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

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CASE NO. WC-0001-C-2021
CONSOLIDATED EVIDENTIARY HEARING No. 12/13

COMPACT PARTIES' POST-HEARING OPENING BRIEF REGARDING CONSOLIDATED MATERIAL INJURY HEARING Nos. 12/13 [Lake County et al.]

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 May 1, 2025, related to claims of material injury of Objectors Lake County, Lake County Schools, Paradise Water District, and Sanders County ("Objectors"). As the Compact Parties explain below, Objectors have not carried their burden of proof to show material injury by operation of the Compact. Objectors' three witnesses introduced no exhibits and provided no testimony that connected the Compact to any problem they described. Moreover, the witnesses' testimony was riddled with speculation and inaccurate statements and theories. 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.

I. MATERIAL INJURY LEGAL STANDARD

As this Court and the Montana Supreme Court have held, to demonstrate material injury from the Compact, an objector 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 ("*Crow Water*") (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).

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*

[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).

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 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. Objectors presented pre-filed, written testimony of three witnesses, all of whom alleged harm to their entities' interests but did not demonstrate concrete, non-speculative injuries. Moreover, their claims were often based on incorrect assumptions about the nature of these proceedings, Montana water rights law and administration, and the Compact itself. In the end, none of their claims withstand scrutiny, and their objections should be dismissed.

A. Gale Decker's Testimony was Inaccurate, Out-of-Date, and Speculative

Gale Decker, county commissioner, testified on behalf of Lake County. He provided no evidence of a viable material injury. Instead, Decker supplied a litany of inapplicable and mistaken allegations: reprising resolved arguments; complaining about Congress's treatment of the counties; hypothesizing about harm to residential development; and speculating about the risk of damage to Lake County roads.

First, Decker rehashed several claims that Objectors argued during the legal motions phase in 2024. In short, conclusory statements, Decker maintained that the federal legislation approving the Compact allows the Tribes to retain all water quality claims. Decker Pre-Filed Testimony, Dkt. No. 2465.00, ¶ 3.h (April 18, 2025). This Court rejected the unknown water quality claims argument. *Compact Validity Order* at 47. Second, in his pre-filed testimony, Decker asserted that the Compact caused lower lake levels in Flathead Lake in 2022. Dkt. No. 2465.00, ¶ 3.f. During cross-examination, however, Decker recognized that lake levels are a

result of the Federal Energy Regulatory Commission license, not the Compact. Hearing Tr. 27:5-17, May 1, 2025 ("Tr.").

Third, Decker complained about the additional costs that Lake County will incur from the rehabilitation of the United States' Flathead Indian Irrigation Project ("Project"). Dkt. No. 2465.00, ¶ 3.b (repairing Project facilities that impact County bridges or culverts should be paid for by the Project or Tribes); *id.* ¶ 3.d (new rights of ways will be needed at significant cost); *id.* ¶ 3.e (tribal members have a treaty right to travel on roads but are not property taxpayers).[2] On cross-examination, however, Decker admitted that these costs stemmed from the federal act, not the Compact. Tr. 23:11-24:1; 24:21-25:21; 26:19-27:4. He also admitted that Congress approved $5 million in unrestricted funds for Lake County once the Compact becomes enforceable. Montana Water Rights Protection Act, Division DD, Pub. L. No. 116-260, 134 Stat. 1182 (2020), § 13(l); Tr. 25:1-20. Decker also acknowledged that the Tribes will reimburse Lake County for the capital costs associated with Project repairs and improvements. Tr. 25:22-26:9; 39:5-16. Decker's plea for greater resources to Lake County should be rejected, as it is unrelated to the Compact, unsupported by any calculation to support his claims, and failed to account for the funds that are or soon may be in the County's possession to offset repairs.

Fourth, Decker speculated about possible impacts to Lake County if water rights for real estate development were not approved by the Flathead Reservation Water Management Board ("Board") that now governs the issuance of new water uses on the Flathead Reservation.[3] Dkt. No. 2465.00, ¶¶ 3.g; 3.j; 3.k. Decker's sparse testimony provided no specific examples of how the Compact would force the Board to limit water rights permitting on the Reservation. Decker's testimony did not acknowledge how the Compact had improved things because there had been no permitting of new water uses on the Reservation since the 1990s. *Compact Validity Order* at 5-6; Tr. 27:18-29:1. Decker also did not know that certain basins around both the Crow and Blackfeet Reservations were closed to all new water permits by those Tribes' compacts as well. Tr. 29:2-10. By contrast, the Compact provides 11,000 AF to be leased for residential development from a new source of water in the Flathead Basin. Section 85-20-1901, MCA, Art. IV.B.7. Decker's vague, unsubstantiated, and incomplete testimony does not prove a material

[2] The concern about taxation is unrelated to the present water rights proceedings. This issue has existed since the Hellgate Treaty in 1855, 12 Stat. 975, and long predates the Compact.
[3] The Compact created the Board to handle all water rights administration on the Reservation. Section 85-20-1901, MCA, Art. IV.I.

injury.

Last, Decker alleged without evidence or specifics that instream flows set in the Compact would cause flooding and wash out County roads. Dkt. No. 2465.00, ¶ 3.c. Seth Makepeace, a hydrologist for the Tribes for 35 years, Tr. 60:4-25, dispelled this allegation. Makepeace compared the highest instream flows required by the Compact (Target Instream Flows) with the flood flows culverts must accommodate under current state highway specifications. Instream flows that may be implemented by the Compact are several orders of magnitude less than what the Montana Department of Transportation requires a culvert or bridge to accommodate. Tr. 61:2-65:3; Compact Parties Ex04_001 (*e.g.*, highest flow from the Compact on Mission Creek is 178 cfs and the 25-year flood that must be designed for is 1,170 cfs; highest flow from the Compact on North Crow Creek is 125 cfs and the 25-year flood that must be designed for is 429 cfs). The flows the Compact requires are not flood flows that will harm Lake County infrastructure.

B. Carolyn Hall Speculated About Harm Under the Compact and Conflated the Schools' Water Rights with What Must be in a Tribal Water Rights Compact

Carolyn Hall's testimony on behalf of Lake County Public Schools was based principally on speculation, which she acknowledged during cross-examination. *See* Tr. 49:3-8. The Board *might* deny the Schools new water permits. Tr. 48:4-7; *see also* Hall Pre-Filed Testimony, Dkt. 2467.00, ¶ 4.b (April 18, 2025). The Board *might* meter the Schools' wells. Tr. 48:24-49:2; Dkt. No. 2467.00, ¶ 4.c. *If* it did, the Schools *might* have a budget problem. *Id*. *If* the Schools are unable to obtain new water permits, they *might* have to choose between drinking water for students and watering athletic fields. *Id*. *If* new school buildings are not guaranteed water, students *might* have to go elsewhere for their education. Dkt. No. 2467.00, ¶ 4.g. But nowhere in her oral or written testimony did Hall explain how the Compact is responsible for these potential harms. And this Court has been clear: injury must be based on something more than just speculation about future harm. *Forest Service Decision*, No. WC-2007-03, 2012 WL 9494882, at *10. Hall's testimony piles speculation upon speculation, all of it insufficient to demonstrate material injury to Lake County Public Schools.

Hall's testimony also illuminated her fundamental misunderstanding about the role of the Reserved Water Rights Compact Commission, its governing statutes, and the purpose of the Compact. On cross-examination, Hall explained that she believes that the Compact should guarantee water for the Schools, and the Compact Commission statutes require the Commission

to negotiate the Schools' state-based water rights. Tr. 43:25-44:4; 44:15-20. They do not. *See* §§ 85-2-701 to -703, MCA. This discrepancy between what the Compact Commission was authorized to do and what Hall *believes* it was supposed to do undermines her claim that the school district is materially injured by the Compact. If—statutorily—the Commission was not authorized to negotiate state-based water rights, then the Schools were not guaranteed to have their rights determined in Compact negotiations and were not harmed by the Commission's failure to do so.[4]

Hall's testimony is both speculative and based on fundamental misunderstandings about the purpose of the Reserved Water Rights Compact Commission and the CSKT Compact itself and thus cannot establish material injury to Lake County Public Schools.

C. Kathleen French Disregarded the Protection that the Compact Provides the Water District

The testimony of Kathleen French on behalf of the Sanders County Water District of Paradise suffers many of the same shortcomings as Hall's testimony. To begin with, it is based on a fundamental misunderstanding about Montana water rights administration. In her pre-filed testimony, French concludes that the community of Paradise "is not a municipality, and though the Compact exempted municipalities, this is not one, and therefore not exempted (*sic*)." French Pre-Filed Testimony, Dkt. No. 2466.00, ¶ 3.i (April 18, 2025). As this Court knows, a water right's purpose is set forth in its abstract. It is *this* purpose that determines whether a water right is subject to call under the Compact—not some subjective characterization by the water right holder about who owns the right. Section 85-20-1901, Art. III.G.1 (exempting from any call by the Tribes and the United States any water right whose purpose "does not include irrigation"). Whether French wishes to acknowledge or believe it, the Compact's plain terms protect from call water rights with the purpose of "municipal" uses, such as that of Paradise Water District.

Notably, on cross-examination, French acknowledged that the Paradise Water District's

[4] In her pre-filed testimony, Hall also laments that "[e]ducation and schools were specifically mentioned in the treaties" but the Compact provided no water for schools. Dkt. No. 2467.00, ¶ 4.a. This is a misreading of the Treaty's plain language. Article V of the Hellgate Treaty provides that the *United States* agreed to build an "agricultural and industrial school . . . and provid[e] it with furniture, books, and stationery, to be located at the agency, and to be free to the children of the said tribes . . . ." To suggest, as Hall does, that this means the Treaty creates water rights in non-tribal entities like the Schools or somehow obligates the Tribes to include the state-based water rights on behalf of state-based schools on and off the Reservation in their Compact is incorrect.

abstract (No. 76N 67805-00) listed its purpose as "municipal." Tr. 54:23-55:5. Yet she still disputed whether the District was protected from call. Tr. 55:6-9. On re-direct, she elaborated that the call protection was not "against all call[s]." Tr. 55:24-56:2. This position was consistent with her pre-filed testimony in which French complained that "[t]he Compact allows call on irrigation and larger irrigators on the Flathead or Clark Fork River who could call our system." Dkt. No. 2466.00, ¶ 3.h. But as both this Court and the Montana Supreme Court have recognized, 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 create the prior appropriation system—but it did specifically exempt municipal uses such as Paradise Water District's from call by the Tribes and United States, the only parties with water rights at issue in the Compact.

The rest of French's pre-filed testimony simply lists entities—schools, churches, the railroad—that use Paradise Water District's water. The Compact Parties do not dispute that they use water. But this variety of uses does not demonstrate material injury and can therefore be disregarded. French also indicates that any *future* growth of the community of Paradise will require water, Dkt. No. 2466.00, ¶ 3.j, and the Big Sky Passenger Rail Project, "if approved," will require water. *Id.* at ¶ 3.k. Each of these assertions speculates about future events that, even if correct, cannot establish material injury. *Crow Water*, ¶¶ 34-35 (no right to water for future development).

III. CONCLUSION

For the foregoing reasons, the Compact Parties request that the Court dismiss all objections, including those of the Objectors in Hearing Nos. 12 & 13, and approve the CSKT 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. 12 was served by email to the counsel for the Objectors and email to counsel for the Compact Parties as set forth below this 22nd day of August, 2025.

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