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Adam R.F. Gustafson
Acting Asst. Attorney General
David W. Harder
Senior Attorney for Legal Issues
United States Department of Justice
999 18th Street, North Terrace, Suite 600
Denver, CO 80202
303-844-1372
david.harder@usdoj.gov
efile-denver.enrd@usdoj.gov

Rebecca Ross, Senior Attorney
United States Department of Justice
Tribal Resources Section
Environment and Natural Resources Div.
150 M Street, NE
Washington, D.C. 20002
202-598-3501
rebecca.ross@usdoj.gov

Molly M. Kelly, Legal Counsel
Jennifer C. Wells, Legal Counsel
Montana Department of Natural Resources
and Conservation
1539 Eleventh Avenue
P.O. Box 201601
Helena, Montana 59601
406-444-5785
406-444-0503
molly.kelly2@mt.gov
J.Wells@mt.gov
jean.saye@mt.gov

Daniel J. Decker, Managing Attorney
Melissa Schlichting, Staff Attorney
Christina M. Courville, Staff Attorney
Zach Zipfel, Staff Attorney
Danna Jackson, Staff Attorney
Confederated Salish and Kootenai Tribes
Tribal Legal Department
P.O. Box 278
Pablo, MT 59855
406-675-2700
daniel.decker@cslkt.org
melissa.schlichting@cslkt.org
christina.courville@cslkt.org
zachary.zipfel@cslkt.org
danna.jackson@cslkt.org

Ryan C. Rusche
Sonosky, Chambers, Sachse, Endreson
& Perry, LLP
P.O. Box 2930
Columbia Falls, MT 59912
202-682-0240, Ext. 697
rusche@sonosky.com

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

* * * * *

CASE NO. WC-0001-C-2021
EVIDENTIARY HEARING No. 11

COMPACT PARTIES' POST-HEARING OPENING BRIEF
REGARDING MATERIAL INJURY HEARING No. 11 [Jore et al.]

Pursuant to the governing orders,¹ the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States (collectively, “Compact Parties”), submit this opening post-hearing brief in connection with the material injury hearing held on April 30, 2025 regarding Objectors Kathleen French, Rick and Nancy Jore, Gunner and Beth Junge, and Rick Schoening (“Objectors”) claims of material injury. As the Compact Parties explain below, Objectors have not carried their burden of proof to show material injury by operation of the Compact. Therefore, the Court should grant the Compact Parties’ *Motion for Approval of the Flathead Reservation-State of Montana-United States Compact and for Summary Judgment Dismissing All Remaining Objections*, Dkt. No. 1823.00 at 71-72 (“Motion”) and approve the CSKT Compact, §§ 85-20-1901, -1902, MCA.

For example, Objectors’ testimony on legal issues the Court already resolved against them fail to prove material injury. Likewise, Objectors’ testimony regarding Flathead Indian Irrigation Project (“FIIP”) deliveries, the risk of being subject to call by a senior water user, or speculative concerns about future Compact administration, all fail to establish material injury under controlling precedents.

I. MATERIAL INJURY LEGAL STANDARD

As this Court and the Montana Supreme Court have held, to demonstrate material injury from the Compact, an objector here must establish, through admissible evidence, a concrete injury to water rights or other real property interests caused by operation of the Compact. *See In re Crow Water Compact Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Crow Tribe of Indians and the State of Montana*, 2015 MT 353, ¶¶ 34-35, 382 Mont. 46, 364 P.3d 584 (rejecting argument that Objectors had “property interest in future appropriations or changes in use” harmed by a Compact’s basin closure provision); *United States Fish and Wildlife Service, Bowdoin National Wildlife Refuge - Montana Compact*, No. WC2013-04, 2015 WL 9699486, at *10 (Mont. Water Ct., Oct. 07, 2015) (determining material injury “requires injury to water rights or real property interests” rather than difference of opinion over correct government policy).

¹ *Case Management Order No. 9*, Dkt. No. 2602.00, (April 16, 2025), *Court Minutes and Order Setting Deadlines*, Dkt. No. 2608.00 (July 11, 2025); and *Order Modifying Briefing Schedule*, Dkt. No. 2628.00 (August 13, 2025).

Evidence of injury that relies on speculation about future Compact implementation cannot demonstrate material injury. *In re Adjudication of the Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the United States Department of Agriculture Forest Service within the State of Montana*, No. WC-2007-03, 2012 WL 9494882, at *10 (Mont. Water Ct., Oct. 31, 2012) (“*Forest Service Decision*”) (court cannot “rely on any fears, concerns, and conjectures expressed by the Objectors about the future application of the Compact provisions or other future Forest Service actions. The expressed uncertainty of feared future events is too speculative upon which the Court can base a decision.”). Additionally, injury stemming from the consequences of the prior appropriation system cannot establish material injury. *Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00 at 75-76 (April 1, 2025) (“*Compact Validity Order*”) (“[N]either the Water Court nor the Montana Supreme Court ever has held that confirmation of tribal reserved rights with senior priority dates alone is sufficient material injury to disapprove a compact.”).

II. OBJECTORS FAILED TO ESTABLISH MATERIAL INJURY

At their hearing, Objectors offered testimony and other evidence that failed to show a concrete, non-speculative injury to a water right or other property interest that stems from the operation of the Compact. Having failed to meet their evidentiary burden, the Court should dismiss their objections, grant the Motion, and approve the Compact.

A. Objectors Gunner and Beth Junge Failed to Establish Material Injury From the Compact

Objector Gunner Junge testified on behalf of himself and Beth Junge. Hearing Tr. 10:12-15, April 30, 2025 (“Tr.”). Junge largely raised issues already resolved by the Court. The Junges’ assertion of material injury was not based on their own water rights and real property interests and thus failed to establish material injury from the Compact.

The Junges, who live off-Reservation, Tr. 41:9-11, do not own a water right. *Hearing 11 Prehearing Order*, Dkt. No. 2551.00 at 2 (Agreed Fact No. 1) (April 28, 2025). They instead base their objection on the City of Thompson Falls’ municipal water rights.² Tr. 17:8-10; 39:9-15. The City of Thompson Falls did not file an objection in this case. Tr. 40:1-5. Even if the City’s municipal water rights were properly at issue, it would not provide a basis for proving

² The Junges’ offer no legal support for their misguided assertion that they have a separate individual right to the City of Thompson Falls’ municipal water rights. Tr. 19:1-2.

material injury because such rights are protected from call under the Compact. Section 85-20-1901, MCA, Art. III.G.1.

The Junges do not own any water rights, do not live on the Reservation, and their water supply is protected from call by the Tribal Water Right under the Compact. They have not established material injury caused by operation of the Compact.

B. Objectors Rick and Nancy Jore Failed to Establish Material Injury From the Compact

Objectors Rick and Nancy Jore offered written testimony in support of their objection to the Compact, *see* Dkt. No. 2443.50, and Mr. Jore was cross-examined at the April 30 hearing. Tr. 48-66. Objectors' five-page written testimony identified the Jores' water rights, set forth legal argument about the Compact, and concluded with their concern that a senior water user could place a call on their water rights. Dkt. No. 2443.50 at 2-5; Tr. 48-66. None of their testimony establishes material injury stemming from operation of the Compact.

First, the Jores' generalized objection to being subject to the authority of the Flathead Reservation Water Management Board ("Board") for water rights administration, *see* Tr. 50-52: 10; 54:14-55:13; Dkt. No. 2443.50 at 2-5, cannot constitute material injury. This is because such objection is tantamount to opposing the Tribes' or the State's exercise of their respective jurisdiction on the Flathead Indian Reservation, which is an issue of law that is controlled by legal precedent, not the Compact. Moreover, the Court already rejected all arguments questioning the legality and authority of the Board. *Compact Validity Order* at 63-73. The Court similarly rejected all arguments that the Reservation was diminished. *Id.* at 2. Thus, the Jores' contrary views about land tenure within the Reservation, *see* Tr. 52:11-54:13; Dkt. No. 2443.50 at 3-4, are irrelevant and also cannot establish material injury.

Next, the Jores' concern about being subject to call by a neighbor was not substantiated in the hearing with reliable evidence, and even if it was, it would not establish material injury. *Compact Validity Order* at 75-76. Mr. Jore admitted that his two claims, *see* Ex. 11-JoreB1 (Abstract for Claim 76L 40286-00); Ex. 11-JoreB2 (Abstract for Claim 76L 128897-00) are protected from call under the Compact. Tr. 59:7-11. It thus follows that if the Compact protects his water rights from call, the Compact cannot be the cause of any material injury to those water rights.

Nevertheless, the Jores testified that because neighboring property owners could place a call on their use, their rights could be impacted. To be sure, a senior water user in a prior

appropriation system can call on junior water users, but such reality does not constitute material injury. *Compact Validity Order* at 75-76. Thus, even if the Jores could establish that there is a senior user who could call on their domestic and fish raceways claims, that does not meet their evidentiary burden to prove material injury from operation of the Compact.

C. Objector Rick Schoening Failed to Establish Material Injury From the Compact

Objector Rick Schoening testified that the only material injury personal to him related to not receiving FIIP water in August 2023. Tr. 67:18-68:10.³ Apart from this personal experience, Mr. Schoening's testimony focused on his "public interest" concerns related to how the Compact affects other water users; the fairness of the Compact; impacts to other unnamed parties' stock water uses; opposition to Board administration; and the Compact's instream flow protections. Tr. 66:21-71:6. Generalized statements purporting to characterize harm to the public at large are not evidence of concrete, non-speculative material injury to Mr. Schoening and thus fail to meet the evidentiary burden required by controlling precedents.

Mr. Schoening testified that he receives FIIP water for irrigation by diverting such water from a neighbor's property. Tr. 72:22-23. According to Mr. Schoening, in August 2023, FIIP turned off the feeder A-Canal that delivers water to his neighbor, preventing him from diverting water to his apple orchard that season. Tr. 72:9-19. Mr. Schoening testified that it is his "belief" that FIIP turned off the water delivery in the canal because the "fisheries took a precedent over the water delivery to the agriculture areas," Tr. 73:10-12, concluding that it is the Compact's provisions concerning instream flow protections that caused FIIP to turn off the water. Tr. 74:4-21. However, Mr. Schoening neither contacted FIIP to inquire why the canal had been shut off, nor did he appeal FIIP's decision to stop delivering water. Tr. 72:20-73:6.

The Court should reject Mr. Schoening's claims of material injury for several reasons. First, his belief that FIIP ended water deliveries in the A-Canal due to the Compact is speculative and thus is not reliable evidence that meets his burden in this case. Second, there are several factors FIIP considers in determining the length of an irrigation season, including instream flow requirements that were imposed well before the Compact. Tr. 75:7-80:21 (confirming that the United States Bureau of Indian Affairs operates FIIP and operates according to guidelines issued in 2008 explaining that FIIP makes water available to users each season based on water supply

³ Mr. Schoening agreed that his domestic water right is protected from call. Tr. 71:20-72:8.

and other factors, including instream flow requirements). Third, the only instream flows in effect in 2023 were the interim instream flows and reservoir pools that have been in place since the 1980s. Section 85-20-1901, MCA, Arts. III.C.1.d.iv & e.iv; IV.C.3.c & d; App. 13; *see Joint Bd. of Control of Flathead, Mission & Jocko Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987) (“*Joint Board*”), There were no Compact flows being implemented then in the Polson area where Mr. Schoening has his personal apple orchard. Tr. 67:22; 68:18-23; Preliminary Decree App. 1 at 55-56 (effective date September 17, 20221); § 85-20-1901, MCA, App. 3.4(2) (Mission Valley North only starting operational improvements two years after the effective date that would lead to Compact’s minimum enforceable flow).

Ultimately, even if FIIP stopped delivering water to the A-Canal in August 2023 due to the instream flow provisions of the Compact, such determination cannot be the source of any material injury. In litigation, the Tribes’ on-Reservation instream flow rights have a time immemorial priority and are thus senior to the FIIP right, which has an 1855 priority date. *Joint Board*, 832 F.2d at 1131-32. Thus, any Compact provision requiring that the Tribes’ instream flow rights be satisfied prior to meeting FIIP demands is entirely consistent with the prior appropriation system in Montana. Nevertheless, Mr. Schoening’s testimony ignores the provisions of the Compact that seek to ensure that instream flow requirements can be met while delivering water to FIIP irrigators consistent with past years. *See, e.g.*, §§ 85-20-1901, MCA, Art. II. 36 & 58; Art. IV.C.1 (target instream flows are junior to the river diversion allowance used to meet FIIP Historic Farm Deliveries); Art. IV.D.1; Art. IV.E (shared shortages provisions making instream and reservoir water available for FIIP use); Apps. 3.2 & 3.3. Mr. Schoening has failed to prove any material injury from operation of the Compact.

D. Objectors Kathleen and Mark French Failed to Establish Material Injury From the Compact

Objector Kathleen French testified concerning a litany of supposed harms to her and her husband, Mark French, stemming from the Compact. Most of her assertions, however, were speculative, unsupported, or based on fundamental misunderstandings about Montana water rights administration and the Compact.

French and her husband own six properties near Paradise, Montana. Tr. 85:12-86:1. One of them is the first property downstream of the Flathead Reservation. Tr. 86:13-15. As a result, they feel like they will be the first irrigators to “be hit with whatever might be coming downstream.” Tr. 86:19-22. French further testified that she was concerned a call on her water

rights might affect her pasture and livestock. Tr. 87:5-9. She also testified that she was concerned about flooding from instream flows, Tr. 88:20-90:11, damage to her driveway from the flooding, Tr. 91:14-92:17, and being forced to call her neighbors' water rights, Tr. 103:15-21. French also claimed she was concerned about sufficient water for her home which is on the Paradise community water system. Tr. 94:12-95:6, 96:2-97:9. According to French, while the Compact protects "municipal" water rights from call, Paradise, Montana, is not a municipality and, therefore, its water rights are not protected. *Id.*; Tr. 114:7-115:5.

None of French's claims demonstrate material injury. Indeed, she acknowledged that she and her husband had not suffered concrete harm from the Compact and her concerns were based on what they "anticipate and expect." Tr. 87:10-13; *see also* Tr. 107:21-23 ("[A]ccumulative nature of all of the decisions at multiple water rights *could have* significant impact on me." (emphasis added)). French pointed to no specific provision of the Compact to support her allegations. An objector's speculation about potential future harm is insufficient to demonstrate material injury. *Forest Service Decision*, No. WC-2007-03, 2012 WL 9494882, at *10.

Likewise, French's concern about the possibility of being forced to call her neighbors' water rights or being subject to call from another water user (after that user was called by the Tribes) does not establish material injury. Being subject to call is not a material injury, it is simply a consequence of being a junior user in a priority system. *Compact Validity Order* at 75-76. A fundamental characteristic of Montana's prior appropriation doctrine is that junior users are subject to call by senior users. *State ex rel. Greely v. Conf. Salish & Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 89, 712 P.2d 754, 762 (1985). The Compact did not establish the prior appropriation system.

French's apparent confusion about the Compact's protection for "municipal" uses also fails to demonstrate material injury. While Paradise, Montana, may not be a "municipality," however French defines it, Tr. 95:3-6, the purpose listed on the water right abstract is "municipal." Tr. 114:7-115:5. It is the purpose listed on an abstract that determines whether the right is subject to call under the Compact, not the alleged legal status of the entity holding the water right. Sections 85-20-1901, Art. III.G.1; 85-2-224(1)(e); 85-2-102(5)(a), MCA.

Finally, and most fatal to the Frenches' claim of material injury, is the fact that all of their water rights are protected from call under the Compact, whether French believes it or not. *See* Tr. 113:14-16. The French properties are all downstream of the Reservation. Tr. 86:13-14;

94:13-17; 85:17-21. The only Tribal Water Right off-Reservation relevant to the Frenches is the Tribes' instream rights on the mainstem of the Clark Fork River in Basins 76M and 76N. Section 85-20-1901, MCA, Art.III.D.3. Those rights can only be exercised against irrigation users on the mainstem of the Clark Fork River. *Id.* at Art.III.D.3.e.

The Frenches' only irrigation rights are from the Flathead River and tributaries to the Flathead River, upstream from its confluence with the Clark Fork River. Tr. 88:3-9; 113:14-15; 117:10-11. French did not identify any water rights they have from the mainstem of the Clark Fork River and thus does not have any water rights subject to call under the Compact.⁴

This protection for their water rights, combined with French's admitted speculation as to harm, and her lack of understanding concerning Montana water rights administration, means the Frenches failed to meet their burden to prove material harm due to operation of the Compact.

E. Objectors' Witness, Tiffani Murphy, Failed to Establish Any Material Injury From the Compact

Objectors called Tiffani Murphy, Lake County Planning Director, who testified that she had seen delays in subdivision approval and the withdrawal of some subdivision applications, ostensibly due to the Board. Tr. 124:19 to 127:5. But Murphy's testimony failed to raise anything relevant to the Objectors' claims of material injury.

On cross-examination, Murphy acknowledged she had no personal knowledge about any of the Objectors' water rights. Tr. 128:19 to 129:12. Nor, to her knowledge, did any of the Objectors have subdivision applications pending before the Lake County planning department. Tr. 129:13-17. Likewise, based on her knowledge as planning director, none of the Objectors had withdrawn any subdivision applications. Tr. 129:18-20. Murphy's testimony was utterly irrelevant to the Objectors' material injury allegations and should be disregarded.

III. CONCLUSION

For the foregoing reasons, the Compact Parties request that the Court dismiss all objections and approve the CSKT Compact.

Respectfully submitted this 22nd day of August, 2025.

⁴ Four of the Frenches' water rights are groundwater wells with a domestic/lawn and garden purpose (76M 30012152, 76L 11258 00, 76L 30148988, 76M 30152109). The others are for irrigation from unnamed tributaries of the Flathead River and the Flathead River, rather than the mainstem of the Clark Fork (76L 35612 00, 76L 35610 00, 76L 103307).

/s/ David W. Harder
Attorney for the United States of America

/s/ Melissa Schlichting
Attorney for the Confederated Salish & Kootenai Tribes

/s/ Molly Kelly
Attorney for the State of Montana

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Post-Hearing Opening Brief* for Hearing No. 11 was served by email to the Objectors and email to counsel for the Compact Parties as set forth below this 22nd day of August, 2025.

/s/ Jean Saye
Jean Saye
Paralegal
Montana DNRC

Adam R.F. Gustafson
Acting Asst. Attorney General
David W. Harder
Senior Attorney for Legal Issues
United States Department of Justice
999 18th Street, North Terrace, Suite 600
Denver, CO 80202
david.harder@usdoj.gov
efile-denver.enrd@usdoj.gov

Rebecca Ross, Senior Attorney
United States Department of Justice
Tribal Resources Section
Environment and Natural Resources Div.
150 M Street, NE
Washington, D.C. 20002
rebecca.ross@usdoj.gov

Molly M. Kelly, Legal Counsel
Jennifer C. Wells, Legal Counsel
Montana Department of Natural
Resources and Conservation
1539 Eleventh Avenue
P.O. Box 201601
Helena, Montana 59601
molly.kelly2@mt.gov
J.Wells@mt.gov
jean.saye@mt.gov

Daniel J. Decker, Managing Attorney
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Christina M. Courville, Staff Attorney
Zach Zipfel, Staff Attorney
Danna Jackson, Staff Attorney
Confederated Salish and Kootenai Tribes
Tribal Legal Department
P.O. Box 278
Pablo, MT 59855
daniel.decker@cslkt.org
melissa.schlichting@cslkt.org
christina.courville@cslkt.org
zachary.zipfel@cslkt.org
danna.jackson@cslkt.org

Ryan C. Rusche
Sonosky, Chambers, Sachse, Endreson
& Perry, LLP
P.O. Box 2930
Columbia Falls, MT 59912
rusche@sonosky.com

Mark and Kathleen French
8682 Hwy200
Plains, MT 59859
esa_french@yahoo.com

Charles F. and Teresa A. Havens
30734 Mission Creek Rd.
St. Ignatius, MT 59865
chartrese@gmail.com

Rick D. and Nancy L. Jore
30488 Mount Harding Lane
Ronan, MT 59864
rickjore@gmail.com

Gunner and Beth Junge
PO Box 591
Thompson Falls, MT 59873
Gunner_J@hotmail.com

Denise A. LaMarche
33334 Emory Rd.
Ronan, MT 59864
prlamarche@hotmail.com

Kenneth C. Matthiesen
PO Box 325
Plains, MT 59859
xfirstsergeant@yahoo.com

Frank K. and Mary E. Mutch
33678 N. Finley Pt. Rd.
Polson, MT 59860
mutchs@gmail.com

Keith S. and Jolene A. Regier
1078 Stillwater Road
Kalispell, MT 59901
keithregier@gmail.com

Trudy A. Samuelson
31118 Mission Creek Road
St. Ignatius, MT 59865
trudy@blackfoot.net

Rick and Carolyn Schoening
41694 Stasso Rd.
Polson, MT 59860
rickschoening112@gmail.com

Bradley E. Tschida
10825 Mulan Rd
Missoula, MT 59808
brad@tschida.org

Brent A. and Stephanie M. Webb
39 Silcox Park Ln
Thompson Falls, MT 59873
litso2084@yahoo.com
77stephm@gmail.com

Deborah C. Wickum
1451 Whitlash Rd
Chester, MT 59522
dobarah@gmail.com