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Montana Water Court

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. 14

COMPACT PARTIES' POST-HEARING OPENING BRIEF
REGARDING MATERIAL INJURY HEARING No. 14 [Blevins 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 material injury hearing held on May 1, 2025, regarding Craig and Beth Blevins, Tad and Tamara Revocable Trust, Sheila Vallejo, Smyth Family Trust, Longhorn Arena LLC, and Ernest Otoupalik (collectively, “the Objectors”). As the Compact Parties explain below, the 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. The Objectors filed written direct testimony that offered wide-ranging complaints largely focused on how the Flathead Indian Irrigation Project (“the FIIP” or “Project”) operates. They further asserted that their property values have declined, that the Compact violates other treaties, agreements, and contracts, and that their Walton Rights have been taken. None of the broad conclusory testimonial assertions of material injury are supported by any explanation in the testimony of how the Compact caused the perceived harm nor are they supported by any of the documents admitted into evidence.

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,

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).

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 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 hearing, Objectors offered no evidence to show a concrete, non-speculative injury to a water right or other property interest that stems from the operation of the Compact. The Objectors’ material injury claims are instead based on several unsubstantiated theories. First, that the Compact violates treaties, contracts, and other agreements. Second, that the Objectors have suffered material injury in the form of a taking of their Secretarial and Walton Rights under the “guise” of the Compact. Third, that the issuance of a Certificate of Domestic Allowance is a taking of the Objectors’ Walton Rights. Fourth, that implementation and operation of the Compact has caused the FIIP to change the way it operates in multiple ways. Specifically, that it has started water deliveries later than expected, turned off water deliveries earlier than expected, reduced total water delivery, increased operation and maintenance fees, failed to maintain canals or control weeds, drained a pond, engaged in less communication with water users, and reduced parcel delivery points. As more fully set forth below, all the Objectors’ claims of material injury are vaguely described in their testimony and not supported with any other evidence. Additionally, their assertions regarding takings and FIIP operations have already been rejected by the Court and are not material injury.

A. Objectors Did Not Show the Compact Violates Contracts, Treaties, and Other Agreements

The Objectors' claim that the Compact caused them material injury by violating various contracts, and other agreements such as repayment contracts, patents, and treaties is unconfirmed by any evidence. *Blevins Direct Testimony*, Dkt. No. 2471.00, at 2:3, April 18, 2025 (“*Test. Blevins*”); *Otoupalik and Longhorn Arena, LLC Direct Testimony*, Dkt. No. 2460.00, at 2:3, April 18, 2025 (“*Test. Otoupalik*”); *Smyth Family Trust Agreement Direct Testimony*, Dkt. No. 2457.00, at 2:1, April 18, 2025 (“*Test. Smyth*”); *Tad & Tamara Revocable Trust Direct Testimony*, Dkt. No. 2458.00, at 2:1, April 18, 2025 (“*Test. Tad & Tamara*”); and *Sheila Vallejo Direct Testimony*, Dkt. No. 2459.00, at 2:3, April 18, 2025 (“*Test. Vallejo*”).

The Objectors' testimony does not explain which contracts, treaties, or other agreements they are referring to, other than a reference to repayment contracts and patents. The Objectors did not introduce any evidence to support the claims that the Compact has violated any document from which they derive water rights or other real property interests. Because no agreements, treaties, patents, or contracts were identified, the Objectors' conclusory injury claims are speculative at best, and speculation cannot form the basis of material injury. *See supra section I.*

B. The Objectors Have Not Suffered a Taking of Any Water Rights

Objector Tad and Tamara Revocable Trust and Objector Smyth Family Trust Agreement make identical claims they have suffered material injury in the form of a taking of their Secretarial and Walton Rights under the “guise” of the Compact. *Test. Tad & Tamara* at 2:1; *Test. Smyth* at 2:2. Objectors Blevins and Vallejo make identical assertions that actions by the FIIP are a taking of their Walton Rights. *Test. Blevins* at 2:2; *Test. Vallejo* at 2:2. Objector Otoupalik similarly claims actions of the FIIP have amounted to a taking of his Walton and Secretarial Rights. *Test. Otoupalik* at 2:2.

The Objectors offered no evidence of said Walton Rights or Secretarial Water Rights, but even if they had, the Court has addressed and rejected the argument that the Compact somehow takes water rights and confirmed that the Compact does not limit the ability of any Objector to claim Walton or other water rights. *Compact Validity Order* at 50-51, 57-58, 61. In fact, the Compact does not divest any Objector of any water rights they hold, and the Compact protects the Objectors right to pursue their Walton or other water rights during the basin-specific adjudication process. Since the right is preserved, there can be no taking.

C. The Water Management Board's Issuance of A Certificate of Domestic Allowance Is Not A Taking

Objector Tad and Tamara Revocable Trust suggests that by applying for and receiving a Certificate of Domestic Allowance for a well on its property, it has suffered material injury in the form of a taking of its Walton Rights. *Test. Tad & Tamara* at 2:1-2, Exhibit “A”; Hearing Tr. 10:16-11:8, May 1, 2025 (“Tr.”). However, the exhibits do not support, and the testimony does not explain, the contention that any water right has been taken in the process provided under the Compact. The issuance of a Certificate of Domestic Allowance, which is distinct from a Walton Right, is within the authority of the Flathead Reservation Water Management Board (“Board”), § 2-2-101, 85-20-1902, MCA, and does not replace or subsume any other water right filed in basin 76L. As discussed above, the Compact does not limit the ability of any person to pursue their Walton or other water rights during the basin adjudication, and nothing in the Compact effectuates a taking of property rights. *Compact Validity Order* at 50-51, 57-58, 61.

The Objector’s testimony further appears to question the validity of the Certificate, noting it is a “never before . . . recognized” document. *Test. Tad & Tamara* at 2:2. The Certificates of Domestic Allowance provided for under the Unitary Administration and Management Ordinance, § 85-2-1902, MCA (“UAMO”), are similar to the exempt well certificates that are issued off-Reservation. *See* § 85-2-306, MCA. The Court has analyzed the formation of the Board and its ability to authorize new water uses and change authorizations on the Flathead Indian Reservation. The Court found the Board’s formation and its authority are consistent with the laws governing water administration in Montana. *Compact Validity Order* at 63-70. Thus, the Certificate of Domestic Allowance issued by the Compact-created Board is valid, undercutting Objector’s contention that the operation of the Compact is the source of material injury.

D. The Objectors’ Complaints About How the FIIP Is Operated Do Not Demonstrate Material Injury

As for the FIIP, the Objectors testified that due to implementation of the Compact, Project operations have caused a myriad of issues resulting in material injury to them in the form of lost income, economic hardship, and stress. *Test. Blevins* at 2:4-7;3:8; *Test. Otoupalik* at 2:4-6; 3:7-8; *Test. Smyth* at 2:4-5; *Test. Tad & Tamara* at 2:3-5; 3:5-8; *Test. Vallejo*, 2:4-6; 3:6-7. The Objectors introduced some exhibits associated with the activities of the Compact Implementation Technical Team (“CITT”), but introduced no evidence relating the Compact to

the actions of the FIIP or CITT that would support their claims of harm. Tr. 11:9-12:16. The Objectors did not attempt to explain how or why the exhibits introduced as evidence were relevant to their claims of injury, the operation of the Compact, or how the Compact controlled the FIIP's operation. This Court has recognized that any Objector who has a dispute with the FIIP about the way it administers water has redress through the FIIP dispute resolution process, which the Compact has not modified. *Compact Validity Order* at 49; § 3-1-101, 85-20-1902, MCA (FIIP water management decisions outside scope of the UAMO for water administration under the Compact).

Two witnesses for the Compact Parties testified at the hearing. Seth Makepeace, a hydrologist who has worked for the Tribes for 35 years, has a Bachelor of Science and a Master of Science, both in geological science with an emphasis on water resources. Tr. 20:2-15. Over the decades, Mr. Makepeace has become familiar with the operations of the FIIP by working for the FIIP and by working for the Tribes to ensure that the FIIP provides needed fishery flows. Tr. 21:21-239. The Compact Parties' other witness was Casey Ryan, a hydrologist for the Tribes, who is currently the manager of the Division of Engineering and Water Resources. Tr. 43:10-12. In his role, Mr. Ryan supervises tribal staff that work with the FIIP on Compact implementation activities, which include the Tribes' Irrigation Infrastructure Program, Water Management Program, and the Water Measurement Program. Tr. 45:20-46:2; 47:1-12.

Mr. Makepeace confirmed the FIIP is operated by the Bureau of Indian Affairs. Tr. 42:7-9. Mr. Makepeace also confirmed all the Objectors are customers of the FIIP. Tr. 25:9-25; 26:8-22; 26:24-27:15; 27:20-28:24. Through analysis of publicly available water delivery data related to the Objectors' property, Mr. Makepeace concluded that diversion volumes were within the range of variability of the prior years, and that the start and stop dates of water delivery over the last five years were like those of previous years. Tr. 33:5-34:16. Mr. Ryan confirmed that the Compact does not dictate the FIIP's weed management practices, the operation and maintenance fees assessed by the FIIP, or the number of farm unit turnouts the FIIP services. Tr. 47:13-49:16. These grievances, along with Objectors' other FIIP complaints about the lack of communication, draining of a pond, or lack of canal maintenance, were not proven to be a result of Compact implementation. The Objectors could not show they have suffered material injury due to operation of the Compact because the Compact does not dictate the way the FIIP operates and

does not extinguish any remedies available to Objectors if they are dissatisfied with the services they receive from Project.

III. CONCLUSION

For the foregoing reasons, the Compact Parties request that the Court find the Objectors have not met their burden to establish material injury to their water rights or other property interests from operation of the Compact. The Court should dismiss all objections and approve the Compact.

Respectfully submitted this 22nd day of August, 2025.

/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. 14 was served by email to counsel for 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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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@cslk.org
melissa.schlichting@cslk.org
christina.courville@cslk.org
zachary.zipfel@cslk.org
danna.jackson@cslk.org

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

Kimberly L. Field
Field Law Offices, PLLC
405 Main SW, Ste. 2
P.O. Box 573
Ronan, MT 59864
kim.field@kfieldlawoffices.com