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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**  
**EVIDENTIARY HEARING No. 16**

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**COMPACT PARTIES' POST-HEARING RESPONSE BRIEF**  
**REGARDING MATERIAL INJURY HEARING No. 16 [Allen]**

Under the governing order,<sup>1</sup> 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 Objector Vivian Allen’s (“Allen”) assertions of material injury in her *Post Hearing Brief Hearing 16*, Dkt. No. 2655.00 (August 22, 2025) (“Allen’s Opening”). As the Compact Parties explained in their *Post-Hearing Opening Brief Regarding Material Injury Hearing No. 16*, Dkt. No. 2647.00 (August 22, 2025) (“Compact Parties’ Opening”) and below, Allen has not carried her 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.

Objector Allen failed to prove material injury at her hearing. She presented only general conclusions about connectivity between surface and groundwater—a principle the Compact Parties generally do not dispute. Beyond that, she offered little other than lay speculation about potential impacts to her well in the event the Tribes exercised their Flathead System Compact Water Right (“FSCWR”), including the 90,000 acre-feet allocation from Hungry Horse Reservoir (“Hungry Horse Allocation”). In crafting her brief, Allen relied on evidence and testimony from another hearing and copied the brief of another objector, making only minor corrections to account for her personal water right. None of this meets her burden to demonstrate material injury by operation of the Compact.

## **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. Allen’s 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 her material injury assertion is uncontested.<sup>2</sup>

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

<sup>2</sup> As with Carter’s brief, Allen’s use of the term “harm,” instead of the correct term of “material injury” to describe her burden throughout her Opening is unsupported by any citation or

## II. ALLEN FAILED TO ESTABLISH MATERIAL INJURY TO HER WATER RIGHT

Allen's brief consists of two sections. The first 13 pages (through section IV) are essentially a cut-and-paste of Mickale Carter's brief, *Post Hearing Brief Hearing 15*, Dkt. No. 2611.00 (July 30, 2025), with modest attempts to tailor the argument to Allen's own water right or alleged material injury. Nearly every heading and subheading are identical to that of Carter's brief. Throughout the brief, Allen repeatedly cites testimony from Carter's hearing and refers to Carter's exhibits. At one point, Allen even describes Carter's water rights, along with testimony from CSKT's Seth Makepeace regarding those rights. Allen's Opening at 7. Thus, at a minimum, Allen's brief suffers the same defects explained in the Compact Parties' response to Carter. *See Compact Parties' Post-Hearing Response Brief Regarding Material Injury Hearing No. 15 [Carter]*, Dkt. No. \_\_\_\_ (Sept. 19, 2025). The second part of Allen's Opening, section V, pages 14-19, reflects her attempt to apply the evidence presented at her hearing to her claim of material injury. But this section ultimately offers nothing new in terms of argument or evidence and, thus, also fails to meet Allen's obligation to demonstrate material injury.

Allen seems to believe that simply invoking her reliance on other objectors' evidence and arguments is sufficient for her to cite to them in support of her own material injury. *See* Allen's Opening at 3, n. 3 ("Allen stated her reliance upon Carter's relevant exhibits and testimony as well as that of others...."). But this Court has been clear. The burden to demonstrate material injury is on each objector who requested a hearing and those objectors can only rely on evidence established at their hearing. *See 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 also* January 30, 2025, Case Management Conference, 4:33-5:00 (describing the purpose and structure of the hearings as "a number of individual hearings, not one big long hearing where we start out with evidence at the beginning and is cumulative evidence"); *Case Management Order No. 9*, Dkt. No. 2602.00 at 2 (May 16, 2025) (any references to exhibits in briefing shall only be to "exhibits admitted *in the hearing addressed in the brief*") (emphasis added). Allen's reliance on Carter's exhibits and testimony presented during Carter's hearing should be disregarded by this Court.

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explanation and does not lessen her obligation as an Objector to the CSKT Compact under the applicable law.

But even if this Court considers Carter’s evidence and testimony as part of Allen’s argument, Allen still fails to prove she is materially injured by operation of the Compact. First, and most fundamentally, Allen’s entire argument is based on a lay understanding of the generalized concept that surface water and groundwater are connected. From this, she makes the leap that if CSKT were to withdraw its FSCWR from Hungry Horse Reservoir, it would lower river levels in her area and thereby lower the water table supporting her well. *See* Allen’s Opening at 6-8. Setting aside whether Allen accurately characterizes the nature of surface-groundwater interactions near her well, her argument misses a bigger point. Any release of the FSCWR from Hungry Horse Reservoir would be released from Hungry Horse Dam and flow down the South Fork of the Flathead River toward the confluence with the Middle Fork—the very area in which Allen’s well is located. Hearing Tr. 58:1-16 (May 7, 2025) (“Tr.”); CP 16 Ex01\_001. Using her own groundwater-surface water connectivity theory, releasing CSKT’s Hungry Horse Allocation would result in *more* water in the South Fork and would arguably *raise* her well level, not lower it. *See* Tr. 82:4-14 (Makepeace testimony). Allen’s belief that the CSKT would drain the Flathead River and lower her well level is undermined by the basic workings of the CSKT’s Hungry Horse Allocation.

Second, existing laws, including the Compact, protect Allen’s water right. *See* Compact Parties’ Opening at 8. To begin, Allen’s well is specifically protected from call under the Compact. *Hearing 16 Prehearing Order*, Dkt. No. 2594.00 at 2 (Agreed Fact No. 1); § 85-20-1901, MCA, Art III.G.2. Moreover, in the event the CSKT decided to develop their FSCWR near Allen’s well, they could not do so without complying with state law, being subject to an objection by Allen or others, and obtaining the approval of the Department of Natural Resources and Conservation (“DNRC”). *See* § 85-20-1901, MCA, Art. IV.B.5.c & Art. IV.B.6.c.vi (requiring compliance with the change of use state law requirements under §§ 85-2-302, 85-2-307 to -310, 85-2-314, and 85-2-402, MCA). Allen now complains that even if the Compact protects her well, she may be subject to call by others or may be forced to call the Columbia Falls municipal well to protect her water right. *See, e.g.*, Allen’s Opening at 16. This is not a function of the Compact, but rather the consequence of being a junior user in a priority system that long predates passage of the Compact and does not establish material injury. *See Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00 at 75-76 (Apr. 1, 2025) (“*Compact Validity Order*”); *see also State ex rel. Greely v. Conf. Salish & Kootenai Tribes of the*

*Flathead Reservation*, 219 Mont. 76, 89, 712 P.2d 754, 762 (1985) (“*Greely*”). Nor, as this Court has determined, is it a 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.”). Allen may have “zero confidence” in DNRC’s process (Allen’s Opening at 18), but the assumption that state agencies will not follow the law is nothing more than speculation and cannot form the basis of material injury. *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, at \*10 (Mont. Water Ct., Oct. 31, 2012) (“*Forest Service*”) (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.”).

Third, like Carter, Allen claims “uncertainty” over her groundwater supply in the driest 15-20% of years. Allen’s Opening at 8. Again, this is nothing more than speculation and cannot demonstrate material injury. *Forest Service*, at \*10. Allen cannot meet her burden by mere speculation about what she fears might happen to her well in the future.

Fourth, as with Carter, the evidence Allen submitted does not demonstrate any injury. Allen is a lay witness with no education, experience, or training in hydrology. She did not hire an expert witness to model or analyze her water right. All Allen provided was generalized information showing a connection between groundwater and surface water. Carter’s assertion of material injury is premised on any change in the level of the aquifer being an injury to her shallow groundwater wells. But such a definition would preclude there being any withdrawal from the Flathead River or the aquifer in her area by any party at any time. Instead, state law allows new development if the existing right can still be satisfied. Section 85-2-311(1)(b), MCA (water rights of an existing user “will be satisfied” even with the new use); § 85-2-401(1), MCA (allowing post-1973 water users that lower the water table so long as “the prior appropriator can reasonably exercise the water right under the changed conditions”).

Similarly, as with Carter, Allen attempts to flip the burden to the Compact Parties when she argues that the Compact Parties should have conducted studies to determine the impact on groundwater levels near her home from the CSKT’s use of the FSCWR. Allen’s Opening at 15,

18. But this Court has foreclosed such arguments to demonstrate material injury. *See Hearing 15 Order on Prehearing Motions*, Dkt. No. 2590.00 at 3 (May 5, 2025). The same logic should apply to Allen, particularly given the extent to which she relies on evidence and testimony from Carter’s hearing.

Fifth, like Carter, Allen provides lay opinions on hydrologic matters that go beyond her hearing testimony which must be rejected. Specifically, Allen (relying on Carter’s brief) makes expert witness-like conclusions on the speed at which groundwater near her wells moves and the impact certain Flathead River flows would have on the groundwater-dominated baseflow supporting the Flathead River. Allen’s Opening at 4, 5-6, 7. These matters are outside the capacity of the lay witness to testify about and require application of advanced analysis beyond the cited exhibits. These assertions *during briefing* also amount to improper post-hearing testimony, seeking to prevent the Compact Parties from objecting to or refuting the testimony through rebuttal witnesses.

Moreover, as with Carter, the analysis Allen provides of the baseflow has significant flaws. Initially, Allen assumes that the Flathead River will fall to the minimum allowable flow levels or below in all the drier years. Allen’s Opening at 5-7 (citing 3,200 or 3,500 cfs flow levels in Compact App. 7). But those levels are the *minimum* flows in drought years. The actual flows could be higher, depending on hydrologic conditions, and thus the Compact provides a *floor*, not a ceiling.<sup>3</sup> Further, Carter’s baseflow calculations, upon which Allen relies, use a starting point of 5,000 cfs that is considerably less reliable than Carter describes. *See* Allen’s Opening at 5, citing Carter’s hearing Tr. 46:10 – 48:24 (describing contents of Carter’s Ex. 6). The text of Carter’s exhibit 6 states that “the baseflow for the Flathead River at Columbia Falls (Figure 1.5) might be estimated to be approximately 5,000 [cfs].” Carter’s Ex. 6-4 (emphasis

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<sup>3</sup> The Court should reject Allen’s baseless speculation, Allen’s Opening at 4, n. 6, 5, n. 7, 6, n. 9, that CSKT can or will breach the minimum Flathead River flow levels or otherwise not adhere to the prescriptive terms of the applicable Compact Provision or water rights abstract. The Compact and the relevant abstract require that “[t]he exercise of this water right shall conform with the minimum instream flow schedules [contained in certain tables in Compact Appendix 7]. . . . In the event that the minimum instream flow schedules or ramping rates are not met, the use of the water right . . . *shall be suspended* until such time as those minimum instream flow schedules and ramping rates are achieved.” (emphasis added). Section 85-20-1901, Art. III.C.1.c.iv; Preliminary Decree, App. 2, Decree Report page 65 (pdf page 68). A material injury claim premised on CSKT taking bad faith actions expressly forbidden by the relevant abstract is speculation and must be rejected.

added). The general interest publication Carter cites (and Allen relies upon) for this proposition does not define what period of record is used to compute this estimate, whether that period includes years before Hungry Horse Reservoir was created or after when the hydrology is different, and what statistical metric 5,000 cfs represents (mean, median, certain percentile, etc.).

Allen fails to demonstrate her well will be harmed by operation of the Compact. Nevertheless, using her own logic of surface-groundwater connectivity, it is plausible that CSKT's use of the Hungry Horse Allocation may *raise* her well level by increasing streamflow with releases from Hungry Horse Dam. Furthermore, Allen's well is protected from call under the Compact and by state law in the event the Tribes seek to develop their FSCWR. Allen suffers no material injury by operation of the Compact.

### **III. ALLEN'S LEGAL ATTACKS ON CSKT'S FLATHEAD SYSTEM COMPACT WATER RIGHT MUST BE REJECTED**

Like Carter, Allen next attacks the FSCWR with various legal allegations that all must be rejected. Allen first alleges that the 1855 priority date of the FSCWR is invalid, and therefore all of her water rights are senior to it. Allen's Opening at 10-11. She then argues that she is materially injured by the Compact not conditioning use of the FSCWR with high enough instream flow requirements to support her claimed constitutional right to harvest wild fish. *Id.* at 11-13. Finally, Allen maintains that the Water Court lacks jurisdiction to approve the Compact with water rights for any "new" use like the FSCWR. *Id.* at 13-14. These assertions are meritless for the procedural and substantive reasons detailed below.

#### **A. Allen's Legal Challenges Are Raised Too Late to be Considered by the Court**

Allen raised numerous legal issues in her opening motion of law. *Motion and Memorandum in Support of Motion for Summary Judgment*, Dkt. No. 1809.00 (July 9, 2024). Now, in her post-hearing material injury brief, Allen, copying Carter, raises three more legal challenges. The timing of these latest legal arguments fails various procedural requirements that govern this case and therefore preclude the need for any substantive analysis of their dubious merits.

For example, the current phase of the case concerns factual allegations about material injury. At the start of 2025, the Court outlined that it would hear factual challenges related to material injury from the operation of the Compact and required the Objectors to summarize those

factual allegations that would be the subject of each Objector's hearing.<sup>4</sup> Allen timely filed a *Request for Hearing*, Dkt. No. 2112.00 (February 18, 2025), and properly did not raise any of the legal arguments she has now added to her post-hearing opening brief. Next, all legal issues should have been raised in 2024 during the period set aside for briefing on legal issues. *Case Management Order No. 3* ("CMO 3"), Dkt. No. 1395 at 2-3 (Oct. 18, 2023). This Court has explicitly stated that the 2025 factual hearing process was not the time to reargue legal issues. *See, e.g., 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).

Finally, none of the three legal issues Allen copies from Carter were raised in Allen's Objection or Amended Objection that are her governing pleadings.<sup>5</sup> The time for Allen to revise her Amended Objection and include more legal argument was December 8, 2023. *CMO 3* at 2. That date has long since passed and she cannot now seek to effectively amend her Amended Objection through this briefing. Thus, for many procedural reasons, the Court should not entertain any of the legal contentions lodged by Allen in her Opening.

**B. Allen's Legal Challenges to the Priority Date for the FSCWR Are Meritless**

As with Carter, Allen alleges that the Compact's 1855 priority date for the FSCWR is wrong or so outside established law that the Court could not consider it. But this attack on the FSCWR is refuted by the Court's ruling on legal issues in which it approved the FSCWR. *Compact Validity Order* at 45, 73. If the Court were to consider Allen's legal challenge to the priority date for the FSCWR, such opposition should be rejected because it disregards a fundamental aspect of Indian reserved water rights: that they must provide for the *future* needs of the CSKT's reservation. *Arizona v. California*, 373 U.S. 546, 599-600 (1963); *Greely*, 219 Mont. at 93-94, 712 P.2d at 764-65. Tribal water rights are not governed by and are different than state-law appropriative water rights; they do not require establishment through actual use. *Greely*, 219 Mont. at 89-90, 712 P.2d at 762-63. Thus, Allen's expectation that state law historical use rules apply to quantify and determine the priority date for the FSCWR is wrong. *See* Allen's Opening at 10-11, 13. And Allen's challenge to the Court's jurisdiction to even adjudicate CSKT's future

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<sup>4</sup> *Case Management Order No. 5*, Dkt. No. 2109.00 at 2 (Jan. 31, 2025); *Order Setting Dates for Evidentiary Hearings and Case Management Conference*, Dkt. No. 2099.00 at 1 (Jan. 2, 2025).

<sup>5</sup> Allen filed her original objection, Dkt. No. 126.00, on November 28, 2022. She then amended her objection to add an additional claim not relevant here on December 5, 2022. Dkt. No. 385.00.



rights fails for the same reason. The Court has correctly ruled that it is empowered to review the Compact based on §§ 85-2-701, -702, MCA, and must be guided by applicable federal law, *Compact Validity Order* at 17, 20-21, which explicitly allows such uses.

Additionally, Allen's attack on the 90,000 acre-feet Hungry Horse Allocation, which is a part of the FSCWR, is infirm for another reason.<sup>6</sup> The Hungry Horse Allocation comes from a federal reservoir over which Congress has exclusive control. Congress can adjust the status of the water stored in federal facilities subject to limitations not applicable here. *In re Crow Water Compact Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Crow Tribe of Indians and the State of Montana*, 2015 MT 353, ¶ 25, 382 Mont. 46, 364 P.3d 584. Allen's challenges to the FSCWR's 1855 priority date must be rejected.

### **C. Allen's Fisheries' Water Rights Contention Fails**

Like Carter, Allen speculates that she will be harmed by a theoretical future drought, and in such context, if CSKT uses their Hungry Horse Allocation, Flathead River flows will decrease to the minimum required flows under the Compact as a result. Allen's Opening at 11-13. Allen claims this interferes with her Montana Constitutional right of the "opportunity to harvest wild fish," thus causing her injury. *Id.* Allen then argues that this opportunity to harvest fish *requires* that higher minimum flows must be maintained as compared to those specified by the Compact. *Id.* This argument is contrary to state law and the priority system.

First, the constitutional provision Allen relies on does not create a right to a certain flow in the Flathead River. The text of the provision focuses on the "opportunity to harvest" fish, a concept that is different from the conditions that provide fish to harvest. This construction is reinforced by § 87-1-107, MCA, that provides the Montana Legislature's understanding that the constitutional "opportunity for a person to harvest" fish is carried out through the enactment of "the laws of this title pertaining to the lawful means of hunting, fishing, and trapping, as defined in 87-2-101 and 87-6-101. . . ." These laws alone provide the "adequate remedies for the preservation of the harvest heritage of the individual citizens of this state." Section 87-1-107, MCA. They include no provision for the instream flows that Allen desires. Allen is mistaken that she has an enforceable instream flow right in the Flathead River under the Montana Constitution. Outside of the United States and the Tribes, only the State of Montana can have

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<sup>6</sup> The Hungry Horse allocation can satisfy the larger FSCWR in part. *See Compact Parties' Opening* at 3-4 (explaining the more junior reservoir allocation component of the FSCWR).

such broad-based rights to protect fisheries, not individual citizens.<sup>7</sup> Nothing in the Compact prevents Allen from the “opportunity to harvest” fish by buying a state fishing license and throwing her line in the water.

Second, Allen is wrong that the “Murphy rights” flows she relies on are “*required flow rates* set by [the Department of Fish, Wildlife and Parks (“DFWP”)]” that the Compact is required to meet. Allen’s Opening at 12 (emphasis added). Rather, the “Murphy rights” fishery flows in the Flathead River are for the available unappropriated flow with an effective priority date of 1970. S. Brown, M. Bryan & R. McElyea, *Montana Water Law*, 202-03 (2021). Those “Murphy rights” flows are *not* a mandatory restraint on any senior uses, like the 1855 priority date FSCWR.<sup>8</sup> Thus, Allen’s new legal arguments—even if not procedurally barred—have no support under state law.

#### **IV. ALLEN’S ADDITIONAL SIX PAGES OF ARGUMENT OFFER NOTHING NEW AND FAIL TO DEMONSTRATE MATERIAL INJURY**

After copying Carter’s brief almost in its entirety, Allen adds an additional six pages of her own argument, most of which either repeat arguments already made and addressed above, rely on her lay assessment of the hydrologic conditions near her well, or raise issues not relevant to this proceeding. *See* Allen’s Opening at 14-19.

For example, Allen repeats the arguments of others concerning CSKT’s supposed unquantified water quality claims. Allen’s Opening at 15. But this Court addressed this matter in the *Compact Validity Order* at 26, concluding even *if* there were unquantified water quality claims held by CSKT, they were outside the scope of this proceeding.

Allen also attempts to undermine the testimony of CSKT hydrologist Seth Makepeace by relying on her lay understanding and anecdotal observations. First, despite Makepeace’s testimony concerning the cause of low reservoir levels at Hungry Horse in the late 1980s, Tr. 83:9 – 84:24, Allen claims she “provided eyewitness testimony in detail and USGS documentation to the contrary.” Allen’s Opening at 16. This plainly mischaracterizes the nature

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<sup>7</sup> Section 85-2-223, MCA (only DFWP has exclusive representation of the public to hold pre-Montana Water Use Act rights for recreation purposes like fisheries); § 85-2-316(1), MCA (allowing only Montana to reserve water to maintain streamflow); § 85-2-436(1), MCA (only DFWP may hold leases for instream flows for fisheries or hold instream water rights resulting from a change of use from another purpose); § 89-901(2), RCM (Murphy rights held by DFWP).

<sup>8</sup> Section 85-20-1901, MCA, Art. III.C.1.c.viii.

of Makepeace’s testimony, which contradicted Allen’s understanding of what *caused* low reservoir levels in the 1980s. Tr. 83:9 – 84:24. Makepeace never testified that Hungry Horse Reservoir was not low at that time; on the contrary, he explained *why* the water levels in the late-80s were low, and how new management approaches today prevent that from happening. *Id.* Allen also attempts to undermine Makepeace’s testimony that Bad Rock Canyon restricts groundwater flow into the Flathead River by asserting that “had he better knowledge of the area, he would have known, as all river floaters do, that the funnel is approximately 2 miles upstream of Bad Rock.” Allen’s Opening at 17. Even if Makepeace was wrong on the specifics, Allen is supporting his underlying point: Bad Rock Canyon restricts groundwater flow and does so in such a manner that the water table supporting Allen’s well levels will likely benefit from Reservoir releases into the Flathead River. *See* Tr. 82:4-14.

Allen’s final section offers nothing new for this Court to consider, nor does it demonstrate any material injury to Allen by operation of the Compact.

## V. CONCLUSION

For these reasons, the Compact Parties request that the Court find that Allen has not carried her burden of proof to demonstrate material injury to her water rights from operation of the Compact. The Compact Parties further request that the Court dismiss all objections, including Allen’s, 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. 16 was served by mail to the Objector and email to counsel for the Compact Parties as set forth below this 19th day of September, 2025.

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