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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. 14

COMPACT PARTIES' POST-HEARING RESPONSE BRIEF
REGARDING MATERIAL INJURY HEARING No. 14 (Blevins, et al.)

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 response brief to rebut Craig and Beth Blevins, Tad and Tamara Revocable Trust, Sheila Vallejo, Smyth Family Trust, Longhorn Arena LLC, and Ernest Otoupalik (collectively, “the Objectors”) assertions of material injury in their *Post Hearing Brief Hearing No. 14*, Dkt. No. 2653.00 (Aug. 22, 2025) (“Objectors’ Opening”). As the Compact Parties explained in their *Post-Hearing Opening Brief Regarding Material Injury Hearing No. 14*, Dkt. No. 2649.00 (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.

Objectors showed no material injury at the hearing and Objectors’ Opening confirms as much. Objectors’ evidence consists of pre-filed written testimony containing conclusory statements and exhibits that do not show any causal link between the Compact and their purported material injury. Objectors further advanced arguments the Court rejected in its *Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00 (Apr. 1, 2025) (“*Compact Validity Order*”). Accordingly, neither Objectors’ Opening nor any admitted evidence meets their burden in this case.

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 a cursory description of the governing standard, asserting that the Compact Parties had the burden to disprove Objectors’ claims of material injury. Objectors’ Opening at 1. Such erroneous contention relies on the *Compact Validity Order*, *id.*, but nothing in the Court’s order establishes as much. After the Compact Parties met their burden to demonstrate that the Compact was presumptively valid, the burden shifted to *Objectors* to prove concrete, non-speculative material

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

injury to a property interest stemming from operation of the Compact. Compact Parties' Opening at 2-3. Objectors' misrepresentation does not effectively refute the Compact Parties' description of the governing standards.

II. THE COURT SHOULD REJECT OBJECTORS' PROCESS COMPLAINTS

Objectors' Opening immediately veers off course to argue issues that have been settled by the Court. Objectors argue that the discovery process was deficient, that the Court did not provide them with an opportunity to be heard during their May 1, 2025 evidentiary hearing, that there is allegedly missing testimony omitted from the official transcript, and that the Compact Parties' exhibits were not properly introduced. Objectors' Opening at 2, 3, and 5. For the reasons set out below, Objectors' process complaints should be disregarded by the Court.

Objectors take issue with the Court's refusal to require disclosure of the "Damages Report," claiming that the Court "sealed" it. Objectors' Opening at 2. This is not only inaccurate, but Objectors offer the Court no basis to reconsider its rulings concerning this document. As the Court is aware, the Court ordered the CSKT and United States to file the Damages Report under seal with the Court and asked the parties to file briefs as to the production or protection of the Damages Report. *Court Minutes and Confirmatory Orders*, Dkt. No. 2286.00 at 1-2 (Mar. 21, 2025). The Objectors filed the requested brief stating their basis for production and its relevance to their material injury. *Motion and Brief for Production of the Damages of the CSKT Due to the Actions by the United States, Including All Volumes and Supplemental and Economic Valuation*, Dkt. No. 2327.00 (Mar. 28, 2025). Objectors were then given an opportunity to view the Damages Report. *See Order Setting Damages Report Review Procedures and Setting Hearing*, Dkt. No. 2346.00 (Apr. 4, 2025); *Clarification Order*, Dkt. No. 2373.00 (Apr. 8, 2025). After a lengthy *in-camera* hearing on April 10, 2025, the Court considered the issue and concluded the Objector's basis for production (that there are some undeclared water rights for water quality) was unfounded and therefore the Damages Report was irrelevant to their claims of material injury. *Order on Motion for Protective Order*, Dkt. No. 2420.00 (Apr. 15, 2025). Contrary to Objectors' statement, they were allowed to review the Damages Report and explain how or why the report was relevant but failed to convince the Court. Objectors did not petition the Court to reconsider its order at the time it was issued, and they offer no basis for the Court to reconsider such ruling at this late stage.

Second, while Objectors stipulated to pre-file written direct testimony in lieu of being

deposed, *Hearing 14 Prehearing Order*, Dkt. No. 2579.00 at 9 (Apr. 30, 2025), they also claim they reserved the right to “supplement” pre-filed written testimony with live testimony and additional exhibits. Objectors’ Opening at 2. This argument wholly lacks merit. Objectors waived their right to present live testimony at the hearing when they agreed to pre-file their written testimony and extend all their pre-hearing and hearing dates. *Order Granting Request for Extension of Time and Modifying Briefing Schedule and Hearing Date*, Dkt. No. 2403.00 at 2 (Apr. 11, 2025). Objectors’ confusion about the stipulation they entered into—which reasonably allowed them to forgo being deposed in exchange for providing the full measure of their direct testimony prior to the hearing—is no basis to allege the Court treated Objectors unfairly. As the Court pointed out during the hearing, Objectors were treated the same as any other represented party. Hearing Tr. 3:13-5:21 (May 1, 2025) (“Tr.”).²

Third, Objectors complained about the delay in receiving the hearing transcript and requested that it be recreated, declaring that a substantial portion of the testimony from the Compact Parties’ witness Seth Makepeace was missing. Objectors’ Opening at 2; *see also Objectors’ Request to Correct Transcript, Hearing No. 14*, Dkt. No. 2627.00 (Aug. 13, 2025). After an independent transcriptionist completed a partial second transcript showing no such omission, Objectors continued to claim testimony was absent and asked for additional time to review the matter. *Objectors’ Motion for Extension of Time, Hearing No. 14*, Dkt. No. 2634.00 (Aug. 22, 2025). The Court convened a hearing to address the issue, *Hearing 14 – Order Setting Status Conference*, Dkt. No. 2637.00 (Aug. 22, 2025), at which Objectors’ Counsel failed to justify an extension because she could not identify any specific timestamp in the recording or page in the transcript where content was missing, nor could she describe, with any specificity, the nature of the alleged “missing” testimony. As a result, the Court denied Objectors’ last-minute motion to extend the briefing any further. *Hearing 14 – Court Minutes*, Dkt. No. 2650.00 (Aug. 22, 2025). Most recently, the Court granted Objectors’ request for the Zoom video file after they renewed their request for relief related to their allegations of “missing” testimony. *Hearing 14 – Order on Request for Zoom Video with Audio*, Dkt. No. 2667.00 (Sep. 12, 2025). Objectors’ claims that this Court has treated them unfairly, when it has given them multiple opportunities to

² Throughout this Brief, Compact Parties refer to the original Hearing Transcript by Cindy Prindiville as it is the only transcript in the record. The second transcript obtained by Objectors, a partial transcription beginning with Compact Parties’ witness Seth Makepeace, is not part of the official court record.

be heard, are meritless and should be rejected.

Finally, Objectors claim the Court erred when admitting Compact Parties' Exhibits 4-10. Objectors' Opening at 3. However, the hearing record reflects that these exhibits received no objection from Objectors' Counsel. The time to challenge the admission of the Compact Parties' exhibits was during the hearing, but Objectors' Counsel did not do so. Tr. 25:9-23; 29:20 – 30:18; 48:3-14. Objectors have offered nothing in their Opening to justify allowing a challenge to these seven exhibits after the hearing record closed. Furthermore, Objectors did not preserve the right to challenge the exhibits, and the Court should summarily reject this complaint. M. R. Evid. 103(a)(1); *Kizer v. Semitool, Inc.*, 251 Mont. 199, 207, 824 P.2d 229, 234 (1991) (failure to raise a timely and specific objection forfeits the ability to assert error on appeal).³

In sum, Objectors have been afforded ample opportunity to engage in discovery, present testimony and exhibits concerning their material injury, explain their concerns regarding the transcript, and object to the admission of exhibits. That Objectors disagree with the outcome of their unsuccessful efforts to create a different record is due to their errors, not the Court's. Objectors offer no reason for the Court to revisit its rulings now.

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

Objectors' Opening seeks to establish material injury by contending that alleged reductions in Flathead Indian Irrigation Project ("FIIP") water deliveries were "caused" by the Compact, Objectors' Opening at 3-5; claiming the initial operation of the Compact Implementation Technical Team⁴ ("CITT"), also contributed to the drop in the amount of water FIIP may deliver to irrigators, *id.* at 8-12; and further claiming the Compact effected a "taking" of their water rights, *id.* at 5-8. These allegations of material injury fail for many reasons.

A. Objectors' Complaints About FIIP Fail to Demonstrate Material Injury

At the hearing, Objectors provided only very brief conclusory written statements about reduced FIIP deliveries in 2021 - 2024 and some documents that were not referenced in that testimony in any way. The Compact Parties rebutted that limited evidence with a knowledgeable technical witness who explained that based on the publicly available data the timing of FIIP

³ It is worth also noting that the Compact Parties' Exhibits 4-8 are *Federal Register* notices, which any court can judicially notice. See 44 U.S.C. § 1507.

⁴ Objectors Opening incorrectly cites to § 85-20-1901, MCA, Article G. There is no Article G in the Compact; the correct citation is Article IV.G, § 85-20-1901, MCA.

deliveries was not appreciably different the last few years than it had been 20 years earlier. Compact Parties' Opening at 5-7. Objectors' Opening responds to that substantial testimony with distorted conclusions from the key testimony and erroneous statements about the existing implementation of the Compact by the CITT. The Court should reject these contentions as they show no causal link between the Compact and when FIIP delivers water or how much water FIIP delivers, and the Compact does not eliminate Objectors' ability to seek remedies regarding their disputes with FIIP.

First, Objectors candidly acknowledge that FIIP operational problems are what have caused them difficulty in receiving water. They stated that two FIIP facilities "that service the majority of these Objectors" were ones with operational issues. Objectors' Opening at 4 (referencing two FIIP facilities that are shown on Hearing 14 CP Ex 11, 13, 16 and that Makepeace stated had operational problems in 2024 causing a late start to deliveries, Tr. 34:1-16). Dissatisfaction with the way FIIP is managed or that FIIP facilities are in poor condition that limits the efficient or consistent water delivery is not proof of material injury caused by the Compact. *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").

Second, the Compact Parties rebutted the charge that the timing of FIIP deliveries to the Objectors changed substantially in the 2021 – 2024 period compared to the last 20 years. Hydrologist Seth Makepeace testified that based on data on FIIP canal and reservoir activity tracked in the CSKT water management program, FIIP delivery periods and annual diversion volumes for the canals and reservoir serving Objectors' property were within normal ranges when compared to other years. Tr. 29:2 – 34:16. In support of this testimony, Makepeace provided exhibits showing 21 to 24 years of water measurement data related to the FIIP canals and reservoir serving the Objectors' properties. Hearing 14 CP Ex. 10, 12, 14 & 17. Makepeace disagreed strongly with Objectors' characterization that he did not have the necessary information to understand the issues they experienced with water deliveries, explaining the CSKT water measurement program, in place since 1982, shows water moving through the FIIP canal network, and stored in FIIP reservoirs. From that information, Makepeace could recognize when water was available for delivery in the FIIP facilities related to their FIIP served lands. Tr. 35:9 – 36:20.

Third, Objectors try to undermine Makepeace's testimony in several ways that the Court should reject. Objectors complain that Makepeace's testimony was not based on actual deliveries to each individual Objector. Objectors' Opening at 10. Objectors' request is hyper technical and inapplicable. Makepeace's testimony and exhibits showed when FIIP had water available for delivery in Project facilities. Many factors impact whether and when water is delivered to a particular person such as the crops being grown, the condition of their irrigation facilities, the amount of labor they have to use water when ordered, etc. Objectors also protested because the Compact includes the term "historic farm deliveries" and therefore Makepeace's testimony should have included actual farm use. Objectors' Opening at 10-11. These things are unrelated, though, and do not bear on the worth of the FIIP canal and reservoir data that Makepeace presented to the Court. The Compact Parties' information is very probative of when FIIP deliveries were available in Objectors' area and that the volume of water for that area has remained relatively constant. Hearing 14 CP Ex 9-17. Historic Farm Deliveries under the Compact were used in calculating the entire FIIP water right on a regional level, not the amount for any specific farm. Section 85-20-1901, MCA, Art. II.36, II.58, II.59 and App. 3.2. After the Compact is fully implemented, Historic Farm Deliveries for each River Diversion Allowance Area are to be maintained through a process of evaluation and adjustment. *Id.* at Art. IV.D. But that Compact metric is not relevant at this juncture to the material injury inquiry nor to the amount delivered to individual farms.

Fourth, Objectors seemingly recognize that none of their five testimonies included any Compact provision allegedly causing the decline in their recent FIIP deliveries, and so they use misstatements and half-truths about the CITT's role in 2021-2024 to conjecture a causal link from the Compact to their alleged injury. For example, Objectors quote Article IV.G of the Compact on the creation of the CITT and then leap from the existence of the CITT to the conclusion that the CITT caused lower FIIP deliveries—all without any further evidence or citation. Objectors' Opening at 8-9. The Court should not accept such unsupported allegations. And the evidence shows only that the CITT has made information available for FIIP to use consistent with the Compact. *See* § 85-20-1901, MCA, Art. II.24 (CITT is to "plan and advise the Project Operator" on numerous implementation tasks); Tr. 35:9 – 36:6; 37:3 – 39:9 (Makepeace described, at length, background tasks completed by the CITT, including the task to bring the CSKT's water measurement data gathered since 1982 online for the public and FIIP to

use). From this, Objectors' Opening implausibly concludes that because the CITT provided for a website where data is made available to FIIP, this means the CITT dictates to FIIP when and how much water it may deliver.

Objectors next state, without citation to the transcript or any document, that the Compact Parties claim there is no connection between the CITT and the operation of the FIIP. Objectors' Opening at 11. This is not correct. The Compact Parties two witnesses, Makepeace and Casey Ryan, both testified about the time periods when they chaired the CITT since 2015 to implement appropriate parts of the Compact. Tr. 22:21-23; 37:5 – 39:9; 40:11– 41:5; 51:25 – 52:20. The Compact includes an entire Appendix (3.5) that defines the CITT's role. *See* Art. II.24; Objectors' Opening at 11 (quoting from App. 3.5(2)(i)). The Compact Parties did not object to Objectors' Exhibits related to the CITT. Tr. 11:9 – 12:16 (Exhibits 13 – 18).

Objectors further err when they state that the measurement tools and information aggregation done by the CITT caused specific water delivery decisions. Objectors' Opening at 11 (first full para.), 12 (the building blocks to better water management “resulted in a significant reduction in irrigation water”). Again, these conclusory statements are unsupported by any testimony or specific conduct of the CITT to supply the “by operation of the Compact” connection to their alleged material injury. Rather, the testimony of Makepeace and Ryan is that the only work accomplished by the CITT during this time period was to provide the Project Operator with better information and better tools to operate the Project and manage the water supply. Tr. 22:21 – 23; 37:5 – 39:9; 40:11– 41:5; 51:25 – 52:20.

In sum, Objectors identify no connection to the Compact for their allegations of material injury, and the evidence shows that Objectors water delivery dates and volumes have not appreciably changed unless related to FIIP operational problems.

B. Objectors Have Not Shown the Compact Takes Any Water Rights

Even though the Court rejected the argument already, *Compact Validity Order* at 57-58, Objectors seek to revive their claim that they have suffered a taking of their water rights because of the Compact, Objectors' Opening at 5-8. Objectors appear to believe that the Compact had to account for their purported Walton water rights, and they object to having to work with the Flathead Reservation Water Management Board (“Board”) to obtain a certificate for such claimed use. These arguments reveal Objectors' misunderstanding of water rights and the water rights adjudication process in Montana.

Walton water rights are rights that are subject to the state-wide Montana adjudication process. The Montana Water Use Act provides the framework for adjudicating water rights that existed prior to July 1, 1973, including *Walton*, Secretarial, or any other water use. Like any other water user in Montana, Objectors had to file timely statements of claim for any water rights they believe “existed” prior to July 1, 1973, including rights arising under federal law. *See* §§ 85-2-221; 85-2-222, MCA. Those rights, if timely filed, will be evaluated during the Montana adjudication in due course. *Compact Validity Order* at 58. Moreover, Walton rights do not automatically run with the land; they must have been actively maintained by continuous use and all steps in the relevant adjudication process taken for them to be legally recognized. *See Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981). This Court has clarified that Objectors’ right to pursue those water rights claims in the state-wide basin adjudication is preserved by the Compact; thus, the Compact causes no taking. *Compact Validity Order* at 50-51, 58, 61. Objectors’ argument fails to show material injury by operation of the Compact and impermissibly seeks to relitigate legal issues the Court already decided.⁵

IV. COMPACT VALIDITY CHALLENGES ARE OUTSIDE THE SCOPE OF THE EVIDENTIARY HEARING AND BRIEFING AND SHOULD BE DISREGARDED

The purpose of the evidentiary hearing was for the Objectors to prove, through admissible evidence, that they suffer a concrete, non-speculative material injury from operation of the Compact. *Case Management Order No. 5*, Dkt. No. 2109.00 at 2 (Jan. 31, 2025) (“The parties should expect the hearing to include the objectors’ burden to prove material injury by operation of the Compact.”); *see Order Setting Dates for Evidentiary Hearings and Case Management Conference*, Dkt. No. 2099.00 at 1 (Jan. 2, 2025) (“The factual issues [to be addressed at evidentiary hearings] may include, . . . , evidence from any remaining objector . . . to prove material injury. . . .”). The material injury hearings were not Objectors’ opportunity to relitigate issues that should have, or were raised and resolved, during the period set aside for briefing on legal issues. *CMO 3* at 2-3; *Hearing 15 Order on Prehearing Motions*, Dkt. No. 2590.00 at 3; *Clarification Order and Case Management Order No. 7*, Dkt. No. 2147.00 at 1

⁵ All legal issues should have been raised in 2024 during the period set aside for briefing on legal issues. *Case Management Order No. 3*, Dkt. No. 1395.00 at 2-3 (Oct. 18, 2023) (“CMO 3”); *Hearing 15 Order on Prehearing Motions*, Dkt. No. 2590.00 at 3 (May 5, 2025); *Clarification Order and Case Management Order No. 7*, Dkt. No. 2147.00 at 1 (Mar. 5, 2025); *see also* section IV (addressing Objectors’ renewed Compact validity arguments).

(Mar. 5, 2025). After the hearings concluded, the Court reiterated this governing principle. For example, the Court further explained that, in post-hearing briefing, the “content of the brief is limited to the scope of issues addressed at the evidentiary hearing” and that any references to exhibits shall only be to exhibits admitted in the hearing addressed in the brief. *Case Management Order No. 9*, Dkt. No. 2602.00 at 2 (May 16, 2025). Objectors’ Opening devotes attention to legal matters that they did not address at the evidentiary hearing, that they should not raise now, and that the Court should disregard.

For example, Objectors suggest the Court’s ruling regarding the Compact’s validity was erroneous and the Compact does in fact violate Article IX of the Montana Constitution. Objectors’ Opening at 8. First, briefing on Objectors’ material injury is not an opportunity to relitigate conclusions the Court has decided. *Compact Validity Order* at 62, 66-68 (rejecting claims that the Compact violates the Montana Constitution, including Article IX). Second, Objectors boldly state CSKT’s position is that it owns all the water on the Flathead Reservation, somehow making a certificate issued by the Board invalid. As discussed above, this misguided argument appears rooted in Objectors’ misunderstanding about how to obtain decreed water rights under the Montana Water Use Act versus how to seek and obtain approval for new water uses on the Reservation. *See* Unitary Administration and Management Ordinance, § 85-20-1902, MCA (“UAMO”), § 2-2-101. Third, Objectors ignore this Court’s consideration of CSKT’s apparent position during Compact negotiations and its conclusion that the Compact reflects CSKT’s compromised position about water ownership. *Compact Validity Order* at 62. Objectors erroneously believe that any requirement that they obtain a permit from the Board for new water uses is a “taking” of some existing, but non-decreed water right they claim to possess. This unfounded view must be rejected, as it is entirely inconsistent with state-wide practice that new water uses require users to obtain a permit. *Compare* § 85-2-302, MCA, *with* UAMO, § 2-2-101. That Objectors—like every other Montana citizen—are subject to a permitting process for new water uses is not a constitutional or other legal violation.

Objectors’ Opening goes on to challenge the Compact’s validity by claiming it violates certain treaties because the Compact “provides the Compacting Parties to control water availability to the Objectors and that control inherently results in value depredation that gives rise to the Treaties’ remedies.” Objectors’ Opening at 12-13. Objectors advanced this argument in legal issues briefing. *Motion and Brief to Deny Compact Based on Adequacy and Fairness*

and Other Issues of Law, Dkt. No. 1814.00 at 2-10 (July 10, 2024). The argument went nowhere then, and the Court should not entertain it now. Objectors’ fanciful invocation of a 19th Century remedy for actions that have no relationship to the Compact do not show material injury. *Mares v. United States*, 29 Ct. Cl. 197, 201-06 (Ct. Cl. 1894) (discussing limitations on the availability of “Indian depredation” claims); *Compact Parties’ Answer Brief to Motion and Brief to Deny Compact Based on Adequacy and Fairness and other Issues of Law* (Dkt. No. 1814.00), Dkt. No. 1898.00 at 9-10 (Sep. 12, 2024) (arguing that the negotiation and compromise over the scope of CSKT’s reserved water rights was not a “depredation”). The bottom line is that, through the Hellgate Treaty and other laws, CSKT was guaranteed sufficient water to ensure the Flathead Reservation will serve as a permanent homeland for its people. Motion at 7-11. That CSKT reached a compromise with two other sovereigns—the United States and the State of Montana—about the scope of that reserved right does not give rise to any “depredation” claim. Such “claim” is just Objectors’ attempt to repackage their dissatisfaction with being junior to CSKT’s senior rights and thus fails to show any error in the Compact or material injury to them from it.

Continuing to disregard the procedural boundaries this Court established, Objectors revive their claim that the Compact is not ratified because the Montana Water Rights Protection Act allegedly amended it, invalidating the Montana Legislature’s ratification. Objectors’ Opening at 13. This issue was briefed, and the Court already rejected this argument. *Compact Validity Order* at 25-27. Repeating it now, in the context of material injury, is not only procedurally improper, but it further demonstrates that Objectors cannot prove material injury from the Compact in this case.

V. CONCLUSION

For the foregoing reasons, the Compact Parties request that the Court find the Objectors have not carried their burden to demonstrate material injury to their water rights or other property interest from operation of the Compact. The Court should dismiss all objections and approve the 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. 14 was served by email to counsel for the Objectors and email to counsel for the Compact Parties as set forth below this 19th day of September, 2025.

/s/ Jean Saye

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