that the Compact Commission’s PIA assumptions were unreasonable. *See* Tr. 1:51 (Osborne) (merely “question[ing]” feasibility of interbasin transfer due to absence of study).

The Objectors also failed to meet their burden with respect to their argument (*Brief* at 6) that an additional 225,818 AFY (of the 500,000 AFY natural-flow right) cannot be used by the Tribe, because “47% of the PIA” considered by the Compact Commission “is in fee status.” There is no dispute that some irrigable acreage on the Reservation is privately owned. The Commission explained, however, that precise information on land status is not available, that the Tribe’s longstanding goal is to return fee lands to Tribal trust status, and that the Compact is deliberately structured to enable water rights returned to trust status to become

part of (and not in addition to) the Tribal Water Right. *Gov't. App.* 64-65, 84-85.

This allowed the Settling Parties, during Compact negotiations, to avoid getting “bogged down” by land-status issues, *Gov't. App.* 65, and will enable uniform Tribal administration of all Tribal and allottee water rights in the event lands with appurtenant water rights are reacquired and returned to trust status.

At bottom, the Montana Legislature is free to determine, within constitutional limits,¹¹ whether and to what extent possible surplus (unappropriated) waters are made available for appropriation and when basins may be closed. As the Objectors note (*Brief* at 12), the Montana constitution provides that all “waters within the boundaries of the state are the property of the state for the use of its people.” Mont. Const. Art. IX, § 3(3) (1972). But the constitution also entrusts the Legislature with authority to “provide for the administration, control, and regulation of [State] water rights.” *Id.*, § 3(4). The Legislature acted well within this power when determining, as part of the settlement of the reserved-

¹¹ The Objectors also imply (*Brief* at 20) that closure of the Bighorn River basin is subject to MCA § 85-2-319(1), which states that “the Legislature may by law preclude permit applications” “with regard to [any] highly appropriated basin or subbasin.” The Objectors contend (*Brief* at 20) that the Bighorn River basin is “highly appropriated,” only because the Compact provides the Tribe with excessive rights. The Legislature is not limited, however, to its own prior determination as to when basins “may” be closed. See MCA § 85-2-319(1); see also *Dorsey v. United States*, --- U.S. ---, 132 S.Ct. 2321, 2331 (2012) (“statutes enacted by one Congress cannot bind a later Congress . . .”).

rights claims for the Crow Reservation and in exchange for the protection of all existing (pre-1999) and additional State-law rights, that any surplus water in the Bighorn River,¹² up to 500,000 AFY, is properly left to the Tribal Water Right.

Moreover, by their own concession (*Brief* at 8), the Objectors are “not users of the Big Horn [sic] River,” but instead draw their rights from other sources named in the Compact. Thus, the Objectors’ argument (*Brief* at 6-7, 16-17) that the Tribe and allottees cannot practicably use all of their specified Bighorn River rights is irrelevant to the Objectors’ interests. As explained (p. 29, *supra*), the other negotiated basin closures reflect an insufficiency of water in those basins, a point the Objectors do not contest.

3. *The Basin Closures Do Not Preclude Changes in Use*

Unable to show any direct injury from the negotiated basin closures and associated water rights, the Objectors are reduced to arguing (*Brief* at 21-22) that the Crow Compact will indirectly injure their rights, by preventing potential future changes of use. The Objectors speculate (*Brief* at 22) that, if a fee owner seeks to change a State-law water right – *e.g.*, to change an instream stock water use to a diversion for a stock water pond – the applicant will be unable to meet objections from the Tribe, because the Tribe, as holder of all unappropriated “surface water,

¹² Although the Bighorn River can supply water beyond current appropriations, *see Gov’t. App.* 70-71, the Settling Parties do not concede that there is excess water in relation to the federal reserved right, were that right to be adjudicated.

ground water, and storage” will be free to object to any adverse impact to “any *potential* diversion” of such water (emphasis added). This complaint misapprehends how the Compact operates.¹³

The Compact specifically allows the State to “authorize a change in use or transfer of a [State-law] water right within the Reservation in accordance with state law,” as long as “such change or transfer [does] not Adversely Affect¹⁴ a use of the Tribal Water Right *existing at the time of the application* for change in use or transfer.” MCA § 85-20-901, Art. IV.D.2 (emphasis added). Stated differently, to object to a change in use, the Tribe cannot claim injury to any *potential* diversion of the Tribal Water Right, but must show an adverse effect on an “existing” use. *Id.* This is entirely consistent with existing State law. *See* MCA § 85-20-402(2).

The Objectors also speculate (*Brief* at 21, 29) that the Tribe will be able to prove adverse effects to the Tribal Water Right, merely by showing a groundwater impact within a stream’s so-called “depletion halo,” and that this ability – which the Objectors trace to this Court’s post-Compact decision in *Montana Trout Unlimited v. Montana Department of Natural Resources*, 2006 MT 72, 331 Mont.

¹³ As the Water Court correctly noted (*Obj. App.* 50), the Objectors also lack any protectable property interest in future appropriations or changes in use. *Seven Up Pete Ventures v. Mont.*, 2005 MT 146, ¶ 26, 327 Mont. 306, 316, 114 P.3d 1009, 1017-18 (2005).

¹⁴ “Adversely Affect” means “to interfere with the reasonable exercise of a water right.” MCA § 85-20-901, Art. II.3.

483, 133 P.3d 224 (Mont. 2006) (“*Trout Unlimited*”) – was not considered by the Settling Parties and renders the basin closures unreasonable. This argument is also unfounded.

In *Trout Unlimited*, this Court voided DNRC’s regulatory interpretation of a basin-closure statute, because DNRC failed to exclude appropriations for new groundwater wells that could cause “prestream capture of tributary groundwater” from the closed basin. *Trout Unlimited*, ¶¶ 34-44. Based on this ruling, the Objectors’ expert (Osborne) opined that the Compact’s basin closures could prohibit new permits for groundwater pumping within certain “depletion halos,” *i.e.*, areas within which groundwater pumping might be presumed to cause “prestream capture of the tributary groundwater” in a closed basin. *Obj. App.* 85-86 (¶¶ 13-17). Osborne further opined that, if the Settling Parties had anticipated the possibility of distant wells causing “prestream capture” from the waters of a closed basin, they would have adopted “de minimis” exceptions. *Id.* (¶ 18).

But the Compact already includes an exception for specified new small groundwater wells. *See* MCA § 85-20-901, Art. III.A.8.a(1), III.B.7.a(1), III.C.7.a(1), III.D.8.a(1), III.E.7.a(1). And, more to the point, prohibiting *new* wells that cause prestream capture of tributary groundwater would not prevent a change in use of an *existing* right. If an Objector has a pre-1999 right to divert from a particular stream – by prestream capture of tributary groundwater or

otherwise – Tribal-Water-Right users cannot object to a proposed change in diversion on the grounds that the changed diversion also would “capture” stream water. Rather, any objection alleging injury to the Tribal Water Right must be based on an existing use of such right. MCA § 85-20-901, Art. IV.C.2; MCA § 85-20-402(2).

4. *The Ceded-Strip Rights are Reasonable*

There is also no merit to the Objectors’ argument (*Brief* at 25-26) that the Crow Compact allocates excessive water to Tribal interests in the Ceded Strip. Because federal reserved rights may include water for purposes other than irrigation (p. 10, *supra*), and because a negotiated settlement of reserved-rights claims reasonably may include water rights or other benefits that could not be obtained in the adjudication of a federal reserved right (pp. 25-28, *supra*), the Objectors’ observation that the Settling Parties failed to prove PIA for the Ceded Strip is not any basis for objection.

The Compact Commission used total surface acres held in trust for the Tribe and individual Indians as an expedient for calculating the Tribal Water Right in the Ceded Strip for irrigation and *all* other purposes, including the development of significant mineral interests. *Gov’t. App.* 101-102; *Tr.* 1:233-34, 2:94-95. Diversions for the Ceded Strip from the Bighorn River basin must be discounted from the Tribal Water Right in the Bighorn River. MCA § 85-20-901, Art.

III.F.1.a(1). If the water is taken from specified Yellowstone River drainages or segments, the water right for the Ceded Strip is in addition to the quantified Bighorn River rights, but other more-stringent limitations apply (in lieu of or in addition to the 47,000 AFY cap). *Id.*, Art. III.F.1.a(2). The Objectors do not acknowledge or challenge these limitations. *See Brief* at 25-26.

Further, contrary to the Objectors' argument (*id.*), Tribal-Water-Right users in the Ceded Strip will not be able to call upon existing (pre-1999) State-law rights in the Yellowstone River. Although shortage sharing under the Compact is limited to State-law rights within the Reservation (MCA, § 85-20-901, Art. IV.A.4), the Compact specifies that Tribal-Water-Right users cannot assert senior priority in their Ceded-Strip rights against any pre-1999 State-law rights, *id.*, Art. III.F.6.a(1), and that any new development of the Tribal Water Right will be exercised as "junior in priority" to pre-1999 State-law rights. *Id.*, Art. III.F.6.a(2). This fully protects the Objectors' water rights from injury.

B. The Fishery-Protection Provisions are Reasonable

The Objectors allege (*Brief* at 18-19) that the State agreed to allocate "extra" water to the Tribe, solely to preserve water for the blue-ribbon trout fishery in the Bighorn River *via* the subsequently negotiated Streamflow Plan, and thus to circumvent Montana's constitutional provision declaring "all . . . waters within the boundaries of the state" to be "the property of the state for the use of its people."

See Mont. Const., Art. IX, § 3(3). Contrary to the Objectors’ suggestion, this reservation of water “for the use of [Montana’s] people” does not require all State waters to be made available for private appropriation. *Id.* The Montana Legislature has recognized the need to protect water resources for “public recreational purposes and for the conservation of wildlife and aquatic life.” MCA § 85-1-101(5); *see also id.* § 85-2-102 (“beneficial use” includes “public” use for “fish and wildlife” and “recreational” purposes). The Objectors fail to explain why allocating surplus waters to fishery protection (assuming any surplus in this case)¹⁵ is not a constitutionally-authorized public use.

Nor do the Objectors provide any support for their argument (*Brief* at 19) that the Streamflow Plan was unnecessary for fishery protection. *See Oregon*, 913 F.2d at 581 (objectors have burden of proof). The Objectors cite only the “Dalby Report” (appended to the Compact Commission’s Staff Report), which determined, based on a 77-year historic record, that there were sufficient natural flows within the Bighorn River basin to satisfy the natural-flow portion of the Tribal Water Right in the Bighorn River (500,000 AFY) during the years studied, and, conversely, that the Bighorn Lake storage allocation would not have been necessary to satisfy Tribal diversions up to 500,000 AFY during the same period. *See Gov’t. App.* 144-48. The Dalby Report does not determine the practical limit

¹⁵ *See* p. 33, n.12, *supra*.

of Tribal and allottee water use on the Crow Reservation, or whether the natural flow in the Bighorn River would be sufficient for fishery protection if the Tribe and allottees were to divert up to 500,000 AFY for irrigation and industrial use. *Id.*

Thus, the Dalby Report shows only that the Bighorn Lake storage allocation is unnecessary for full development of the natural-flow right, assuming historic flow rates and *no instream-flow requirement for fishery protection*. The Objectors do not contend that Congress lacked authority, in aid of settlement, to grant storage rights that will enable the Crow Tribe and allottees to divert to the full-extent of the natural-flow right *and* provide minimum stream flows for the trout fishery. *See generally* Pub. L. No. 111-291, §§ 408, 412, 124 Stat. 3106-3108, 3116-3118. Nor, in any event, do the Objectors show any injury to their water rights from the Compact provisions regarding fishery protection.

C. The Compact Does Not Deprive the Objectors of Their Water Rights or Render those Rights Unenforceable

The Objectors' inability to show injury also dooms their due process argument (*Brief* at 28-29). The Compact Commission opened compact negotiations to the public and held numerous public hearings before presenting the Crow Compact to the Montana Legislature for ratification. *Gov't. App.* 54-55. The Objectors do not contend that the Compact Commission violated any public-participation requirement imposed by statute. To the extent the Objectors contend that the Legislature's *ratification* of the Crow Compact violated constitutional

procedural limits, the Objectors had (and have) an adequate remedy in the present Compact-review proceedings.

The Objectors’ argument (*Brief* at 28-29) that Compact approval will take their property without due process fails because the Objectors cannot show a deprivation of their water rights.¹⁶ *See ISC Distributors, Inc. v. Trevor*, 273 Mont. 185, 191-92, 903 P.2d 170, 173-74 (1995). The Crow Compact does not adjudicate or prejudice the validity of any of the Objectors’ State-law water-right claims, including their claims to water within the Crow Reservation. As explained *supra*, the Crow Compact fully protects pre-Compact State-law rights, by precluding users of the Tribal Water Right from asserting seniority against such rights. MCA § 85-20-901, Art. III.A.6, III.B.6, III.C.6, III.D.6, III.E.6, III.F.6.

The Objectors also are mistaken in arguing (*Brief* at 14-15) that the State-law protections provided in the Compact “require Tribal administration.” The BIA will continue to administer the CIP, including the distribution of water to any fee lands within CIP units, MCA § 85-20-901, Art. IV.A.2.d, IV.A.3.c, and the State will administer State-law rights outside the CIP. *Id.*, Art. IV.A.3.a.; *see also Gov’t. App.* 107-108. Nor are the Objectors correct in asserting (*Brief* at 15) that the

¹⁶ The United States and State do not concede that the Objectors have a procedural due process claim. *See Ileto v. Glock, Inc.*, 565 F.3d 1126, 1142 (9th Cir. 2009) (“the legislative determination provides all the process that is due”) (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982)).

Compact precludes enforcement of their State-law rights in State, federal, or Tribal court. Rather, the holder of a State-law water right may bring any dispute regarding the Tribal Water Right to the Compact Board, *id.*, Art. IV.F.4., and if dissatisfied by the Board's action, may appeal to any court of competent jurisdiction. *Id.*, Art. IV.F.7.a.

The Objectors similarly err in arguing (*Brief* at 24-25) that the lack of quantification of the Tribal Water Right in specified basins will stymie enforcement. If, as in the example cited by the Objectors (*id.*), a user of the Tribal Water Right diverts all water from a specified source and thereby prevents the exercise of a State-law water right, such action would constitute an assertion of senior priority contrary to the Compact. *See, e.g.*, MCA § 85-20-901, Art. III.C.6. If there is insufficient water from the relevant source to satisfy Tribal uses and State-law rights on the Crow Reservation, the Compact requires equitable sharing (as between pre-1999 uses). *See id.*, Art. IV.A.4. The Compact Board or a reviewing court can order the Tribe or user of the Tribal Water Right to cease and desist actions that preclude use of a State-law right and/or to share equitably (*e.g.*, on a pro rata basis), notwithstanding the absence of a numerically-quantified Tribal Water Right in the source as a whole.

To be sure, as the Objectors note (*Brief* at 14, 23), the Compact Board members have not yet been appointed, and the Settling Parties have not yet agreed

on a final Current Use list for the Tribal Water Right, which is necessary for enforcing the equitable sharing provision. But the action before this Court concerns the facial validity of the Compact, not its implementation. The Court may presume that the Settling Parties will complete the required actions and that judicial enforcement options will be available if the actions are not completed.¹⁷

D. The Compact Does Not Grant Easements across Private Land

Finally, there is no merit to the Objectors' argument (*Brief* at 15) that the Compact grants easements across private land. Under established canons of interpretation, the Compact must be interpreted in accordance with its purpose and in a manner that avoids absurd results or potential constitutional difficulties. *See McCulley v. U.S. Bank of Montana*, 2015 MT 100, ¶ 59, 378 Mont. 462, 480, 347 P.3d 247, 261 (2015); *Molnar v. Fox*, 2013 MT 132, 370 Mont. 238, 250, 301 P.3d 824, 833 (2013).

State-law water rights include a defined point of diversion, associated with the original appropriation, to preclude changes that would impair the rights of subsequent appropriators. *See generally* MCA §§ 85-2-234(6)(g); 85-2-402(2)(a); *Thompson v. Harvey*, 164 Mont. 133, 136, 519 P.2d 963, 965 (1974). Because Indian reserved rights do not depend on appropriation and may include future

¹⁷ The delay to date has had no impact since the Compact is not yet enforceable. *See* p. 6, *supra*.

development, *Greely*, 219 Mont. at 89-93, 712 P.2d 762-765, however, the assignment of a fixed diversion point for future use of a tribal right can be impractical. Accordingly, in the Crow Compact, the Settling Parties agreed, as noted in the Compact Commission Staff Report, that “[t]he Tribe can divert water from any point . . . *where it owns land or has permission from the landowner to divert.*” *Gov’t. App.* 83, 94, 96, 97, 100, 103 (emphasis added).

Although the italicized limitation is not expressly stated in the Compact, *see* MCA § 85-20-901, Art. III.A.4, III.B.4, III.C.4, III.D.4, III.E.4, III.F.4, it is implicit, and the Settling Parties subsequently stipulated to it. *Gov’t. App.* 40-45. The Objectors’ interpretation is contrary to the purpose of the Compact and should be rejected.

CONCLUSION

For the foregoing reasons, this Court should affirm the May 27, 2015 order of the Water Court approving the Crow Compact and deny the Objectors' request (*Brief* at 30) for attorneys' fees.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

- double spaced (excluding footnotes),
- printed in a proportionally-spaced typeface (Times New Roman) of 14 points, and
- contains **9,990** words (excluding the table of content, table of citations, and certificates of counsel).

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CERTIFICATE OF SERVICE

I certify that, on this 4th day of September 2015, a copy of the foregoing document was served via first-class mail (and by courtesy email) on all parties through the following counsel of record:

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