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WC-0001-C-2021

September 19, 2025

Montana Water Court

*Attorney for Objectors  
Hearings 12-13*

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

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CASE NO. WC-0001-C-2021

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OBJECTORS RESPONSE BRIEF  
HEARINGS 12-13

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Pursuant to the order of this court the Objectors response to the compact parties is as follows:

First, compact parties ignore the fact that there is no operating compact as it is not approved and implemented as their questions of witnesses and witness testimony indicated. They note on page 1 (a) “the witnesses’ testimony was riddled with speculation.” As our initial post hearing brief notes, their questions and answers are speculation, and we as Objectors cannot prove the impossible.

Compact parties also note on page 1, last paragraph that “Evidence of injury that relies on speculation about future compact implementation cannot demonstrate material injury.” their citations. As we noted in our brief, we cannot prove damage from what is

not and compactors agree.

The compactors note at page 3 "At the hearing Objectors offered evidence that failed to show a concrete, non-speculative injury to a water right or other property interests from the operation of the compact." Compact brief at 3. As MCA 1-3-222 notes, "The law never requires impossibilities." As the statutes note, there is no completely approved compact. As compactors note we prove no non-speculative damages, which is not enough they allege. The proof is therefore impossible and that violates Montana's maxims of law.

As the review of the compact therefore violates the maxims of law, the process of review does so as it requires an impossibility by the admission of the compact parties, making the process of review not satisfactory and a violation of due process.

Witnesses are speculative and those "cannot demonstrate material injury." Brief pg. 2, last paragraph. Their argument and the review by the Court violates Montana law as MCA 1-3-222 provides, "The law never requires impossibilities."

The statutes indicate no compact is in place as no review and approval has been completed by the Court. The compact parties' questions and answers are also speculative about what may or may not occur, indicating no compact is in place. This issue is emphasized by the compact parties at page 3, II, noting "At their hearing objectors offered evidence that failed to show a concrete, non-speculative injury to a water right or other property interest from the operation of the compact." Brief at 3, II. As no compact is operating, only speculation can

predict a consequence, or a material damage. Compact parties note that speculation is not adequate, hence, adequate proof of material damage is not possible. Compact parties have previously noted that no Objector has previously proven material damage.

As this position by the compact parties and the standard of review require an impossibility, we all violate the maxims of law by requiring an impossibility and the compact can not be approved. The treaties and objections are all in the record and the court has notice of the same. The depredations and the violations and the damages if those occur upon enforcement and implementation of the compact are not eliminated by only finishing this review. Those do not disappear as a material damage or claim by this review process, and the compact parties request to dismiss the objections does not eliminate the problems.

The difficult task of showing material damage without speculation is compounded by the compact parties and the court restricting the objectors review, use and disclosure of the "Damages Report" document possessed by the compact parties. Our inability to use the document and its contents frustrates and has frustrated the efforts to disclose material damage from the implementation of the compact. Court ordered inability for Objectors to use information that exists, makes proof of damages impossible, violating the maxim of law regarding requiring impossibilities.

We submit that the compact parties brief, proves a substantive violation of due process by acknowledging and supporting the conclusion that "Evidence of

injury that relies on speculation about future compact implementation cannot demonstrate material injury” Brief page 2, last paragraph citing USDA Forest Service within state document no. W6200703 at 10 (Mont. Water Ct, Oct. 31 2021). The compact parties brief also proves a procedural violation of due process by the compact parties and Court since damages from a compact that does not yet exist in implementation cannot be proved without speculation, prediction or conjecture, which the Water Court previously noted, “the expressed uncertainty of feared future events is too speculative upon which the Court can base a decision.” brief page 3 lines 405, citing Forest Service Decision. We as objectors have been in a process wherein, we cannot succeed because speculation is not adequate, therefore defeating the objectors, while restricting use of information in the “damages report” that would be helpful to our proof. The Constitutional issues raised in the objections and demonstrated herein with these substantive and procedural process problems have and are presumed to cause material damage to the Objectors.

In summary, approval of the Compact on the basis of a failure by Objectors to show non-speculative injuries resulting from the implementation of an as-yet unimplemented Compact, while at the same time withholding from Objectors proof in the hands of the other party contrary to both FOIA and Montana’s state-based litigation discovery rules, represents both procedural and substantive violations of the Objector’s due process rights, where this Court has set the Objectors an impossibility and then hamstrung its efforts to achieve it.

For those reasons the court should not approve the compact based upon no proof of material damage, as proving that is an impossibility without speculation as no compact is in effect.

Dated this 19<sup>th</sup> day of September, 2025



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Walter E. Congdon

### **CERTIFICATE OF SERVICE**

I, Walter Congdon, do hereby certify that on the 19<sup>th</sup> day of September, 2025, a true and correct copy of the foregoing document by email with a request for delivery receipt upon the person(s) named below.

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