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WILLIAM SEGO AND BILL & IRENE, LLC,
AND GRACE SLACK

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

CASE NO. WC-0001-C-2021

EVIDENTIARY HEARING NO. 1

OBJECTORS WILLIAM SEGO, BILL & IRENE, LLC, AND GRACE SLACK'S POST-HEARING BRIEF REGARDING EVIDENTIARY HEARING 1

I. INTRODUCTION

Objectors William Sego and Bill & Irene, LLC ("Sego") and Grace Slack ("Slack" and collectively, the "Sego/Slack Objectors") submit this post-hearing briefing following Evidentiary Hearing 1 held on April 22, 2025 on the issue of Sego/Slack Objectors' material injury suffered by operation of the Confederated Salish and Kootenai Tribes Water Rights Compact ("Compact"), codified at § 85-20-1901, MCA.

II. LEGAL STANDARD

"Water Court judges have the powers of a district court within their area of jurisdiction, § 3-7-224(3), MCA, and the Montana Rules of Civil Procedure generally apply to Water Court proceedings." *In re Crow Water Compact*, 2015 MT 217, ¶ 23, 380 Mont. 168, 354 P.3d 1217 ("*Crow Compact I*"). Where the Court is determining whether to include a compact in a final decree or to sustain an objection to a compact, its review is limited. § 85-2-702(3), MCA; Compact, Art. VII.B.2. Even so, because the Water Court is adjudicating tribal water rights, it has a "solemn obligation to follow federal law." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571, 103 S. Ct. 3201, 3216 (1983). Thus, where tribal water rights and compact approval are at issue, as here, *Winters* and other federal reserved rights cases apply. *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 89–93, 712 P.2d 754, 762–65 (1985); *Crow Compact I*, ¶ 17.

The Water Court presumes a compact is valid if it is (1) "fundamentally fair, adequate and reasonable" and (2) conforms to applicable laws. If the Court makes these determinations and no objections are received, the Court's review ends, and the Court approves the compact. *In re Crow Water Compact*, 2015 MT 353, ¶ 18, 382 Mont. 46, 364 P.3d 584 ("*Crow Compact II*"). However, if non-parties to a compact file objections, as here, the parties to this Compact ("Compact Parties") must also prove the Compact "was the product of good faith, arms-length

negotiations." *Crow Compact II*, 2015 MT 353, ¶ 18 (internal quotation omitted). If the Compact Parties meet this test, the burden of proof shifts to objectors to overcome the presumption of compact validity by proving that the compact is "unreasonable" and their "interests are materially injured by operation of the Compact." *Crow Compact II*, ¶ 20.

Here, where the Court has determined that the Compact is fundamentally fair, adequate, and reasonable and conforms to applicable law, the issue is whether Sego/Slack Objectors have demonstrated that their interests are materially injured by operation of the Compact. Order on Pending Motions Regarding Compact Approval, April 1, 2025 (Doc. 2,336) at 30–38; 56, 77.

III. FACTUAL BACKGROUND

A. History of the proceedings.

On March 15, 2022, Compact Parties filed a joint motion for incorporation of the Compact. (Doc. 8). On June 9, 2022, the Court issued the Preliminary Decree for the Compact (Doc. 19). Sego/Slack Objectors timely filed an objection. (Doc. 506).

On July 10, 2024, the Compact Parties filed a joint motion asking the Water Court to (1) approve the Compact, and (2) enter summary judgment dismissing all remaining objections to the Compact. (Doc. 1,823). Several objectors opposed the motion, and other objectors, including Sego/Slack Objectors, timely filed affirmative motions on issues of law relating to the Compact's approval. (Doc. 1,820). The Water Court held a hearing on these motions on November 14–15, 2024. (Doc. 2,087).

On April 1, 2025, the Water Court issued its Order on Pending Motions Regarding Compact Approval (Doc. 2,336). The Court determined that the Compact is fundamentally fair, adequate, and reasonable, and conforms to applicable law. *Id*. at 30-38; 56, 77. Thus, the burden shifted to objectors to show that their interests are materially injured by the Compact.

On April 22, 2025, Sego/Slack Objectors participated in Evidentiary Hearing 1, during which they presented testimony and submitted exhibits that were admitted into evidence related to their material injury suffered by operation of the Compact. (Doc. 2,507). The Court then set a post-hearing briefing schedule, which was subsequently vacated and rescheduled. (Doc. 2,595).

B. Sego's and Slack's testimony and evidence regarding material injury.

Sego/Slack Objectors own water rights within the State of Montana located in Basins 76L and 76LJ in Lake County, within the boundaries of the Flathead Indian Reservation ("Reservation"). Specifically, they own certain identified water rights claims, Secretarial water rights, *Walton* water rights, and rights to receive Flathead Irrigation Project ("FIP") water deliveries. Both Sego and Slack testified at Hearing 1 in the form of pre-filed testimony and direct testimony.

1. Sego

Sego owns three properties within the exterior boundaries of the Reservation—the Sego Ranch Property, the Sego Moise Property, and the Sego Lake Property. Sego Pre-filed Testimony ("Sego Testimony"), Doc. 2,386 at 1:12–26; 3:1–6. Sego receives water from the FIP, *id*. at 4:9, 7:13–22; and has state-based water rights and Secretarial and *Walton* rights. *Id*. at 3:23–7:12. *See also* Sego Testimony Exhibits 1–5, 7, 9.

At Hearing 1, Sego testified that he has been materially injured by operation of the Compact in the following ways: (1) the Compact-created Flathead Reservation Water Management Board ("Board") administers Sego's existing water rights and Sego has no right to state court review of his water rights, Sego Testimony at 10:23–28; 11:1–10; (2) Sego has had reduced irrigation deliveries to his property and has had to rely on water sources other than the FIP, *id*. at 8:11–21; 12:2; (3) because the FIP irrigation water is now, under the Compact, used for purposes other than irrigating, his water deliveries have been reduced causing material injury

to his agricultural operations, *id.* at 12–13:4, *see also* Sego Testimony Exhibit 6; and (4) the volume of water to be released by the Tribe, consistent with the level of instream flows claimed in the Compact, will cause road and structure washouts to Sego's property. Sego Testimony at 12:21–28. Importantly, a consensual agreement would not ameliorate these material injuries, even with the safe harbor provision. *Id.* at 13:10–15-22.

2. Slack

Slack owns property within the exterior boundaries of the Reservation, called the Doubleshoe Ranch. Slack Testimony ("Slack Testimony"), Doc. 2,385 at 1:11–19. Slack receives water from the FIP, *id*. at 5:12–24, and has state-based water rights and Secretarial and *Walton* rights, i*d*. at 2:14–5:11; *see also* Slack Testimony Exhibit 1.

At Hearing 1, Slack testified that she has been materially injured by operation of the Compact in the following ways: (1) the Compact-created Board administers Slack's existing water rights and Slack has no right to state court review of her water rights, Slack Testimony at 8:6; (2) Slack has had reduced irrigation deliveries to her property and has had to rely on water sources other than the FIP, *id*. at 6:19–7:2; 9:13; 10:10; (3) because the FIP irrigation water is now, under the Compact, used for purposes other than irrigating, her water deliveries have been reduced, materially damaging her agricultural operations, *id.* at 1:21–24; 9:19–22; and (4) the volume of water to be released by the Tribe, consistent with the level of instream flows claimed in the Compact, will cause erosion and undercutting of roads on Slack's property. Slack Testimony at 10:3–8. Importantly, a consensual agreement would not ameliorate these material injuries, even with the safe harbor provision. *Id.* at 10:18–13:6.

C. The Compact Parties' witnesses.

The Compact Parties offered two witnesses at Hearing 1, Seth Makepeace and Casey Ryan. Makepeace, a hydrologist for the Confederated Salish and Kootenai Tribes ("CSKT"),

testified about the hydrological conditions in 2022, including above-average snowpack and below-average rainfall on the Reservation, which he argued contributed to the timing of water deliveries. Hearing 1 Transcript Volume 2 ("Tr. Vol. 2"), 59:5–17; 77:4–9. He also discussed the operation of the FIP, the CSKT's Water Management Program, compliance with interim instream flows (as defined in Article III of the Compact), channel flows, the role of channel maintenance flows, his time on the Compact Implementation Technical Team ("CITT"), and his role with the Board. *Id.* at 12:6–11; 36–39; 67:21–68:1.

Ryan, a hydrologist and division manager for the CSKT Natural Resources Department, provided additional testimony on the Compact's implementation (including the role of the CITT), the monitoring of hydrological conditions, interim instream flows, channel flows, channel maintenance, and the operation of the CSKT's Water Management Program. *Id*. at 81–90.

IV. LEGAL ANALYSIS

The implementation and enforcement of the Compact will substantially harm both Sego and Slack and result in material injury to their interests. The water rights confirmed in the Compact and Decree will reduce the nature and scope of the Sego/Slack Objectors' water rights, and have already reduced irrigation deliveries on their respective properties. Additionally, to fulfill the instream flows provided by the Compact, the CSKT plans to release water which will cause road and structure washouts to both Sego and Slack's properties.

A. The Compact's operation materially injures Sego and Slack's interests in the future adjudication and exercise of their *Walton* water rights.

The Compact as implemented does not quantify, allocate, or set aside any water for *Walton* rights from which Objectors may later in the basin adjudications obtain their pro rata share of the "federally reserved water right for the reservation." *See* Apr. 1, 2025 Order at 50

(quoting *In re Scott Ranch LLC*, ¶ 4 (describing *Walton* right legal foundation from *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981))).

In discovery, Objectors asked Compact Parties to "[a]dmit that the tribal water right under the Compact does not include an amount of water to fulfill the *Walton* water rights or claims to *Walton* water rights held by the non-Indian successors in interest to Indian allottees on the Flathead Reservation." Sego/Slack [Corrected] Exhibit 1 (filed Aug. 21, 2025) at 3. In response, the Compact Parties lodged various objections,[1] but ultimately "admit[ed] the Request to the extent it is consistent with the provisions of the Compact and related Appendices." *Id.* The Request is so consistent, and therefore the Request was admitted by Compact Parties.

Thus, Compact Parties admit that there is no water (i.e., no amount or quantification of water) within the Compact's Tribal Water Right from which to provide Sego/Slack Objectors a pro rata share of the federal reserved right attributable to the Indian allottee predecessor owners of the lands currently owned by Sego or Slack. Yet, by definition and the law confirming *Walton* water rights, that is what is required and what Sego/Slack Objectors would ultimately (if their *Walton* rights are confirmed in the basin adjudications) be entitled to—a pro rata share of the overall federal reserved water right for the Reservation, which share was attributable to the former Indian allottee owners of the lands now owned by Sego or Slack.

Moreover, CSKT counsel stated at the November 14, 2024 hearing that there may be no water left available for appropriation by non-Indian landowners within the exterior boundaries of

[1] Those objections are not pertinent here. In any event, they may be overruled by the Court on the same basis and rationale expressed by the Court in overruling the Compact Parties' other objections to the testimony of Sego and Slack concerning those Objectors' factual assertions about their claims of material injury. *See, e.g.*, Evidentiary Hearing No. 1 Transcript Volume 3 ("Tr. Vol. 3"), 11:4–12:23; *see also* Apr. 1, 2025 Order at 74–75.

the reservation once the Tribal Water Right established under the Compact is fulfilled.[2] Thus, the holders of *Walton* water rights, including Sego/Slack Objectors, are further materially injured by the unavailability of water—as a function of the Compact's structure and implementation—to fulfill their claimed *Walton* water rights, which *Walton* rights should have a co-equal status, in terms of priority date, with the consumptive use portion of the federal reserved right for the Reservation. That is a material injury to Objectors arising from the operation of the Compact.

This issue is neither a purely legal one nor is it fully addressed nor precluded by the Court's April 1, 2025 Order. *See* Apr. 1, 2025 Order at 50, 74–75 ("[A] showing of illegality is not the only way to establish material injury"); Tr. Vol. 3 12:1–10, 20, 23. The premise of the *Walton* rights discussion in the April 1 Order is that the Compact does not "categorically" extinguish Objectors' "ability to claim Walton water rights." Apr. 1 Order at 50. As that Order reasons, a non-Indian holder of a *Walton* claim may go into the subsequent Basin 76L or 76LJ Adjudications to claim that right. If the holder is able to establish his claim to the *Walton* right, it—as an abstract matter—could be decreed in that adjudication. Therefore, as a purely legal matter, without consideration of the specific implementation facts here, the Court held that the Compact did not extinguish Objectors' *Walton* rights. *Id*.

At that legal issues stage, the same issue and evidence now raised by Sego/Slack Objectors were not before the Court. The current issue is this: in the subsequent basin

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[2] Legal Issues Hr'g (Nov. 14, 2024), Partial Tr. 141:23–142:4 (Mr. Rusche: "[*United States v.*] *McIntire*[, 101 F.2d 650 (9th Circ. 1939)] . . . clearly held that . . . all the waters on the [Flathead] reservation were reserved to the Tribes under *Winters*, and that being reserved, no titles of waters could be acquired by anyone except as specified by Congress.") (italics added); *id*. 148:15–20 (Mr. Rusche: "[T]hat's an assumption [that there will be enough water left over for objectors to exercise their junior rights and then further go on and seek permits to appropriate more water] that the Court can't make because there is no way to assume that there will be enough water that was reserved for the Tribes to make their permanent homeland and that the Ninth Circuit has specifically said were all reserved for the Tribes."); *see id*. 148:8–11.

adjudications, does the Compact's present operation preclude the availability of an amount of water to fulfill *Walton* right claims because the Compact does not include as part of the federal reserved right for the reservation the quantity of water appurtenant to the land of the Indian allottee predecessors of the current *Walton* right claims holders? The answer is "yes." Thus there is an unequivocal, present material injury to the Sego/Slack Objectors and others similarly situated. The Compact, by the Compact Parties' own admission, does not include as part of the base amount of water (i.e. the federal reserved water right for the reservation portion of the Tribal Water Right) any water from which the pro rata share attributable to the non-Indian successor to an Indian allottee may be later allocated or decreed in a basin adjudication. *See also* Compact art. II,¶ 67 (definition of "tribal water right").

Put another away, the die is cast in the Compact such that while one can *make a claim* to an individual *Walton* water right in the subsequent basin adjudications, there is either nothing (no water) to obtain under such *Walton* rights or the measure (amount) of the *Walton* right has been materially reduced by the operation of the Compact. These *Walton* rights have the same priority date as the consumptive-use portions of the Tribal Water Right, which Compact Parties also admit. *See* Sego/Slack [Corrected] Exhibit 1 at 2 (admitting that a *Walton* water right has the same priority date "as the tribal reserved right for which the *Walton* right is a pro rata share attributable to the original Indian allottee").

Accordingly, the operation of the Compact will deprive Sego/Slack of their *Walton* water rights—or at the very least deprive them of the full measure of those rights—by not allocating for *Walton* right holders, purposes, and uses any of the water that is by definition the source of the *Walton* right—*i.e.* the pro rata share of the overall tribal reserved right for reservation purposes/uses, with a priority date as of the date of the Reservation.

The amount of water for those "pro rata shares" must first be included now, in the Compact and Decree, as part of the overall determination and allocation of the tribal reserved water right. If it is not (as the Compact Parties now admit), then it is logically and definitionally impossible for Sego/Slack Objectors to later obtain in the basin adjudications a "pro rata" share of the original federal reserved right when that share was not included as part of the denominator (i.e., the overall extent of the federal reserved right including those reserved water rights attributable to the land formerly owned by Indian allottees) from which the pro rata share is determined. When Sego/Slack Objectors go to claim those *Walton* rights in the subsequent basin adjudications, the court there cannot decree to them a pro rata share of the Tribes' reserved water right quantified in the Compact, because by definition that tribal reserved water right from the Compact did not include the amounts (or acreage) for the *Walton* rights. And if the adjudication court does decree to Sego/Slack Objectors a portion of Tribes' federal reserved water right established under the Compact, that pro rata share is improperly reduced because the overall amount of the federal reserved right did not include an amount attributable to the allotted lands owned by the Indian allottee predecessors of Sego or Slack.

Scott Ranch, LLC, 2017 MT 230, 388 Mont. 509, 402 P.3d 1207, does not compel a different outcome. There, the Montana Supreme Court noted that Scott Ranch's *Walton* water rights were "private water rights" that "arose out of the transfer of land from a tribal allottee," and not out of the Crow Compact at issue. *Id*. ¶¶ 4, 17. The *Scott Ranch* Court was not faced with the issue raised here—whether the Compact there adequately included water to fulfill *Walton* right claims as part of the federal reserved right quantified and decreed under that Compact. Thus, a prior compact's—and this Compact's—classification of *Walton* water rights as rights "recognized under state law," *id*. ¶ 17, is not dispositive of the issue raised here, nor

dispositive of the Sego/Slack Objectors factual demonstration of material injury from the Compact outlined above. *In re Neal*, 2015 Mont. Water LEXIS 15, is distinguishable on the same basis.

B. Sego and Slack have suffered material injury by operation of the Board as authorized by the Compact.

1. Sego's material injuries

The Compact created the Flathead Reservation Water Management Board ("Board"). Compact, art. IV, § I(1). As recounted in Sego and Slack's testimonies, the Compact became effective on September 17, 2021, and the Board held its first public meeting in January 2022 and is currently operational. Sego Testimony at 10:27–11:1; Slack Testimony at 8:10–10:12; *see also* Tr. Vol. 2, 36:19–37:4; 37:15–17 (testimony of Seth Makepeace).

The Board has "the jurisdiction to enforce the terms of this Compact as provided by Article IV.I.1." Compact, art. IV, § I(4)(c). Additionally, it has "*exclusive* jurisdiction to resolve . . . any controversy over the right to use of water as between the Parties or between or among holders of Appropriation Rights and Existing Uses on the Reservation except as explicitly provided otherwise in Article IV.G.5." *Id.* art. IV, § I(1) (emphasis added). Thus, both the administration of the Sego water rights and any new water rights developed in the future will be determined in the first instance by the Board, and not the Montana Department of Natural Resources, the Montana Water Court or District Court, or any other apparatus of state government. Sego Testimony at 11:1–11:6. Critically, the Compact also substantially limits the right of judicial review of a Board decision: a party "may appeal any final decision by the Board to a Court of Competition Jurisdiction within thirty days of such decision," but a "Court of Competent Jurisdiction" only includes a state court if "the parties to the dispute . . . consent to its exercise of jurisdiction." Compact, art. IV, §I(6); *id.* art. II, § 26. Thus, for any dispute within

the exterior boundaries of the Reservation, Sego will be deprived of his constitutional right to seek judicial review in state court. Sego Testimony at 11:11–11:16. This system is unlike other compacts with other tribes within the State. *Id.* Notably, the Compact Parties did not dispute this portion of Sego's testimony in any way at the hearing. *See generally* Hearing 1 Transcript at Volume 3.

This is not a mere technical or legalistic injury, either. Both the Board and the CITT have already begun to exercise their authority under the Compact to make determinations regarding operation of the FIP. Sego Testimony at 12:2–5; Tr. Vol. 2, 11:19–12:11; 36:19–37:4; 37:15–17 (testimony of Seth Makepeace); *id*. at 85:23–87:3 (testimony of Casey Ryan). These determinations have resulted in reduced irrigation deliveries to the Sego property—that is, a reduction in the amount of water that Sego would have received absent the Compact. Sego Testimony at 12:2–6, 13:2–4. Relatedly, under the Compact, the FIP claims that it has the right to use Sego's FIP irrigation water rights for purposes *other than* irrigating the Sego Ranch and Sego Moise properties. *Id.* at 12:8–12:13; Compact, art. III.C. Beginning in the 2022 irrigation season, FIP water deliveries to the two Sego properties have begun later in the spring and ended earlier in the late summer or early fall than they would have been otherwise, along with varying levels of water deliveries. Sego Testimony at 12:11:–12:16. This inconsistent delivery and conversion of Sego's FIP water rights to other uses has caused and will continue to cause material injury. *Id.* at 12:16–12:19. Additionally, Sego offered his Exhibit 6 into evidence at Hearing 1, which are copies of receipts for supplemental hay purchases he was required to make in 2022 as a result of the reduced water deliveries—totaling more than $60,000. Sego Testimony Exhibit 6 at 1.

2. Slack's material injuries

Slack has suffered similar injury resulting from the Board's establishment and operations. As with Sego, both the administration of the Slack water rights as well as any future water rights that are developed will first be determined by the Board, and not by any Montana state entity. Slack Testimony at 8:6–8:20. Slack would be subject to the same severe limitations on her appellate rights as to any Board decision. *Id.* at 8:17–9:11.

As with Sego, both the Board and the CITT have already begun to exercise authority that has resulted in reduced irrigation deliveries to Slack's property. *Id.* at 9:13–9:16; Tr. Vol. 2, 11:19–12:11; 36:19–37:4; 37:15–17 (testimony of Seth Makepeace); *id*. at 85:23–87:3 (testimony of Casey Ryan). The Compact asserts the right or authority to use Slack's FIP irrigation water rights for purposes other than irrigating her property. Slack Testimony at 9:19–20; Compact, art. III.C. As a result, starting in 2022, Slack's FIP water deliveries begin later in the spring and earlier in later summer or earlier than they would have otherwise, substantially damaging her agricultural operations. Slack Testimony at 1:21–24; 9:21–10:2. For example, Slack has had to reduce her cattle operation from 400 head to 180 due to unreliable irrigation attributable to the Compact. *Id.* at 1:21–24.

C. Sego and Slack's injuries from washouts, erosion, and other physical damage.

Sego's properties will suffer physical damage as well. The amount of water that the Compact Parties intend to release, which is consistent with the level of instream flows claimed under the Compact, will cause road and structure washouts and other damage. Sego Testimony at 12:21–12:25. This is not a prospective, future injury: Sego's properties were damaged during the year when the FIP deliveries ended early and the water was used instead for fish or channel flows rather than irrigation. *Id.* at 12:23–12:28.

The same is true for Ms. Slack's ranch. Specifically, the instream or channel maintenance flows in Post Creak and other nearby streams could result in the erosion and undercutting of roads, diversion structures, and crossing from high low levels contemplated by the Compact. Slack Testimony at 10:3–10:7.

D. The Compact Parties' witnesses were unable to rebut the evidence of material injury presented by Sego and Slack at Evidentiary Hearing 1.

The Compact Parties called two witnesses, Seth Makepeace and Casey Ryan, both hydrologists who work for the CSKT. Tr. Vol. 2, 7:13–17; 78:16–17. These witnesses' testimony are insufficient to rebut the evidence discussed above.

1. The testimony of Seth Makepeace

At the outset, the Court should not credit any of Makepeace's testimony for two reasons. *First*, he was not timely disclosed. He was not identified until the April 15 pretrial order, and the Compact Parties submitted updated disclosures on April 18, the Friday before the hearing. *Id.* at 6:7–20; 16:22–17:1. This late disclosures prejudiced Sego and Slack by making it impossible for them to meaningfully prepare for Makepeace's testimony. *Id.* at 6:15–20. While the Court noted—but did not expressly overrule—the timely objection made by the Sego/Slack Objectors, *id.* at 6:21–22; 17:13–14, it should take this fact into account and decline to credit the evidence.

Second, the Court held during the hearing that Makepeace had not been qualified as an expert witness, and his testimony was therefore limited to lay witness testimony. *E.g.*, *id.* at 16:22–18:23. As a result, Makepeace is limited to only what he personally knows, Mont. R. Evid. 602, and lay opinions that are "rationally based" on his perception or "helpful to a clear understanding of [his] testimony or the determination of a fact in issue," Mont. R. Evid. 701.

The testimony discussed below does not fall under either category. Indeed, it is clear that Makepeace did not testify as a lay witness: he testified that he "collected the information that I

just referenced in terms of stream, snowpack and precipitation data. I applied a very simple procedure to quantify that information . . . ." Tr. Vol. 2, 55:14–17. He then prepared a number of maps using this data, *id.* at 55:21–56:10, including a map that "identif[ied] the location of the hydrologic information resources that I just described" and had a series of "stream flow measurement gauges," *id.* at 56:14–16, 22–23.

Then, *for the first time*, Makepeace described the methodology he used to formulate his conclusions: "What I did was simply take a collection of numbers and organized them into single plots so that I could look at a body of information—quantitative measurement information, empirical information, and observe the information in a—in a distilled fashion." *Id.* at 58:21–59:2. From this, he opined "that 2022 had an above average natural inflow[]" "an above average snowpack accumulation," and a "below average rainfall[.]" *Id.* at 59:6–8; *see also id.* at 60:15–23 (analyzing Slack's property); *see also id.* at 64:1–6 ("I took the daily flow data, which is a large time series of information and organized it into a single figure to allow me to understand the acre-foot volume of water that had passed during these irrigation return flows between August 1, 2021 and September 30, 2021.").

This is not the testimony of a lay witness; it is a detailed methodology that a hydrologist—employed by one of the parties in this case, and whose methodology and opinions were not disclosed to the other side—used to formulate expert opinions on a variety of water-related subjects. Makepeace himself acknowledged that he inferred certain conclusions about water flow and water levels from the available data: he admitted that there is no gauge that directly measures anything at Ashley Creek or Poison Oak Creek. *Id.* at 66:8–10; 68:24–69:1.

Additionally, even taking Makepeace's testimony on its own terms, it does not negate the existence of material injury. To begin with, Makepeace's testimony regarding the CITT and

instream flows is equivocal: he merely testified that he is not "aware of" any "requirements" that the CITT imposed upon the FIP. *Id.* at 36:10–14. His testimony regarding whether and why Sego and Slack received reduced FIP water deliveries in 2022 was likewise ambivalent. He testified, "I can only respond to that in a generalities because I do not have any ground-based or fact-based information." *Id.* at 65:13–15; *see also id.* at 67:11–15 ("So again, speaking in generalities, because I am not aware of the condition of that facility in 2022, the diversion or intake might have been sedimented in or in a state or disrepair, again, speaking in generalities."). His bottom-line conclusion was likewise vague and indefinite: "*So in generalities, I feel that* the water would have been available at that diversion . . . ." *Id.* at 67:23–24 (emphasis added). And on cross examination, Makepeace acknowledged that other factors and causes could have come into play. *See, e.g.*, *id.* at 74:12–19 ("Q. . . . So if there were situations that obstructed flow in the channel . . . could that lead to overtopping? A. . . . If it was steep, no. If it was wide and flat, perhaps."); *id.* at 74:20–22 ("Q. Then it could send water into the flood plain? A. Yes."); *id.* at 76:4–6 ("Q. But there may be other factors; is that correct also? A. There are many."). He also admitted that he did not take any actual field notes in 2022 related to either Sego or Slack's properties. *Id.* at75:16–19.

In short, Makepeace—who again, is employed by a party in this lawsuit—offered last-minute and untimely expert testimony that he walked back on cross examination. His testimony is therefore insufficient to rebut Sego's and Slack's evidence of material injury, which is based on their own first-hand account of what occurred on their property.

2. The testimony of Casey Ryan

The Court should likewise decline to credit Casey Ryan's testimony. As with Makepeace, Ryan's testimony was not timely disclosed, and this late disclosure substantially prejudiced Sego and Slack. *Id.* at 6:7–20; 16:22–17:1.

Additionally, even taken on its own terms, Ryan's testimony is not persuasive. Ryan's limited testimony offered very little to contradict Sego's and Slack's evidence, and in fact corroborated the fact that maintenance flows were conducted in 2022. *Id.* at 87:19–88:14. Ryan's bare declaration that one of Sego's and Slack's allegations are incorrect, *e.g.*, *id.* at 87:4–6, cannot be taken at face value.

E. These harms constitute material injury under Montana law.

Montana law has not clearly defined what constitutes material injury for a compact confirmation proceeding. However, the Court's April 1, 2025 Order provides some guidance on the issue. To begin with, the Court held that material injury is not limited to demonstrating that the Compact is illegal or otherwise inconsistent with federal or state law. Doc. 2,336 (Apr. 1 Order) at 74 (rejecting the argument that "an Objector must prove the Compact is illegal as a condition precedent to proving material injury"); *see also id.* at 75 ("[A] showing of illegality is not the only way to establish material injury."). Rather, an objector must show that his or her "interests are 'materially injured' by *operation* of the Compact." *Id.* at 74 (emphasis added). At the same time, the Order also held that no Montana court "has ever held that confirmation of tribal reserved water rights with senior priority dates alone is sufficient material injury to disapprove a compact." *Id.* at 75–76.

The injuries that Sego and Slack have identified above qualify as "material" for purposes of these proceedings. As explained above, both Sego and Slack have suffered a series of injuries to their interests that go beyond mere complaints about confirming senior water rights. These include (1) irrevocable harm to their *Walton* rights; (2) the loss of their rights to have water disputes adjudicated by state authorities; (3) the improper limitation of judicial review of any Board decision; (4) reduced FIP deliveries for irrigation to both Sego's and Slack's properties; and (5) instream or channel maintenance flows that result in physical damage like washouts and

erosion. Sego and Slack, in other words, have suffered distinct and palpable injuries to their interests from the Compact that interfere with their longstanding legal rights, which puts them in a different position than objectors who challenged previous compacts. *Cf. Crow Compact II*, ¶ 30 ("It is not unreasonable to quantify the Tribe's rights in these basins by the entirety of the water available *if state-based rights are not affected*.") (emphasis added); *id.* ("Although the Compact grants all the water in these basins to the Tribe, it is subject to a significant caveat designed *to protect existing state-based rights*. The Compact also grants a degree of protection to *state-based rights that are junior to the Tribal water rights*.") (emphasis added); *In re Blackfeet Tribe Compact*, 2020 Mont. Water LEXIS 770, at *27 (2020) ("Pondera fails to explain how approving a Compact quantifying *an unquestionably senior reserved water right* causes it material injury.") (emphasis added).

CONCLUSION

For the above reasons, Sego/Slack Objectors ask that the Court sustain their Amended Objection to the Compact.

Respectfully submitted this 22nd day of August, 2025.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was served to the following persons as noted below, on the date herein.

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