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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 Nos. 12 and 13
(Lake County, Mineral County, Sanders County and Paradise Water District)

HEARINGS 12 and 13 – FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

The Court enters these Findings of Fact and Conclusions of Law to address evidence offered and admitted in the evidentiary hearing involving objectors Lake County, Mineral County, Sanders County, and Paradise Water District (collectively the “Local Government Objectors”). The Local Government Objectors objected to the Water Rights Compact (“Compact”) entered into by and among the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (“Tribes”), the State of Montana (the “State”), and the United States of America on behalf of the Tribes (“United States”) (collectively, the “Compact Parties”). The Compact settles the Tribes’ existing claims to water rights within the State of Montana.

On April 1, 2025, the Water Court issued its Order on Pending Motions Regarding Compact Approval (“Order on Motions”). (Doc. 2336.00). The Order on Motions concluded that the Compact is fundamentally fair, adequate, and reasonable, and that the Compact conforms to applicable law. The Order on Motions shifted the burden to parties who filed objections to the Compact (“Objectors”), including the Local Government

Objectors, to prove their interests are materially injured by operation of the Compact. Order on Motions, at 73.

Although the Order on Motions concluded the Compact Parties met their threshold burden as a matter of law, the Order deferred ruling as to whether the Compact Parties proved the Objectors lack material injury as a matter of law. The Order on Motions also did not conclude the Objectors proved material injury. Instead, the Order on Motions determined evidentiary hearings were necessary before the Court may issue a final ruling on the Compact. The Order on Motions provided the opportunity for any Objector to request an evidentiary hearing as to their proof of material injury. Although most Objectors did not request a hearing, several did, including the Local Government Objectors.

This Order addresses evidence of alleged material injury specific to the Local Government Objectors. These Findings of Fact and Conclusions of Law address the evidence provided to the Court in connection with Evidentiary Hearing Nos. 12 and 13, which were consolidated as one proceeding to hear evidence as to the claims of material injury alleged by the Local Government Objectors.

PROCEDURAL BACKGROUND

1. On June 9, 2022, the Water Court issued a Preliminary Decree based on a motion by the Compact Parties to incorporate the water rights described in the Compact into decrees for nine hydrologic basins in western Montana. (Doc. 19.00). Issuance of the Preliminary Decree commenced a statutory period for potentially interested parties to file objections to the Compact.

2. Each of the Local Government Objectors filed (and, in some cases, refiled) objections to the Compact. (Doc. 903.00 (Lake County); Doc. 768.00 (Mineral County); Doc. 767.00 (Sanders County); Docs. 821.00, 863.00, 872.00, 933.20, and 1033.90 (Carolyn Hall); Doc. 1029.00 (Paradise Water District)).

3. The Local Government Objectors and others filed a joint Motion and Brief to Deny Compact Based on Adequacy and Fairness and Other Issues of Law. (Doc. 1814.00). The Court denied this motion as part of the Order on Motions.

4. After the Court issued its Order on Pending Motions, the Local Government Objectors, along with several others, filed hearing requests.¹ The Court initially consolidated Lake County's request into Evidentiary Hearing No. 12 and the remaining Local Government Objectors into Evidentiary Hearing No. 13. At the prehearing conference, the Court consolidated Evidentiary Hearing Nos. 12 and 13 into a single proceeding, with consent of the parties. (Doc. 2569.00 – Prehearing Order).

5. Following various prehearing proceedings, the Court conducted an evidentiary hearing on May 1, 2025, at the Lake County Courthouse in Polson, Montana. The Local Government Objectors were represented by counsel at the hearing.

6. The Local Government Objectors called several witnesses to provide testimony. Pursuant to Case Management Order No. 6 (Doc. 2142.00), the Local Government Objectors pre-filed direct testimony for Lake County Commissioner Gale Decker (Doc. 2465.00), Lake County Superintendent of Schools Carolyn O. Hall (Doc. 2647.00), and Katy (aka Kathleen) French (Doc. 2466.00). Ms. French testified in her capacity as a board member of the Sanders County Water District at Paradise (aka Paradise Water District). Each of these witnesses was present at the hearing for cross-examination.

7. The Compact Parties called Seth Makepeace to testify.

8. The testimony and exhibits admitted for this hearing are summarized in the Court Minutes for the hearing. (Doc. 2587.00).

9. Following the hearing and preparation of a hearing transcript, each party filed post hearing briefs pursuant to the briefing schedule set by the Court. The Local Government Objectors filed their opening brief on August 21, 2025. (Doc. 2631.00). The Compact Parties filed their opening brief on August 22, 2025. (Doc. 2644.00). The Local Government Objectors filed a response on September 19, 2025. (Doc. 2669.00). The Compact Parties filed a response on September 19, 2025. (Doc. 2674.00).

Based upon the record, the Court makes the following findings of fact and conclusions of law for Evidentiary Hearing Nos. 12 and 13:

¹ Hungry Horse Water and Sewer District originally was part of this group, but withdrew its request to participate in an evidentiary hearing on April 21, 2025. (Doc. 2488.00).

FINDINGS OF FACT

Facts Applicable to All Local Government Objectors

1. None of the Local Government Objectors are parties to the Compact.
2. Unlike other compacts that have come before the Water Court, this Compact does not close basins within the Flathead Reservation to authorizations for new water uses.
3. The Court took judicial notice of the Compact as codified, the Hellgate Treaty as codified in its entirety, and various codified provisions of the Montana Code Annotated. (H-12/13 Tr. 7:1-23).²

Facts Specific to Lake County

4. Lake County is a political subdivision of the state of Montana.
5. A significant portion of Lake County is within the Flathead Indian Reservation.
6. Lake County maintains various county roads. Some of these roads are within the Flathead Reservation. Some roads cross natural streams and canals, some of which are subject to the Compact's instream flow provisions.
7. Historically water conveyances have caused some road washouts. At some point water caused damage to Dublin Gulch Road. The County incurred some cost for repair. The County also has replaced culverts where county roads cross irrigation canals.
8. Lake County Commissioner Gale Decker testified about concerns over damage resulting from water conveyance through the FIIP system. Decker conceded that the federal Montana Water Rights Protection Act ("MWRPA")³ contains provisions providing for repairs and modernization of the FIIP system. Decker also acknowledged that water conveyances upgrades are authorized by the MWRPA, not the Compact. (H-12/13 Tr. 23:18-24)
9. In 2022, Lake County and the Tribes executed a memorandum of agreement that provides the Tribes will reimburse the County for certain road repairs.

² All transcript ("H-12/13 Tr.") citations are to the page and line numbers in the Evidentiary Hearing Nos. 12 and 13 transcript.

³ The MWRPA is codified at Division DD, Pub. L. No. 116-260, 134 Stat. 1182, which is part of the Consolidated Appropriations Act of 2021.

Decker acknowledged that Lake County will be reimbursed for the capital costs associated with repairs and improvements associated with the FIIP. (H-12/13 Tr. 25:22-26:9).

10. Decker testified about concerns relating to well permit authorization, but conceded that the Water Management Board is authorized to issue permits. (H-12/13 Tr. 28:12-14).

11. Decker testified that the Compact caused lower lake levels in Flathead Lake in 2023. However, Decker conceded on cross examination Flathead Lake water levels are a result of the Federal Energy Regulatory Commission operation license for the Séliš Ksanka Qlispé hydropower project. Decker testified “I don’t believe the Compact was responsible for the lowering of the lake.” (H-12/13 Tr. 27:11-13).

12. Although Lake County opposed the federal MWRPA, the County supported the Montana Legislature’s approval of the Compact.

13. Lake County School Superintendent Carolyn Hall testified about the county school system. The system includes eight school districts. The schools require water for drinking water, health and cleanliness, athletic field irrigation, nutrition, and firefighting. The schools currently have state-based water rights for these uses. Hall also was unable to point to any provision in the Compact that would directly affect the validity of any state-based water rights.

14. Hall testified about concerns about the uncertainty of obtaining permits or approvals for new water supplies for schools, as well as potential metering costs. Hall was unable to point to any specific provision of the Compact that would prevent the schools or districts from obtaining additional water rights. Hall also could not identify any provision of the Unitary Administrative Management Ordinance that might prevent the Water Management Board from issuing new water use authorizations to Lake County school districts.

Facts Specific to Other Local Government Objectors

15. Kathleen French was the only witness called by the other (i.e. non-Lake County) Local Government Objectors.

16. French's testimony was limited to testifying on behalf of the Paradise Water District as a governmental entity within Sanders County.

17. The Sanders County Water District at Paradise owns water right no. 76N 67805-00. This water right is a provisional permit for a groundwater well with a municipal use purpose and a March 21, 1988, priority date.

18. French testified that the Paradise Water District provides water to approximately 110 water users, including local residents and businesses, for a local school, and for fire and other emergencies.

19. French testified that she understands Paradise Water District is not a municipality and therefore is not protected by the Compact's call protection provisions.

20. French also testified that the Compact does not protect the Paradise Water District from calls that might be made by "larger irrigators on the Flathead or Clark Fork River who could call our system." (Doc. 2466.00 at 2, ¶ 3h).

21. The Local Government Objectors did not offer pre-filed testimony or call anyone to testify on behalf of Sanders County generally.

22. The Local Government Objectors also did not file pre-filed testimony or call anyone to testify on behalf of Mineral County.

Compact Parties' Witnesses

23. The Compact Parties called Seth Makepeace to testify. Makepeace has been a hydrologist with the Tribes for 35 years.

24. Makepeace testified that the Compact authorizes instream flows, referred to as "Target Instream Flows." Makepeace described the Target Instream Flows as the "highest magnitude Instream flows called out in the Compact." (H-12/13 Tr. 61:21-23).

25. Water right abstracts included in various Compact appendices quantify the Target Instream Flows that Makepeace referenced in his testimony. The abstracts specify maximum instream flow rates for certain streams that vary by month. For example, the abstract for water no. 30052795 sets monthly maximum flow rates for a measurement point on North Crow Creek below the Pablo Feeder Canal. The flow rates vary from

14.00 cubic feet per second (“cfs”) during February to 125.00 cfs during June. Compact Appx. 11.⁴

26. Makepeace prepared an exhibit that compares the maximum monthly Target Instream Flow for various streams to the 25, 50 and 100 year maximum flood flow values on the same streams. (H-12/13 CP Ex. 4). For North Crow Creek below the Pablo Feeder Canal, these flow rate values are 429 cfs (25-year), 486 cfs (50-year), and 544 cfs (100-year).

27. Makepeace testified that the flood flow values form the basis to set evacuation route designs for roads that cross various streams as specified the 2022 Montana Department of Transportation Hydrology and Hydraulics manual. (H-12/13 Tr. 62:5-64:5). Using North Crow Creek as an example, the highest Target Instream Flow (125.00 cfs) is approximately 29 percent of the 25-year flood design criteria for the same stream. The table on Exhibit 4 shows similar conclusions when Target Instream Flows are compared to flood magnitudes for correlating streams.

CONCLUSIONS OF LAW

Standard

1. The standard followed by the Court when reviewing a compact requires an objector to prove the objector’s interests are “materially injured” by “operation of the Compact.” *In re Crow Water Compact*, 2015 MT 353, ¶ 18, 382 Mont. 46, 364 P.3d 584 (“*Crow Compact II*”). To meet this standard, an objector must (1) identify a legally protected interest, (2) prove material injury to that interest, and (3) establish a link between the proven injury and an operative provision of the Compact. This standard requires the objector to meet a “heavy burden” to prove the Compact is unreasonable as applied to the objector. *Id.*

⁴ The Preliminary Decree contains three appendices. Appendix 1 is the full text of the Compact as ratified by the Montana Legislature, codified in § 85-20-1901, MCA, and approved by the Secretary of Interior. Appendix 2 contains the abstracts that document the elements of the Tribal Water Right. Appendix 3 contains lists and abstracts of the Tribe’s water rights co-owned with FWP. These three appendices are referenced as “Decree Appendix” or “Decree Appx.” Decree Appendix 2 also includes several numbered appendices from the Compact. These are referred to as “Compact Appendix” or “Compact Appx.”

Future Implementation

2. The Local Government Objectors contend it is impossible for them to prove material injury because the Compact provisions have not yet been implemented. There are several problems with this contention.

3. The Local Government Objectors' argument conflicts with the judicial review provisions of the Compact. Those provisions – as adopted and codified in the Montana Code – required that the judicial review process begin within 180 days of the date all of the Compact Parties ratified the Compact. Compact Art. VII.B.1. The Court does not have authority to delay judicial review of a request to decree the Compact terms that are within the Court's jurisdiction.

4. The Local Government Objectors did not call any expert or fact witness to evaluate the quantification provisions of the Compact and compare them to existing streamflow and other records, or explain why such analysis cannot be done. The Compact and its appendices contain significant objective numeric flow rate and volume figures, but the Local Government Objectors did not provide testimony to challenge the veracity of any of that information.

5. The Local Government Objectors' future implementation argument is inconsistent with how the Water Court has evaluated all prior compacts in a process that has been confirmed by the Montana Supreme Court. In *Crow Compact II*, the Supreme Court conducted a detailed analysis of the Water Court's approval of the Crow Compact without waiting for the Compact to be implemented. The Supreme Court upheld the Crow Compact on the basis of the compact as drafted and measured against the objectors' articulated legal interests. Nowhere in the opinion did the Supreme Court suggest judicial review must wait until such time as an objector suffers actual injury.

Flathead Lake Levels

6. Gale Decker's testimony about Flathead Lake levels in 2022 does not demonstrate material injury. The Local Government Objectors failed to produce evidence of any water right or legal basis that Flathead Lake must be maintained at a certain level. The Local Government Objectors also did not identify any specific provision of the Compact that led to modification of Flathead Lake levels in 2022 or any other year.

Additionally, as Decker conceded, the maintenance of Flathead Lake levels is governed by a Federal Energy Regulatory Commission hydropower license, not a Compact provision.⁵

Flooding Risk

7. The Local Government Objectors contend the Compact causes material injury because the instream flows for various streams quantified in the Compact have not been evaluated for risk to county road structures.

8. The Local Government Objectors' flood risk and road damage concerns are general in nature and, other than a reference to Dublin Gulch Road, do not identify any specific road damage or threatened road damage. The concern also does not explain how the Compact exacerbates any actual or threatened flood risk or road damage.

9. The Compact authorizes Target Instream Flows, but does not authorize flooding. For example, the Compact sets the highest Target Instream Flow for a location on North Crow Creek below the Pablo Feeder Canal at 125.00 cfs. As the Compact Parties' witness Seth Makepeace testified, this figure is well below the flow rate that results in a flood risk. To the extent flooding might occur, such flooding is a function of runoff or precipitation, not the exercise of Target Instream Flows, even at their maximum flow rates. The Compact sets Target Instream Flows that may be enforceable up to their maximum rates, but that does not equate to the Compact authorizing flood flows that might exceed these rates. The Local Government Objectors bear the burden to prove this risk. However, as with their other objections they did not call an expert or fact witness to explain to the Court the magnitude of any increased risk.

Future Permit Issuance

10. The concerns articulated by Decker and Hall about risks to future permitting do not amount to proof of material injury. Unlike other compacts, the Compact does not close the reservation to issuance of future permits so there is no legal bar to future permitting.

⁵ This conclusion is underscored by the abstract for water right now. 76LJ 30052867, which quantifies a water right for the "*naturally occurring* surface water in Flathead Lake up to the shoreline elevation of 2,883." Compact Appx. 18, abstract no. 76LJ 30052867 (emphasis added). The Compact does not address the controlled storage pool portion of the lake above this level.

11. The Local Government Objectors did not identify any future permit being contemplated or demonstrate how any provision of the Compact might impair the opportunity to obtain a water use permit. Additionally, as the Supreme Court indicated in *Crow Compact II*, objectors do not have a property interest in future appropriations of water, and any concern about future authorizations is too speculative to amount to material injury. *Crow Compact II*, ¶ 35.

Risk of Calls for Water

12. The Local Government Objectors, and specifically the Paradise Water District, raised concerns about the risks of calls for water. These concerns arise out of Article III.G.1 of the Compact under which the Tribes and the United States agree to relinquish the right to exercise a call for water against any state-based water right with a purpose that does not include irrigation.

13. Paradise Water District (via French) contends it does not qualify for call protection because the District is not a municipality. This argument misreads the Compact's call protection provision which applies to the character of the use, not the character of the entity. This provision of the Compact is consistent with Montana law. *See Lohmeier v. State*, 2008 MT 307, ¶ 29, 346 Mont. 23, 192 P.3d 1137 (“the character of the use rather than the character of the applicant has been the defining factor in determining whether an application could be considered as one within the municipal use category”). The Paradise Water District right is a right for municipal purposes regardless of who owns the right.

14. Paradise Water District also suggests the call protection provisions in the Compact are illusory because they do not protect the District from calls for water by senior irrigation rights that are subject to calls because they lack call protection under the Compact. The District provides no information about any specific senior irrigation user at risk of being called by the Tribes that then might exercise a viable call against the District. The District also provides no analysis as to how such a call by a hypothetical large irrigator would mitigate the call made by the Tribes against the unidentified irrigator. Without more analysis, this concern is speculative at best, which is not a basis for asserting material injury. *Crow Compact II*, ¶ 25.

Conclusion

15. The evidence and testimony offered by the Local Government Objectors fails to prove material injury by operation of the Compact.

ORDER

Therefore, it is ORDERED that these Findings of Fact and Conclusions of Law shall be incorporated by reference into the Court's Final Order Approving the Compact.

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Chief Water Judge

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