

WC-0001-C-2021

August 21, 2025

Montana Water Court

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Hearings 12-13*

IN THE WATER COURT OF THE STATE OF MONTANA
CONFEDERATED SALISH AND KOOTENAI TRIBES–MONTANA–UNITED STATES
COMPACT

CASE NO. WC-0001-C-2021

POST HEARING BRIEF
HEARINGS 12-13

COME NOW the Objectors in these Consolidated Hearings 12 and 13 who submit this Post Hearing Brief per the Order of this Court.

The Objectors proceeded per the Order of this Court dated April 1, 2025, document 2336.00, at page 74, wherein the Court acknowledges the “heavy burden” the Objector must show is that its interests are “materially injured” by operation of the Compact, citing Crow Compact II, 18.

The “heavy burden” is difficult to meet, and the facts around the Compact illustrate that the Compact is not operating, or implemented, making it impossible to demonstrate that “operation of the Compact causes “material injury” to Objectors interests. The Compact parties affirm this issue in their examination of their rebuttal witness Seth

Makepeace. Ryan Rushe, Counsel for the Compact Parties at page 61 of the Hearing Transcript, line 13, asked Mr. Makepeace “How will increased flows for Compact implementation result in additional maintenance or revision of structures “wherein Mr. Makepeace answered at line 32-24” so I evaluated the wet instream flows, which are the highest magnitude instream flows called out in the Compact, and I benchmarked those against standard flood hydrology determinations to evaluate if there will be impact from the instream flows to Lake County Road Crossings.”

The question by Mr. Rushe “How will increased flows for compact implementation” and the answer by Mr. Makepeace “to evaluate if” are both speculative or predicting circumstances, not actual or fact based. This is further demonstrated by Mr. Makepeaces admitting at transcript page 64 answering Mr. Rushe’s question at line 20 about “How will the on-Reservation instream flows contained in the Compact affect the conveyance and County Road intersections.” The answer at Transcript Page 64 line 25 and page 65 lines 1 and 2 notes, “So I believe that they will not impact the County Road structures that meet the criteria for 25-year floods or the lower 10-year flood”. The question and answer are both speculation or future projection, and both indicate the Compact is not in operation, but will be. Also, speculation.

The Objectors proving material injury from operation of the Compact is impossible as the Compact is not implemented or operating. The burden and standard of the test itself violates the Montana Maxims of Law. Per MCA 1-3-222 “the Law never requires impossibilities”.

We submit that proof of the benefits of, or damages from the Compact is not

possible until the Compact is implemented and operating, and it is presently not, as indicated by the questions and answers of the Compact parties.

The Objectors first witness Mr. Gale Decker was examined by David Harder, Compact Attorney. He first inquired at Transcript page 23, line 18-20, "If he (Mr. Decker) agreed that the action by FIIP to update water conveyances are authorized by the Water Rights Protection Act and not the Compact", to which Mr. Decker agreed at line 21. Mr. Harder then inquired about funds for Lake County and the FIIP at pages 23 and 24 of the Transcript, and at lines 12-19, page 24 Transcript, asked "so, the County will get the five million dollars after the Compact is enforceable under the Act, and one of those provisions is that the Compact is approved through the Judicial process, correct?" Mr. Decker agreed at line 20, Transcript. Mr. Harder's questions indicate the Compact is not implemented or operational, as "will" is speculative or a prediction, not a fact or guarantee, and it is further acknowledgement that proving a "material damage" from a Compact that is not implemented or approved is impossible.

Mr. Harder continued inquiry at pages 24-26 of the transcript, resulting in proof of material damage to Lake County from the Compact, and repairs, as Mr. Harder asked at Line 5, page 26 Transcript, "And that provides a process for the Tribes to reimburse the Counties for repairs that the county makes to roads and bridges"; wherein Mr. Decker answered, line 8 "not all of the repairs. Not the complete costs of the repairs." The repairs are a material damage in the form of costs to Lake County. Mr. Harder did not demonstrate that costs for repairs from compact implementation will be repaid. The cost incurred is a material damage.

Mr. Harder attempts to divert any existing or potential problems to the Water Rights Protection Act, without attention to the fact that this Court took notice of the Bill and its provisions at Transcript, page 12 lines 1 through 6. Mr. Harder confirmed the connection between the Compact and the Bill, and ignores that per MWRPA, PL 116-260 Title V, Division DD, and MCA 85-20-1901, the purpose is to administer the waters of CSKT, or Allottees, or the USA on their behalf. As the Statute provides, this court is to consider the Compact and its administration. Mr. Decker's testimony indicates that the implementation and administration of the Compact will cause significant costs not repaid to Lake County, which is material damage. It is still impossible to quantify the material damage of the Compact. Mr. Harders questions point to the Act causing issues (Transcript page 23, lines 18-20) and to upcoming Compact approval (Transcript page 24, lines 7 and 18-19), leading us further to the impossibility of proof by Objectors due to no Compact implementation yet and no Compact approval yet.

The prefiled testimony of Superintendent Carolyn Hall is enlightening in that it specifically notes that education and schools are mentioned in the treaties but not in the compact. Mr. Zipfel, attorney for the compact parties at transcript 44-47, inquired of Hall regarding if 1) other tribal compacts have water for state-based schools and 2) if the compact commission guarantees state based claims; and 3) if the Federal Register which guides settlements has requirements guaranteeing water rights and; 4) if Ms. Hall understood the purposes of the compact is intended "at least in part" to settle the Tribes Federal reserved water rights" transcript page 46, line 1-2.

This cross examination missed or ignored the fact that the treaties mention and

provide for schools and education and Ms. Hall mentioned that in paragraph 4 of her pre-filed testimony and the filed objections, which mentions that fact. The costs and uncertainty identified in paragraph 4g of her pre-filed testimony are a material damage that is not yet quantifiable since the compact is not yet approved per Mr. Harder's questions or implemented per Mr. Rushes' questions and settles the Tribes Federal and reserved water rights at least in part pursuant to Mr. Zipfel's questions.

As we indicated previously, it is impossible to determine actual material damage from a compact that is not implemented or approved. Mr. Zipfel's questions further complicate the issue as Title 85-20-1901 Article I provides the parties agree to enter into the compact for the purpose of settling the water right claims of the CSKT. His question at page 46, line 1, regarding the compact asks "would you agree that it is intended at least in part, to settle the tribes Federal Reserve water rights". This raises the issue of what part of their rights did it not settle. This addition to the uncertainty noted by Ms. Hall is a material damage and is not yet definable.

The direct testimony of Ms. French identifies at paragraph 32 that "The compact allows call on irrigation on larger irrigators on the Flathead or Clark Fork River who could call our system." This issue is substantial in the filed objections and also recorded in paragraph 3g of her pre-filed testimony.

Mr. Dan Deckers cross examination questions resulted in an answer that did not confirm his inquiry about "Is it true under Article 3D, 3E of the compact that Paradise Water District water right is protected from call." Paragraph 55 line 6 through 17. This also resulted in a statement by Ms. French that call protection is a good thing "to some

degree”, p. 55 line 16. This was better defined in page 55 lines 24-25 and page 56, line 1-2 when Ms. French confirmed the call limit was not believed to be against all call.

The compact parties ignored her direct testimony that the district is not a municipality and therefore may not be excepted, per her testimony 3i. As the objections of the district and others and her testimony indicates, the call protection is not against all call, which is a material damage.

However, the proof is difficult as there is no compact yet and damages and benefits are both speculative at best. It is impossible to determine the exact material damage and it is against the maxims of law to do so. This is also difficult because documents we reviewed after years of discovery efforts, we were unable to use, by order of the Court, regardless of their contents including damages from compact implementation.

CONCLUSION

Objectors submit the filed objections as docketed, transcript at page 13, all indicate material damage will occur from the compact if approved and implemented, and the hearing testimony indicates the material damage is impossible to quantify or reliably prove as the compact is not approved or implemented at this time, and we cannot prove the impossible.

These objectors acknowledge the other parties proof of and acknowledgment of material damages from the CITT actions and the potential or prospective or predicted consequences of compact implementation that has not occurred, and predicted impacts of a compact that is not yet approved per the specified process.

Dated this 21 day of August, 2025



Walter E. Congdon

CERTIFICATE OF SERVICE

I, Walter Congdon, do hereby certify that on the 21 day of August, 2025, a true and correct copy of the foregoing document by email with a request for delivery receipt upon the person(s) named below.

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