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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 RESPONSE BRIEF
REGARDING MATERIAL INJURY HEARING No. 5 [Doty/Palmer]

Pursuant to the governing order,¹ the Confederated Salish and Kootenai Tribes (“CSKT”), the State of Montana, and the United States (collectively, “Compact Parties”), submit this post-hearing response brief rebutting Objectors Randolph Doty’s and Delbert Palmer’s (“Objectors”) claims of material injury in their *Post-Hearing Brief of Petitioners Palmer and Doty*, Dkt. No. 2630.00 (Aug. 20, 2025) (“Objectors’ Opening”). As the Compact Parties explain in the *Compact Parties’ Post-Hearing Opening Brief Regarding Material Injury Hearing No. 5 [Doty/Palmer]*, Dkt. No. 2643.00 (Aug. 22, 2025) (“Compact Parties’ Opening”) and 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 (July 10, 2024) (“Motion”), and approve the CSKT Compact, §§ 85-20-1901, -1902, MCA.

Specifically, Objectors showed no material injury from operation of the Compact at the hearing, and Objectors’ Opening confirms as much. In their Opening, Objectors seek to rely on evidence not admitted at the hearing and assert, without support, that they have an enforceable “right” to Flathead Indian Irrigation Project (“FIIP”) water that the Compact has somehow violated. The admitted evidence fails to prove these assertions, however, and Objectors have failed to meet their burden in this case as a result.

I. MATERIAL INJURY LEGAL STANDARD

The Compact Parties’ Opening explained that this Court and the Montana Supreme Court have held that to demonstrate material injury from a 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. Compact Parties’ Opening at 2-3. Objectors’ Opening has no discussion of the relevant case law defining when a water rights compact causes material injury. The Compact Parties’ description of the governing law regarding Objectors’ material injury assertion is thus uncontested.

II. THE COURT SHOULD REJECT OBJECTORS’ ARGUMENTS REGARDING THE ADMISSION OF CERTAIN EVIDENCE

Objectors’ Opening argues mostly about evidence not offered or discussed at the April 24, 2025 evidentiary hearing, or evidence the Court refused to admit. Objectors first ask the Court to

¹ *Order Modifying Briefing Schedule*, Dkt. No. 2626.00 (Aug. 13, 2025).

admit what they describe as the “December 12, 2022 DNRC Staff Report” into evidence, which the Compact Parties understand to be the Montana Department of Natural Resources and Conservation’s (“DNRC”) Staff Report available online at https://dnrc.mt.gov/Water-Resources/2022-12-12_CSKTCompact-Staff-Report_FINAL.pdf (“Staff Report”). Objectors’ Opening at 3-5. They then take issue with the Court refusing to admit DNRC’s written analysis of water right claims Objectors have filed in Basin 76L. For the reasons set forth below, the Court should reject Objectors’ arguments.

A. The Staff Report Is Not Relevant to Objectors’ Material Injury Claims

Objectors focus a significant portion of their brief on attacking the negotiation process leading to the Compact’s formation, and they ask the Court to admit the Staff Report to assist this argument. The Court should reject such request for several reasons.

First, the Staff Report is arguably already part of the Court’s record, given that its admissibility was questioned and resolved in the Compact Parties’ favor when the Court considered the Compact’s validity. *See, e.g., Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00 at 21-24 (Apr. 1, 2025) (“*Compact Validity Order*”) (rejecting hearsay challenges to the Staff Report, concluding it constituted an admissible public record under Mont. R. Evid. 803(8)). As a government publication available on a public website, the Court can certainly take judicial notice of the document, *see* M. R. Evid. 201(b)(2), as it appears to have done when rejecting certain objectors’ hearsay challenges to it, *Compact Validity Order* at 24. To the extent the Staff Report is not already part of the Court’s record for this proceeding, the Compact Parties do not object to its admission.

Nevertheless, the Staff Report is not relevant to Objectors’ material injury claims even if the document is part of the Court’s record. Objectors plainly seek to use the Staff Report to attack the negotiation process leading to the Compact’s formation as insufficiently transparent. Objectors’ Opening at 1-5; *see also Response to Compact Parties’ Motion and Hearing Evidence* at 3, Dkt. No. 2663.00 (Sep. 9, 2025) (“Objectors’ Response”) (arguing for the first time that the Staff Report supports their contention that the “political ruling class” impedes Objectors’ ability to “challenge the process”).² The Court already decided the question of the Compact’s validity,

² The scheduling order does not permit surreplies, so the Compact Parties herein respond to new arguments Objectors advance in their response brief, should the Court consider them. *See, e.g., Zempel v. Liberty*, 2006 MT 220, ¶ 13, 333 Mont. 417, 143 P.3d 123 (“well-settled precedent dictates [that the] Court does not consider issues raised for the first time in a reply brief”).

including the sufficiency of the negotiations process. *Compact Validity Order* at 30-33 (rejecting arguments questioning the sufficiency of the negotiations process); *id.* at 73 (concluding that the Compact Parties met their burden to show the Compact’s validity). And the Court made clear that the evidentiary hearings were not an opportunity for Objectors to relitigate that issue. *Order on Motion for Protective Order and Cross-Motion to Compel* at 2, Dkt. No. 2558.00 (Apr. 29, 2025) (“The [*Compact Validity Order*] specified that the evidentiary hearings were limited to the Objector burdens”); *Clarification Order and Case Management Order No. 7* at 1, Dkt. No. 2147.00 (Mar. 5, 2025) (“The hearing is not intended as another opportunity to re-argue motions pending before the Court.”). The Court should thus reject Objectors’ attempt to relitigate issues involving the Compact’s validity.³

Second, Objectors suggest they sought to admit the Staff Report into evidence at the hearing, and that the Court refused to admit it under M. R. Evid. 408. *Id.* at 3-4.⁴ This is incorrect. Objectors never sought to admit the Staff Report into evidence, and their citations to

³ Similarly, Objectors’ “legal errors” concerning *Arizona v. Navajo Nation*, 599 U.S. 555 (2023), *see* Objectors’ Response at 3, fail to prove their material injury claims. Objectors appear to argue the United States lacked authority to engage in actions leading to CSKT’s water rights settlement, and thus the Compact Parties’ reliance on those alleged unlawful actions was “misplaced.” As the Compact Parties explained in briefing on the Compact’s validity, the *Navajo Nation* case affirmed the principles in *Winters v. United States*, 207 U.S. 564 (1908) and has no bearing on this proceeding. *E.g.*, *Compact Parties’ Answer Brief to Objector Mickale Carter’s Motion and Memorandum in Support of Motion for Summary Judgment* (Dkt. No. 1786.00), and *Objector Vivian Allen’s Motion and Memorandum in Support of Motion for Summary Judgment* (Dkt. No. 1809.00), Dkt. No. 1906.00 at 4 (Sep. 12, 2024). The fact that the Supreme Court found no enforceable duty in a treaty with the Navajo Nation *requiring* the United States to secure water for the Nation does not support that the United States lacks authority to have negotiated and finalized the Compact at issue here. *See, e.g.*, *Haaland v. Brackeen*, 599 U.S. 255, 275 (2023) (“[W]e have not doubted Congress’s ability to legislate across a wide range of areas, including criminal law, domestic violence, employment, property, tax, and trade.”); Consolidated Appropriations Act of 2021, Division DD, Pub. L. No. 116-260, 134 Stat. 1182, 3008-3038, § 4 (ratifying CSKT Compact).

⁴ Objectors rely on *Mont. Env’t Info. Center v. Off. of the Gov.*, 2025 MT 112, 422 Mont. 136, 569 P.3d 555, *see* Objectors’ Opening at 1; Objectors’ Response at 3, but such reliance is misplaced. There, the Montana Supreme Court held that a party who successfully vindicates their right to know under Art. II, Sec. 9 of the Montana Constitution is entitled to a presumption toward the award of attorneys’ fees. Nowhere does that Court state that this provision “extends broadly ‘to any matter in which the State of Montana is involved’” as Objectors contend. Objectors’ Opening at 3. Attorney fees are not at issue in this case. Nevertheless, Objectors’ reliance on such case is for the purpose of relitigating the Compact formation process, which this Court has made clear is outside the bounds of the material injury hearings.

the hearing transcript do not refer to the Staff Report or its contents, but instead to an exchange regarding FIIP's reduction of Objector Palmer's assessed acres, Objectors' Opening at 3 (citing to Hearing Tr. 75:1-14, April 24, 2025 ("Tr.")), or to documentation concerning "damages," Objectors' Opening at 2 (citing to Tr. 58:10-24). Thus, Objectors identify no error on the Court's part with respect to the Staff Report because it *never* came up in the hearing.

To the extent Objectors offered any testimony regarding the Staff Report, the Court properly sustained objections to it as irrelevant under Mont. R. Evid. 402. As discussed above, while the Staff Report is relevant to the Court's consideration of the Compact's validity, it is not relevant now to the question of Objectors' material injury, especially when Objectors plainly seek to use it to argue that the Compact negotiation process was inadequate. Objectors' Opening at 3. Objectors have identified no error with respect to any evidentiary ruling the Court made concerning the Staff Report, its contents, or issues pertaining to the Compact's validity.

B. The Court Need Not Reconsider Its Refusal to Admit DNRC Analysis of Objectors' Water Right Claims into Evidence

Objectors take issue with the Court's refusal to admit documentation prepared by or related to DNRC's examination of the claims they filed in the adjudication of Basin 76L. Objectors' Opening at 1-4. *See also* Objectors' Exhibits 1-3. The Court properly refused to admit such documentation, and nothing in Objectors' Opening suggests otherwise.

As a preliminary matter, the time to make arguments in support of the admission of evidence was during the hearing, not in post-hearing briefing. To the extent Objectors ask the Court to reconsider those evidentiary rulings, they offer no basis for the Court to do so. The Court properly refused to admit DNRC's claims examination of their claimed Basin 76L water rights because such documentation is irrelevant to the question of their material injury from the Compact. Tr. 30:16-35:11. As this Court is aware, the Water Court has not adjudicated the claims filed in Basin 76L nor has a final decree issued, and this proceeding is not the forum to seek rulings on the nature and scope of Objectors' claimed rights. *E.g., Compact Validity Order* at 51 ("The validity of any existing water right claims of any Objector involving on-reservation water use will be a matter of a separate proceeding in Basins 76L and 76LJ.").

Objectors contend that this additional documentation "directly address[es] the operational implementation of the Compact and the delivery to the DNRC find water." Objectors' Opening at 4. While their statement is unclear, the record is not: Objectors have not established—at the hearing or in briefing—that the DNRC has any role with respect to when FIIP decides to deliver

water to irrigators. Objectors entirely fail to explain how DNRC’s examination of the water rights they claim in Basin 76L relates at all to Compact implementation or when FIIP—a federal irrigation project managed by a federal agency, the United States Bureau of Indian Affairs (“BIA”)—delivers water to them during the irrigation season. Their contentions regarding this documentation lack specificity, clarity, and any explanation of its relevance. The Court had the opportunity to review the evidence during the hearing and properly refused to admit it as irrelevant. Objectors offer the Court no reason to revisit that ruling now.⁵

III. OBJECTORS FAILED TO PROVE MATERIAL INJURY FROM OPERATION OF THE COMPACT

Objectors contend that they are materially injured because in recent years the Compact has caused FIIP to “shorten” the irrigation season such that FIIP deliveries to Objectors’ respective properties are delayed at the start, and cease before the end, of the irrigation season. Objectors’ Opening at 4. The “evidence” Objectors describe in their Opening consists of two short statements asserting that Objector Doty is “entitled to 163 days of irrigation water,” and Objector Palmer is “entitled to 153 days of irrigation water.” Objectors’ Opening at 2-3. These assertions, together with their testimony that they received FIIP water during a shorter period in certain recent years, form the entire basis of their claims of material injury.

Objectors’ conclusory statements about a purported “entitlement” to FIIP water, together with their refuted testimony, can only lead to the conclusion that they have failed to show any causal link between the Compact and when FIIP delivers water to them each irrigation season. Objectors’ testimony at the hearing confirms no such causal link. *See* Compact Parties’ Opening at 3 (Objector Palmer admitted that any claim the Compact causes him injury “could be disputed pretty easily”); *id.* at 4-5 (neither could identify any provision of the Compact affecting FIIP

⁵ Similarly, Objectors’ new argument that the Court improperly refused to admit unidentified “crop loss evidence” and “Montana Fish & Game documentation,” Objectors’ Response at 4, should be rejected. Objectors never tried to offer any evidence or documentation regarding alleged “crop loss evidence” at the hearing. *See, e.g.*, Tr. 7:3-9 (Objector Palmer concedes it is “impossible” to “come up with damages” and further concedes that claims that “the Compact caused our problem . . . could be disputed pretty easy”); Tr. 70:5-13 (Objector Doty admits that he offered no documentation supporting his assertion that the Compact affected his property value). It is not clear what Objectors are referring to when describing “Montana Fish & Game documentation,” but Objectors had a full and thorough opportunity to offer evidence for admission; the Court considered such evidence and either properly admitted it or rejected it. Tr. 3-6; 8-56:1-5. Objectors’ argument they have been deprived of a “fair record” is meritless and should be rejected.

deliveries); *id.* (Objectors acknowledged BIA operates FIIP, that FIIP determines when to deliver water to its users, and that the timing of deliveries is conditioned on climactic conditions including annual snowpack and the availability of carryover storage);⁶ *id.* at 5-6 (Objectors did not refute testimony from Casey Ryan stating that neither the Compact Implementation Technical Team nor CSKT have any role nor have taken any action to affect the timing of FIIP deliveries). Objectors' belief that the Compact causes them injury is just that—a belief—not a proven fact.

Even though it has nothing to do with the Compact, Objectors' bare assertion that they are entitled to receive FIIP deliveries each day for irrigation seasons exceeding 150 days is both illogical and unproven. As Objector Doty testified, Objectors are in no position to receive water each day of such applicable irrigation season. *See* Tr. 81:25-82:20 (Objector Doty testified he does not order water every day of the irrigation season, explaining that “[y]ou do not try to just let water run down the creek all of the time” and that “[y]ou can't just order it the once, you have to order it every time” it is needed). And Objector Doty's testimony only suggests he *did* receive water deliveries within the irrigation season, but not *before* the start of such season. Compact Parties' Opening at 5.

Objectors point to their state-law water claim abstracts to support their right to over 153 days of FIIP water deliveries, but only Objectors' Ex. 2 is an abstract for irrigation, and it describes a period of irrigation spanning 160 days.⁷ Such private water right claim is owned by multiple people, has not been finally decreed, and does not encompass the water FIIP delivers to them. The FIIP water right is part of CSKT's reserved water right, and for the Doney Ditch that diverts water for delivery to Objector Doty, *see* Objectors' Ex. 5 (Doney Ditch is the means of

⁶ In their Response, Objectors argue for the first time that the Court improperly admitted Hearing 5_Compact Parties Ex07, which is a copy of FIIP's 2008 Operation and Maintenance Guidelines. Objectors' Response at 2-3. Objectors claim they lacked notice of or access to the document, and as a result, its admission to rebut their testimony violated their state constitutional rights. *Id.* The document was properly admitted as relevant because it directly refutes Objectors' unsupported testimony that their alleged injuries stem from FIIP “mismanagement,” which in turn is allegedly caused by the Compact. Moreover, the gravamen of their complaint is that BIA should have delivered a copy of the document to them each year. *Id.* at 2-3. BIA has no such obligation under any statute or regulation. And as Objector Palmer knows, any issue Objectors have with FIIP operations can and should be taken up with FIIP. *See, e.g.,* Tr. 74:2-77:9 (discussing FIIP's reduction in Palmer's assessed acres and his appeal of that decision).

⁷ Objectors also cite to portions of the hearing transcript for support, but the citations do no such thing. *See* Tr. 34:12-16 (short exchange regarding the admission of Objectors' Ex. 2); Tr. 36:3-8 (discussing admission of a letter from Lake County).

diversion for the irrigation highlighted by Objectors), that claim identifies a period of diversion spanning from April 15 to September 15. Preliminary Decree, App. 2, pdf pages 15–24 (Claim 76L 30052931). This April 15 to September 15 period is the same general season of use for irrigation found in the 2008 Operations Manual. Hearing 5_Compact Parties Ex07_028-034. That FIIP recognizes a general period of use for irrigation in the climactic area encompassing Objectors’ property does not transform Objectors’ use of FIIP water into a state law-based water right as they appear to contend or mandate that FIIP actually deliver water in any given year for the entire 153-day period. Objectors’ Opening at 2-3.

Objectors have failed to establish by a preponderance of the evidence that any reduced FIIP deliveries they experienced in recent years were caused by the Compact. Rather, the only reliable evidence admitted at the hearing shows that when FIIP started irrigation in a given year, it did so consistent with its established guidelines and the climatic situation. Compact Parties’ Opening at 5. Lastly, unsubstantiated claims of FIIP “mismanagement” rooted in Objectors’ personal beliefs rather than admissible evidence are not proof of material injury caused by the Compact. *See, e.g., 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”).

IV. CONCLUSION

For these reasons, the Compact Parties request that the Court find that Objectors have not carried their burden of proof to demonstrate material injury from operation of the Compact. The Compact Parties further request that the Court dismiss all objections, including Objectors’, and approve the CSKT Compact.

Respectfully submitted this 19th day of September, 2025.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Post-Hearing Response Brief* for Hearing No. 5 was served by email/mail to the Objectors and email to counsel for the Compact Parties as set forth below this 19th day of September, 2025.

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