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Montana Water Court

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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. 5

COMPACT PARTIES' POST-HEARING OPENING BRIEF
REGARDING MATERIAL INJURY HEARING No. 5 [Doty/Palmer]

Pursuant to the governing orders,¹ the Confederated Salish and Kootenai Tribes (“CSKT”), the State of Montana, and the United States (collectively, “Compact Parties”), submit this opening post-hearing brief in connection with the evidentiary hearing held on April 24, 2025 related to Objectors Randolph M. Doty’s (“Doty”) and Delbert Palmer’s (“Palmer”) (collectively, “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 offered testimony and documentation at the hearing concerning water deliveries by the Flathead Indian Irrigation Project (“FIIP”), but they failed to establish that the Compact affected those deliveries in any way. Objectors’ opinions about FIIP management are irrelevant and Objectors’ speculation that FIIP operations have been affected by the Compact were refuted by their own testimony as well as the Compact Parties’ witness and other evidence. Objectors have failed to meet their burden to show material injury.

I. MATERIAL INJURY LEGAL STANDARD

As this Court and the Montana Supreme Court have held, to demonstrate material injury from the Compact, Objectors were required to establish, through admissible evidence, a concrete injury to water rights or other real property interests caused by operation of the CSKT 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 (May 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) (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 the April 24 evidentiary hearing, neither Palmer nor Doty offered evidence proving any material injury from operation of the Compact. They also failed to offer any evidence in support of their allegations of mental, physical, or economic damages. *See Request to Be Heard*, Dkt. No. 2140.00 at 2, Feb. 21, 2025; Hearing Tr. 70:5-13, April 24, 2025 (“Tr.”). Because Objectors failed to meet their evidentiary burden, the Court should dismiss their objections and approve the Compact.

A. Objector Palmer Failed to Establish Material Injury from the Compact

Palmer started his testimony by conceding that it would be “impossible” for him to prove damages stemming from the Compact and that any claim that “the Compact caused [his] problem[s] . . . could be disputed pretty easy.” Tr. 7:3-25. These concessions alone provide the Court with a basis to dismiss Palmer’s objection to the Compact.

Nevertheless, Palmer’s failure to offer any evidence in support of his injury claim, combined with additional admissions that the Compact does not cause him injury, confirms he failed to meet his evidentiary burden. For example, Palmer stated his injury derived from a “lack of information” and from being “left out of the process” and “let down” by “politicians and attorneys.” Tr. 7:12-19. He asserted, without evidentiary support or elaboration, that “the Compact has put somebody else in charge” of his life, land, water, and share of the water. Tr.

7:23-25. At best, Palmer’s testimony reflects his dissatisfaction with the process leading to the Compact being agreed to and ratified, which are issues outside the scope of this proceeding and do not prove material injury from operation of the Compact.

Palmer’s claims concerning the timing of FIIP water deliveries also fail to show material injury from operation of the Compact. Palmer testified that he receives the correct volume of water from FIIP each year, but asserts he is injured because FIIP has varied the start and end dates for water deliveries in recent years. Tr. 23:21-24:3, 7-11. While Palmer believes the Compact affects the timing of FIIP water deliveries, he could not identify any provision of the Compact governing how or when FIIP delivers water. Tr. 24:25-25:3, 12-15.² Palmer further admitted that the timing of FIIP deliveries is affected by carryover storage and snowpack. Tr. 25:23-26:2. And, when conceding he could not prove damages from the Compact, Palmer testified that “[a]ll farmers and ranchers are in the same situation with climate change and farming practices,” Tr. 7:5-7, appearing to recognize that factors well outside the scope of the Compact can affect water supply.

Palmer further acknowledged that the United States Bureau of Indian Affairs (“BIA”) operates FIIP, and that six years ago, he sought relief from the BIA in connection with a reduction in his FIIP-served acreage. Tr. 74-77. The Compact was not in effect then, Tr. 98:10-13, refuting Palmer’s claim that the Compact caused or affected that reduction in service from FIIP in any way. Likewise, FIIP’s compliance with instream flow requirements necessary to protect fish species, *see* Tr. 73:3-22, is required by the United States Fish and Wildlife Service’s 2018 Biological Opinion, *see* Hearing 5_Compact Parties Ex08_001. That opinion is legally independent of the Compact because it was issued pursuant to the Endangered Species Act, and it is temporally unrelated as it was issued three years before the September 2021 effective date of the Compact. Thus, FIIP’s compliance with such requirements is not caused by the Compact.

B. Objector Doty Failed to Establish Material Injury from the Compact

Doty similarly failed to prove material injury from operation of the Compact. Doty claims he is injured by the length of the FIIP irrigation season and that the Compact and FIIP

² The transcript for Hearing 5 inaccurately represents the question posed to Mr. Palmer. *See* Tr. 25:12-15. The Court’s audio recording clarifies that Palmer was asked, “You haven’t identified any provision of the Compact that determines the length of the FIIP irrigation season, is that right?,” to which he responded, “No, I have not.” Water Court Audio Recording, at 45:12-24 (recorded Apr. 24, 2025).

mismanagement cause that injury. Tr. 58:19-59:2; 61:25-62:18; 64:13-14. Doty identified the period of use for the FIIP claim as April 15 to September 15, but otherwise could not identify any provision of the Compact that dictates when FIIP will deliver water to users within that irrigation season. Tr. 41:10-13; 58:19-59:11. Doty acknowledged that the BIA operates FIIP, Tr. 107:1 (“Bureau of Indian Affairs is FIIP”), that FIIP determines when it will deliver water to users, Tr. 61:25-62:5, and that the amount of water supply—including snowpack levels and the availability of carryover storage—can affect when and for how long FIIP is able to deliver water each irrigation season, Tr. 62:6-64:14. *See also* Hearing 5_Compact Parties Ex07_074 (FIIP Operation and Maintenance Guidelines explaining factors FIIP considers when determining annual water deliveries to users); § 3-1-101(1), Unitary Administration and Management Ordinance (“UAMO”), § 85-20-1902, MCA (FIIP issues outside scope of the UAMO). Doty did not appeal any denial of water to FIIP, stating that he was unaware of the appeal process. Tr. 80:7-18. At bottom, how FIIP operates, including its decisions regarding water deliveries to users, is not dictated by the Compact but rather is outside the scope of this proceeding and thus cannot prove material injury from operation of the Compact. *See Compact Validity Order* at 49 (“to the extent any Objector has a dispute with the way FIIP is administering water to persons within its service area, those disputes may be addressed through the FIIP dispute resolution process, which the Compact does not modify.”).

In addition to failing to show any causal link between the Compact and how FIIP delivers water to users, Doty’s testimony undercut his claims of injury altogether. Doty testified that the only times FIIP denied him water were for dates that preceded the start of the April 15 irrigation season, outside the period he asserts he has a “right” to FIIP water. Tr. 79:9-80:23. *See also* Ex. 5-Doty5 (identifying the FIIP irrigation season as April 15 to September 15). Doty testified that FIIP would deliver water to him when requested during the irrigation season, and that he does not expect FIIP to send water to him every day during the season, but only when he requests it. Tr. 80:24-82:20; 84:3-6 (“I call the ditch riders, the ditch riders say I will get you water as quick as I can. I have them turn the water off and I go do my crop thing.”).

C. The Compact Parties’ Witness Casey Ryan Refuted Objectors’ Contentions That the Compact Dictates the Timing of FIIP Water Deliveries

The Compact Parties’ rebuttal witness, Casey Ryan (“Ryan”), further established that the Compact does not govern nor affect the timing of FIIP water deliveries. Ryan is a Hydrologist for CSKT, and he manages the CSKT’s Division of Engineering and Water Resources. Tr. 85:8-

11. Ryan has worked for CSKT for over nine years in various capacities, Tr. 85:13-25, and Compact implementation has been a “major component” of his job duties since 2017. Tr. 86:1-12. His familiarity with the Compact’s terms stems from his professional experience working for CSKT, but also from his status as a tribal member and a citizen of the State of Montana, as well as from his personal interest in water resources issues. Tr. 86:4-12.

Ryan testified that neither the Compact Implementation Technical Team nor CSKT has taken any action to limit the FIIP irrigation season, as such water delivery determinations are handled by the BIA. Tr. 87:11-88:4. Palmer’s and Doty’s cross-examination of Ryan failed to establish a causal link between the Compact and the timing of water deliveries to either of them. *See generally* Tr. 93-110 (discussing only FIIP improvement projects authorized by federal appropriations and FIIP management issues). Indeed, during cross-examination, Objectors focused on the FIIP improvement projects the Compact makes possible that would address some of the FIIP management issues raised during the hearing, demonstrating that the Compact will alleviate some of those management issues, not further them. *See generally* Tr. 88-96; 102-05.

III. CONCLUSION

Objectors failed to prove a concrete, non-speculative injury to a water right or other property interest that stems from the operation of the Compact. All their claimed injuries stem from FIIP management and operations, which Objectors failed to prove was caused by the Compact. Moreover, Objectors failed to prove specific injuries at all, and indeed, Ryan offered extensive testimony explaining how the Compact will facilitate the improvement of FIIP infrastructure to improve services for irrigators. Accordingly, the Compact Parties request that the Court dismiss all objections, including Objectors’, and approve the Compact.

Respectfully submitted this 22nd day of August, 2025.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Post-Hearing Opening Brief* for Hearing No. 5 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.

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