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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 Nos. 12/13

COMPACT PARTIES' POST-HEARING RESPONSE BRIEF REGARDING CONSOLIDATED MATERIAL INJURY HEARING Nos. 12/13 [Lake County, Sanders County, Lake County Schools, Paradise Water District]

Under 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. The Compact Parties oppose the assertions of material injury by Objectors Lake County, Lake County Schools, Paradise Water District, and Sanders County ("Local Governments") in their *Post Hearing Brief Hearings 12-13*, Dkt. No. 2631.00 (August 21, 2025) ("Local Governments' Opening"). As the Compact Parties explained in their *Post-Hearing Opening Brief Regarding Material Injury Hearing No. 12 and 13*, Dkt. No. 2644.00 (Aug. 22, 2025) ("Compact Parties' Opening") and below, the Local Governments have not carried their burden of proof to show material injury by operation of the Montana–CSKT–United States Compact.[2] 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) and approve the Compact.

The Local Governments' Response largely pivots away from their admitted three written direct testimonies that allege material injury. The Local Governments change course and attempt to deflect their burden of proof by claiming that they cannot show any injury until the Compact is fully implemented. This allegation is at odds with the text of the Compact, other water rights compacts, decisions of the Water Court, and basic trial practice. *See* section I below. Without any material injury identified and demonstrated at the hearing, the Local Governments are left to complain about the material injury standard. And the Local Governments' residual claims of material injury advanced in their Opening are belied by the law and the record. *See* section II below.

I. THE LOCAL GOVERNMENTS' ATTACKS ON THE MATERIAL INJURY STANDARD ARE INCORRECT

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. The Local Governments' Opening has no explicit discussion of the relevant case law defining when a water rights compact causes material injury. Thus, the

[1] *Order Modifying Briefing Schedule*, Dkt. No. 2626.00 (August 13, 2025).
[2] Sections 85-20-1901, -1902, MCA ("Compact").

Compact Parties' description of the governing law defining a material injury is not overtly contested. Still, the Local Governments make three mistaken arguments that implicitly attack how the Water Court reviews water rights compacts.

A. Judicial Review of the Compact Can Occur Now

The Local Governments assert that they cannot meet their material injury burden now because the Compact has not been implemented and thus, they do not know what harm it might cause. Local Governments' Opening at 1-5. This complaint is contrary to law and practice in many ways. One, the Compact is written to require initiation of the water rights decree review process shortly after the Compact is ratified and necessarily before it is implemented. Section 85-20-1901, MCA, Art. VII.B.1 (requiring initiation of suit to review Compact within 180 days of ratification). So, the relative lack of implementation of the Compact when judicial review of the Compact occurs is part of the Montana state law that Congress ratified. *Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00 at 8, 9 (April 1, 2025) ("*Compact Validity Order*"). Two, this timing for judicial review, shortly after a compact is ratified and before widescale implementation, is the norm of Montana water rights compacts for when judicial review is conducted.[3] Three, this timing for judicial review is efficient as it allows opponents a chance to stop the Compact before material injury could occur and is useful for the compacting parties because they can receive clearance for implementation of a compact before expending significant resources or providing certain benefits.[4] Four, the Water Court has

[3] Numerous compacts have the same requirement as the CSKT Compact Article VII.B.2 that within 180 days of being effective that the parties must file a motion for judicial review. *See, e.g.*, § 85-20-1601 (National Bison Range Compact), Art. VI.B; § 85-20-1501 (Blackfeet Compact), Art. VII.B.1; § 85-20-1401 (Forest Service Compact), Art. VIII.E; § 85-20-1201 (USDA), Art. V.B; § 85-20-1101 (USDA), Art. V.B; § 85-20-1001 (Ft. Belknap Indian Community), Art. VII.B.1; § 85-20-901 (Crow Compact), Art. VII.B.2.

[4] Under the federal act approving the Compact, there is an "enforceability date" that is the date when a list of actions related to assorted formalities of the settlement are achieved. Consolidated Appropriations Act of 2021, Division DD, Pub. L. No. 116-260, 134 Stat. 1182, 3008-3038 (hereinafter "Settlement Act") §§ 3(4) & 10(b). One of the conditions for the "enforceability date" to occur is that the judicial review process is complete. *Id*. § 10(b)(1). Many actions contemplated under the Settlement Act do not take effect until the enforceability date is reached. These include: the availability of the allocation of 90,000 acre-feet in Hungry Horse Reservoir § 6(i); any funds placed in one of the settlement trust funds, § 8(e)(1); various waivers of claims by the CSKT and the United States, § 10(a); and requirement to pay a lump sum to two counties with lands within the federal irrigation project, § 13(l).

approved all other Compacts based on this sort of judicial review schedule.[5]

Five, there are ways to analyze a compact and assert error before full implementation of a compact. Objectors to the Crow Compact hired an engineer, and he alleged various mistakes in the amounts negotiated for the Crow Tribe's water rights. While none of his assertions were correct,[6] that type of evidentiary presentation does illustrate how objectors can attack the terms of a compact. Six, the use of an expert witness with specificity is unlike the evidence the Local Governments provided. For example, Lake County commissioner, Gale Decker, opined in his written direct testimony that Compact instream flows would wash out Lake County roads. *Gale Decker, Lake County Commissioner Pre-Filed Testimony,* Dkt. No. 2465.00, ¶ 3.c. But an engineer for the Compact Parties quickly dismantled this speculation by looking at the text of relevant Compact provisions and actual engineering requirements for roads. Seth Makepeace, a CSKT hydrologist for 35 years, Hearing Tr. 60:4-25, May 1, 2025 ("Tr."), compared the highest instream flows required by the Compact (Target Instream Flows) with the flood flows culverts must accommodate under current state highway specifications. Compact instream flows are several orders of magnitude less than the stream flow the Montana Department of Transportation requires a culvert or bridge to accommodate. Tr. 61:7-65:3; Compact Parties Ex04_001. Brief and simple examination by an engineer of Lake County's bald accusation showed that it was incorrect.

Finally, the Local Governments raise this argument too late. These proceedings have been ongoing for three years. At no point have the Local Governments asserted they were unable to demonstrate material injury until the Compact was fully implemented. If they believed they were unable to demonstrate material injury based on the status of the Compact, they were obligated to raise this argument at some point prior to their post-evidentiary hearing brief. A due process challenge to the judicial proceedings to review the Compact should have been raised

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[5] *See, e.g.*, *Final Order Approving Blackfeet Tribe—Montana—United States Compact*, 2020 WL 7329247 (Mont. Water Ct., December 9, 2020); *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 ("*Forest Service*") (Mont. Water Ct., October 31, 2012); *In the Matter of the Adjudication of the Existing and Reserved Water Rights to the Use of Water, Both Surface and Underground, of the Crow Tribe of Indians of the State of Montana*, No. WC-2012-06, 2015 WL 5583581 (Mont. Water Ct., May 27, 2015) ("*Crow Compact Order*").

[6] *Crow Compact Order*, 2015 WL 5583581, at *10–14.

during the legal motions phase in 2024. *Case Management Order No. 3*, Dkt. No. 1395.00 at 2-3 (Oct. 18, 2023) (requiring all legal motions be filed by July 10, 2024). In 2025, the Court sought to provide notice to the Compact Parties of the remaining issues and required Objectors to file a "Request for Hearing" that summarized the issues to be raised at the hearing. *Case Management Order No. 5*, Dkt. No. 2109.00 at 2 (Jan. 31, 2025). The Local Governments filed two Request for Hearing pleadings but did not include this full implementation allegation.[7] Nor did the Local Governments' separate proposed Prehearing Order make any such allegation, instead contending that the Compact caused a multiplicity of injuries based on the written direct testimony of three witnesses.[8] Only now, after the legal briefing is long over, after the hearing, and during the post-hearing briefing phase, do they complain about the timing of judicial review under the consent decree legal standard that has been in place not only for this proceeding, but for all previous compact adjudications. This is too late to raise this argument.

B. The Compact Need Not Provide a Complete Subordination to All Water Users

The Local Governments next allege that any sort of water rights call that might impact an objector causes material injury. Local Governments' Opening at 5-6 (complaining that the Compact does not prevent objectors from ever being called by other water right holders). But injury stemming from the consequences of the prior appropriation system cannot establish material injury. *Compact Validity Order* at 75-76 ("[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."); *In re Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation within the State of Montana in Basins 40E, 40EJ, 40O, 40Q, 40R, & 40S*, No. WC-92-1, 2001 WL 36525512, at *22 (Mont. Water Ct., Aug. 10, 2001) (not requiring CSKT to subordinate to all water users in compact terms).

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[7] *Mineral County, Sanders County, et al., Request for Hearing*, Dkt. No. 2116.00 at 2 (Feb. 21, 2025); *Lake County and Lake County Schools, Request for Hearing*, Dkt. No. 2115.00 at 2 (Feb. 21, 2025).

[8] Lake County Schools *Proposed Prehearing Order, Hearing No. 12*, Dkt. No. 2500.00 at 2-4 (Apr. 22, 2025); Mineral County *Proposed Prehearing Order, Hearing No. 13*, Dkt. No. 2501.00 at 2-4 (Apr. 22, 2025); Lake County *Proposed Prehearing Order, Hearing No. 12*, Dkt. No. 2502.00 at 2-4 (Apr. 22, 2025); Sanders County Water District – Paradise, *Proposed Prehearing Order, Hearing No. 13*, Dkt. No. 2503.00 at 2-4 (Apr. 22, 2025); Sanders County, *Proposed Prehearing Order, Hearing No. 13*, Dkt. No. 2504.00 at 2-4 (Apr. 22, 2025).

C. Uncertainty About Future Water Supply Does Not Demonstrate Material Injury

Third, the bare claim that the Compact creates "uncertainty" for the Lake County Schools, because the Compact does not include guaranteed water rights for new schools, is not a material injury. Local Governments' Opening at 4-5 (relying on testimony of Superintendent Carolyn O. Hall, *Carolyn O. Hall, Lake County Superintendent of Schools Pre-Filed Testimony,* Dkt. No. 2467.00 at ¶ 4g). Evidence of injury that relies on speculation about what might happen in the future because the Compact does not include a desired provision cannot demonstrate material injury. *Forest Service*, 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."). That is all the Local Governments have offered in this case, which fails to satisfy their burden.[9]

II. OBJECTORS FAILED TO ESTABLISH MATERIAL INJURY

While generally arguing that no material injury can be discerned at this time because the Compact is not being implemented, the Local Governments also maintain the opposite—that some injuries are apparent. The limited and contradictory assertion of injury in the Local Governments' Opening should be rejected too. The Opening highlights the testimony of Lake County Commissioner Gale Decker that the County will have to pay "significant costs" for road repairs caused by the Compact. Local Governments' Opening at 3-4. This assertion is without foundation in fact and law.

On a factual basis, the Local Governments' claim hinges on an MOU where CSKT pays for materials and Lake County provides the labor and equipment to make road and bridge

[9] The Local Governments chide the Compact Parties for not cross-examining Superintendent Hall on her interpretation of the Hellgate Treaty, 12 Stat. 975, and its school related provisions. Local Governments' Opening at 4-5. But Ms. Hall's interpretation of the Hellgate Treaty is irrelevant. Furthermore, Hall's direct testimony did not mention the Hellgate Treaty, let alone Article V that specifically addresses the building of a school on the Reservation for children of the CSKT. As the Compact Parties explained in our Opening, that treaty provision provides no basis for a state-based school district that is not operated by the United States nor the CSKT, nor exclusively for children of the CSKT, to be a necessary component of *CSKT*'s water rights settled in the Compact. Compact Parties' Opening at 6, n. 4.

repairs. But Commissioner Decker's own testimony described this program as being part of the standard County roads program with the annual assessments of which bridges are needing repairs. Tr. 38:14 – 39:16. That arrangement is not a creation of the Compact and does not address Compact-specific construction projects. How the County handles standard road and bridge repairs cannot be a material injury under the Compact.

As a legal matter, the Local Governments' assertions are mistaken too. While they recognize that the federal settlement legislation approving the Compact,[10] rather than the Compact itself, may lead to repairs of roads and bridges for which Lake County could incur costs, the Local Governments perceive a link to the Compact under the guise of this Court's review provisions of "the Compact and its administration." Local Governments' Opening at 4. The Local Governments do not cite any provision of the Compact in their brief for this perceived linkage, because there is none. The Compact's judicial review provisions define "administration"—but not in any way that would include Congressionally authorized irrigation system repairs. Judicial review of the Compact is limited to the Preliminary Decree in Appendix 38 and "may extend" to any other part of the Compact if "they relate to the determination of water rights and their administration." Art. VII.B.2. Administration of the water rights recognized in the Compact is encompassed within the Compact's entire second part labelled "Unitary Administration and Management." *See* § 85-20-1902, MCA. This part of the Compact has nothing to do with the federal irrigation project. Section 3-1-101, MCA. The Settlement Act provisions authorizing rehabilitation of the federal irrigation project are not part of water rights administration under the Compact. The Court should not accept the Local Governments' complaints about future payments under the Settlement Act as somehow being under the terminology of the "administration of water rights." The two are unrelated.[11]

III. CONCLUSION

For these 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.

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[10] Settlement Act § 4.

[11] To be sure, the Settlement Act did consider impacts to Lake County roads from repairs of the federal irrigation project. For one, the Settlement Act does authorize CSKT to expend settlement funds associated irrigation project repairs that impact Lake County roads or bridges. Settlement Act § 8(h)(13). And under the same authority, CSKT must pay Lake County $5 million for road and bridge repairs when the Settlement Act enforceability definition is met. *Id*. § 13(l).

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 Nos. 12 & 13 was served by email to the counsel for the Objectors and email to counsel for the Compact Parties as set forth below this 19th day of September, 2025.

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