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

CASE NO. WC-0001-C-2021

RESPONSE TO COMPACT PARTIES'
POST HEARING BRIEF
Hearing No. 14

COME NOW the Objectors, as shown on Exhibit "A" attached hereto, by and through their attorney of record Kimberly L. Field, and hereby submit their *Post Hearing Brief* for hearing no. 14, which was held on May 1, 2025.

In this Court's Friday, September 12, 2025 Order, regarding Objectors' contention that the "official" transcript is missing critical testimony dealing with the Tribe's refusal to consider historical usage, a consideration that is mandated by the Compact, the Court states that "the Request has little foundation other than the recollections of counsel as to what might have been said during the hearing". This Attorney subsequently filed Declarations of Wally Congdon, Gale Decker, Russ Smyth, and Tad and Tamara Thomas supporting Objectors' contention. The Court further states that the "video recording is *not* the official transcript of the hearing," and that "Field shall not distribute the video absent further order of the Court," and "[N]o copy or redistribution of the video shall be made without a further request and order of the Court." The Video recording is (or should be) public record and accordingly the Court's restrictions on the "copy or redistribution" of the video, *absent a Court Order*, places an unreasonable restriction on Objectors' ability to validate their contention and stymies their ability to allow third-parties, including possibly technical experts, to properly analyze the video. Objectors maintain that the Zoom Video recording is still

incomplete. They submit that the missing testimony further validates their material damage claims and the Court's restrictions inhibit Objectors' ability to substantiate those claims.

The task of showing material damage is compounded by the Compact Parties and this Court restricting the Objectors' review, use and disclosure of the "Damages Report." The "Damages Report" should be of public record, is the "missing link" to the Compact and was a significant contributing document to the Compact's purported ratification. The inability to use the Damages Report frustrates the efforts to disclose material damage and the proof that Compact pre-implementation resulted in significant material damage. This Court's inspection and use restrictions resulted in Objectors' inability to use information that exists within the Damages Report to further substantiate their material damage claims.

A. The Compacting Parties' Contention that Objectors Did Not Show the Compact Violates Contracts, Treaties, and Other Agreements is Wrong.

The Compact Parties contend that the Objectors' claim that the Compact caused them material injury by violating various contracts and other agreements such as repayment contracts, patents, and treaties is not supported by the record evidence. The Compact Parties failed to review the Objectors' original Objections and Amended Objections, along with the Compact Parties' first set of discovery requests directed to Objectors. The Compact Parties state that the "Objectors' pre-hearing testimony did not explain the contracts, treaties, or other referenced agreements, other than a reference to repayment contracts and patents. The repayment contracts and patents are sufficient to support the claim that the Compact violates Objectors' water rights and their real property rights. Objectors specified which contracts, treaties and other agreements that have been violated by the Compact in detail in their original Objections and Amended Objections and to which this Court took Judicial Notice.

In Objectors' Pre-Hearing Testimony Objectors expressly reserved the right to supplement by oral testimony to provide further proof of their material damages. At the Evidentiary Hearing, Objectors requested that they be permitted to provide additional testimony to introduce exhibits supporting their Pre-Hearing Testimony. The Court agreed with Objectors, however denied that request. As stated in their *Post Hearing Brief*, the Court allowed pro se objectors the ability to provide testimony beyond their prehearing submissions. Again, as the discovery process was ongoing, Objectors filed supplemental exhibits with this Court and submit that the admission of Objectors' testimony should have been granted.

B. The Compact Parties' Contention that the Objectors Have Not Suffered a Taking of Any Water Rights is Without Merit.

The Compact Parties, again, fail to review the named Objectors' original and Amended Objections, along with the Compact Parties' first discovery requests. The Thomas Objectors demonstrated how the "Certificate of Domestic Allowance" resulted in material damage. Exhibit 12, September 27, 2025, from the Flathead Reservation Office of the Water Engineer, re: Response to 60DF-PartB: Domestic Allowance Completion Form, which provides:

"Lawn and Garden Acreage. You have applied for 1 acre of lawn and garden on form 60DF-Part B. This is above the maximum (0.7 Acres) allowed on a domestic allowance. The areal image provided shows what appears to be a 0.9 acres of watered lawn and garden area. To have your application reconsidered, please reduce your lawn area by approximately 0.2 acres to meet the 0.7 Acres maximum threshold allowed on this type of allowance. *Please show how you have reduced your lawn by submitting a detailed map of your new lawn and garden design that shows how you will stay below the 0.7 Acre limit with your response to this letter.*" (emphasis added)

That restriction was implemented as a result of the Compact's pre-implementation. The restriction usurps Objectors' Walton Rights. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270-72 (9th Cir. 2017) (reserved water rights include ground water). That taking is in direct violation of Objectors' procedural and substantive due process rights under both the Montana and United States Constitutions. The "Certificate of Domestic Allowance" issued pursuant to the Compact Parties' Compact pre-implementation is an unconstitutional taking of Objectors' Walton Water Rights, and their personal property rights and is presumptive proof that material injury occurred.

The Exhibits 11 – 13 admitted into evidence, validate Objectors' takings claim. Exhibit 13 is the "Master Agreement Between the State of Montana Through the Department of Natural Resources and Conservation as Its Designee and The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation". The Preamble states:

...
This Agreement demonstrates a commitment by the CSKT and the State of Montana through the Department of Natural Resources and Conservation (DNRC) to implement this government-to-government partnership. The State-Tribal Cooperative Agreements Act, §18-11-101 et seq., MCA, promotes cooperation between State agencies and *sovereign Tribal governments*, and authorizes the State of Montana to enter into this Master Agreement with the CSKT.

WHEREAS the Parties have negotiated a water rights compact (the

Compact) which was ratified by the Montana Legislature on April 24, 2015, and codified at Montana Code Annotated §85-20-1901;

WHEREAS pursuant to Article VI.A. of the Compact, the State is obligated to contribute \$55 million for the purposes of implementation of the Compact". (emphasis added)

...

It is clear that the State of Montana Department of Natural Resources and Conservation, as Exhibits 11 and 12 show, have given full control and authority to the Tribe to pre-implement, and ultimately fully implement the Compact as codified. MCA, Title 85, Chapter 4, et seq. The State's "cooperation" essentially places unfettered control in the Tribe to use in its discretion to take without compensation rights vested in Objectors.

The Compact Parties admit that the Water Management Board's issuance of the "Certificate of Domestic Allowance" does in fact limit the Objectors' ability to pursue their other water rights (i.e., their Walton Rights). That is in direct violation of *Agua Caliente, supra*. That admission is further and compelling evidence substantiating the Objectors' takings claim. The Compact effectuates a taking of property rights in the form of the taking of water rights. The Compact Parties' statement, that the Objectors' testimony "further appears to question the validity of the Certificate, noting it is a "never before...recognized" document, IGNORES the fact that final adjudication and validation by this Court has NOT happened yet. Notwithstanding that fact, pre-implementation has and continues to materially injure Objectors.

This Court specifically stated that the adjudication of the Tribe's water rights is its only objective. The Court, in its April 1st Order falls back on the Montana legislature approving the Compact and the UAMO, which "jointly administers water use, including new permits and change authorizations, within the Reservation's exterior boundaries." Order, page 11, paragraph 4. The Court, however, cannot simply accept that proposition without consideration of the Compact's detrimental impact on the Objectors' constitutionally protected rights whether or not violation of those rights resulted in immediate quantifiable material damage, and simply overlook these Objectors injury. The Tribe's water rights cannot include reserved rights, i.e., Walton Rights, now held by Objectors.

This Court provided the Objectors with the opportunity to meet their burden to prove their material injury damages. However, the Court also denied Objectors the right to the Damages Report and the alleged missing transcript testimony. That denial infringes on Objectors' procedural and substantive rights, further validating their material damage claims.

C. The Objectors' Complaints about How the FIIP is Operated Demonstrate the Resulting Material Injuries.

These Objectors absolutely suffered the material injuries they described in their original Objections and Amended Objections. Objectors' Exhibit 15, Appendix 3.4: Implementation Schedule, specifically states the following at paragraph one:

... "Operational Improvement actions that modernize Flathead Indian Irrigation Project (FIIP) water management procedures and improve the *Compact Implementation Technical Team's (CITT) ability to plan for and manage Natural and regulated stream flows, reservoir storage, and allocation between instream and irrigation uses of water*. Tables in this appendix provide the overall planning schedule for Operational Improvements within each geographic area". (emphasis added)

This, in conjunction with MCA 85-20-1901, Article IV – IMPLEMENTATION OF COMPACT:

E. Shared Shortages Provision.

1. In the event that water supplies are inadequate to simultaneously satisfy an enforceable Instream Flow water right and a corresponding RDA, the provisions of Article IV.E govern the exercise of the water rights set forth in Articles III.C.1.a and III.C.1.d.ii and iv at that location. The CITT shall determine when Shared Shortages conditions *begin and end as specified in Appendix 3.5*. (emphasis added).

Article III.C.1.a. states:

C. Basins 76L and 76 LJ and Flathead Indian Irrigation Project Irrigation Water Diversions from Basins 76F and 76N.

1. Quantification.

a. Flathead Indian Irrigation Project. *The Tribes have the right to water that is supplied to the Flathead Indian Irrigation Project to be used for such purposes in such volumes and flow rates and from such sources of supply as identified in the abstracts of water right attached hereto as Appendix 5.* The FIIP will serve up to, but not more than 135,000 acres. The exercise of this portion of the Tribal Water Right shall be satisfied by meeting the RDA values for each RDA Area described in Appendix 3.2 as evaluated pursuant to Article IV.D.1.e, and is subject to Article IV.D through F.

The priority date for the portion of the Tribal Water Right used by the FIIP is July 16, 1855. (emphasis added)

These Objectors, through their original Objections and Amended Objections, state the lack of FIIP water and stock water has caused them material injury. The above pre-implementation and implementation of the Compact *by the CITT* provides proof that these

Objectors have in fact suffered material injury and damages. The Second and Third paragraphs of Exhibit 15, *Id*, provide:

Incremental implementation of Minimum Enforceable (MEFs) and Target Instream Flows (TIFs), Minimum Reservoir Pool Elevations, and River Division Allowances (RDAs) will occur as Operational Improvements are implemented. MEF, TIF, RDA and Minimum Reservoir Pool Elevations will become enforceable when Operational Improvements are completed following the schedules found in the tables below.

The Parties recognize that State and Federal appropriations to implement Operational Improvements may not be sufficient to cure all deficiencies on the FIIP. Recognizing this, full enforcement of the MEF, TIF, RDA and Minimum Reservoir Pool Elevations will *not* be delayed if the full appropriation State and Federal sources that is directed to Operational Improvement occurs, but is not sufficient to meet all deficiencies the Operational Improvement is targeted to address. (emphasis added).

MCA 85-20-1901,

...

A list of Operational Improvements is set forth in Appendix 3.4. This list may be modified by the CITT as provided in Appendix 3.5. *Any such modification is pursuant to, and shall not be deemed an amendment of, this Compact.* (emphasis added).

...

Exhibit 15 shows how “fluent” the operation of the Compact, or pre-implementation of the Compact, is including Exhibit 14, Appendix 3.5: Adaptive Management & CITT, which states the following:

Article IV.G of the Compact establishes a Compact Implementation Technical Team (CITT) for purposes of planning for and implementation of Operational Improvements, Rehabilitation and Betterment, and Adaptive Management *with regards to the Flathead Indian Irrigation Project (FIIP)*. This Appendix specifies the structure and duties of the CITT.

1. Basis for *Compact Implementation and Adaptive Management*.

a. This appendix identifies actions and tools necessary to carry out provisions of the Compact pertaining to Instream Flows, reservoir pool elevations, and irrigation water management on natural watercourses influenced by, and infrastructure associated with, the Flathead Indian irrigation Project (FIIP).

b. The *commitments and responsibilities of the Parties to implement this Appendix continue over the life of the Compact*.

(emphasis added)

...

This, simply put, states that the pre-implementation of the Compact and Adaptive Management begin with the ratification of the Compact, and with it the CITT. These provisions place absolute control in the Tribe without regard to the probable detrimental impact to other state perfected and vested water rights. The Compact Parties witness, Seth Makepeace, testified that the FIIP is under the direction of the Bureau of Indian Affairs. However, the Objectors demonstrated that the pre-implementation of the Compact is, in fact, the source that supplies the current "empirical" information to the project operations and accordingly ignores the requirement that historic use must be considered. However, as Mr. Makepeace specifically stated in his testimony, page 39, line 18, "[T]hese are empirical observation calculations, so they – they document what the Irrigation Project *is doing* and try to give them the tools to best utilize the available water supply in each year. ***They do not look at historic on-farm water use.*** [T]he CSKT Compact associates the project operator with the responsibility to measure on-farm water use", i.e. the Bureau of Indian Affairs." The Compact specifically states, MCA 85-20-1901:

ARTICLE II. DEFINITIONS:

36. "Historic Farm Deliveries" means the aggregate annual volume of water for irrigation and Incidental Purposes on the FIIP that was delivered to all farm turnouts within an individual River Diversion Allowance Area prior to the date the ratification of the Compact by the Montana Legislature takes effect under State law. Historic Farm Deliveries include historic crop consumption and estimated standard rates of on-farm conveyance and irrigation application inefficiencies and are used to evaluate RDA values pursuant to Article IV.D.1.e. Historic Farm Delivery volumes are specified in Appendix 3.3.

...

e. RDA values shall be evaluated to ensure their adequacy to meet Historic Farm Deliveries. Initial evaluation of RDAs shall occur once the Parties and Project Operator have completed all Operational Improvements in a given RDA Area according to the schedule attached hereto as Appendix 3.4. Evaluation of RDAs will continue as part of the responsibilities of the CITT described in Appendix 3.5 as follows:

- i. The Project Operator must measure and record farm turnout deliveries within a given RDA Area.
- ii. If the aggregate measured deliveries to farm turnouts do not meet Historic Farm Deliveries for a given RDA Area, actual diversions shall be adjusted to assure that Historic Farm Deliveries are met for wet, normal and dry water years. If water in excess of the RDA is needed to meet Historic Farm Deliveries, it will

be provided through an increase of the Flathead River pumping plant diversion allowed by the Flathead Pumping Station RDA attached hereto as Appendix 3.2. If the aggregate measured deliveries to farm turnouts exceed Historic Farm Deliveries within an RDA Area, the actual diversions shall be reduced accordingly.

iii. Any adjustment of actual diversions pursuant to this section shall not result in decrease of the MEFs, TIFs, or Minimum Reservoir Pool Elevations.

Mr. Makepeace testified to the location of the CITT website, he also testified that he was “off” the CITT. This information was not up today as of the day of the May 1, 2025 hearing, Makepeace, testimony at page 41, lines 14 through 23. The current CITT tasks and projects were not accessible to the public, and these Objectors remain in the dark. The release of the Damages Report would be in order.

Exhibit No. 16 – The “Compact Implementation Technical Team Meeting, DRAFT Agenda, included members of the BIA and FIIP. The CITT information is disseminated; “... 2) Informational Updates, CSKT, DNRC, BIA, and the *FIIP, Nick Belcourt, project manager.*”

Exhibit 18, Compact Implementation Technical Team Operating Rules, paragraph 3, CITT membership, “a. CSKT, Montana, BIA, and the Project Operator shall assign a technical team member to the CITT following Appendix 3.5 to the Compact.” Exhibit 14, described above, is the “Adoptive Management & CITT” outlined above.

The material damages from the pre-implementation of the Compact, via the CITT, has directly impacted these Objectors, as well as other irrigators on the reservation.

As stated in these Objectors’ Post Hearing Brief, the Mr. Makepeace testimony is simply not credible. He testified that “I observed that the last four or five years, each of the diversion volumes was in the range of variable prior years” and that he “could not see a *consistent* pattern that suggested that there was a new management procedure in force”. Transcript, page 34, lines 1-5. Later, at lines 10-16, he admits that there were late starts and that there were “some” addressable late starts “due to operational issues with the Irrigation Project, particularly in the Mission C-Canal and the Ninepipes Reservoir.” Again, not surprisingly, it is Mission-C Canal and Ninepipes Reservoir that service the majority of these Objectors and those “late starts” materially damaged Objectors by depriving them of essential irrigation water. Mr. Makepeace did not offer to define or address the operational issues described. He “observed in 2024, there was a *very*, you know, the start and stop dates looked *very similar* to prior periods”. However, no “prior periods” were specified. Yet on page 34, he specifically stated that there were some late starts, however, the “start and stop dates looked very similar to prior periods”. Mr. Makepeace fails to

identify what prior periods he was referring to at that juncture, there he is unable to validate the exhibits that were entered into the record.

All the Objectors Objections and/or Pre-Hearing Testimony stated that the late turn on and early shut off dates limited the Objectors' water delivery from the FIIP and caused economic hardship. On Page 24, Lines 6 – 8, Mr. Makepeace opines that "[t]he measurement network reveals to the tribal staff large insights into how the project is operated through empirical observable information". On Page 27, Line 19 – 24, Mr. Makepeace states "[t]hese are empirical observation calculations, so they – they document what the irrigation project is doing and try to give them the tools to best utilize the available water supply in each year." The use of the word "empirical" denotes "originating in or based on observation and experience." **Unfortunately, Mr. Makepeace's testimony and exhibits, fail to support his argument that the empirical evidence regarding the last 2 – 5 years, negates the material injury or damage that occurred to Objectors' interests.**

As stated above, Objectors submit that the testimony they maintain is missing from the Court's Zoom audio would have supported the Objectors' argument that the current measurement systems, including "empirical observations," do not support Mr. Makepeace's exhibits which were meant to discredit the Objectors' claims of material injury and damages.

Objectors have, in fact, suffered material injury and damages due to the pre-implementation of the Compact.

Virtually all objectors, both on and off the Reservation raised the constitutional problems inherent in the Compact's language and in its ultimate implementation and allowed pre-implementation. The Compact purports to create rights in the Tribe never before recognized. It, essentially, by a "contract" among three governmental entities, adjusts water right priority dates effectively depriving objectors' rights previously granted by the State of Montana; it ignores the rights and limitations created by the various Treaties, including the Hellgate Treaty, between the United States and the Tribe; it effectively eliminates Walton Rights held by many objectors; it fails to provide an adequate forum for objectors to contest actions taken by the Tribe, purportedly taken by rights granted to it by the Compact; it results in depredation disallowed by the Treaties; it inherently devalues privately owned real property to which previously perfected and vested State water rights attach; and, and, among other things, constitutes a taking without just compensation. Those issues are further exacerbated by the Court's refusal to allow reliance on the Damages Report to validate material damage and by the Court's limitations imposed on disclosure of the May 1, 2025, video recording.

Each of those articulated issues raises State and Federal procedural and substantive due process concerns that have not been adequately addressed in these proceedings. Most of the resulting material damages cannot be quantified at least until the Compact receives its final blessing. There is a great likelihood that those damages will occur but proof and quantification is inherently difficult. Those unconstitutionally induced damages are accordingly presumed. See, e.g., *Trevino v. Gates*, 99 F.3d 911, 921-22 (9th Cir. 1996), *holding modified on other grounds by Navarro v. Block*, 250 F.3d 729 (9th Cir. 2001).

CONCLUSION

Objectors submitted their Objections, Amended Objections and Pre-Hearing Testimony that all provide factual and legal bases validating their claims for material injury and damages. However, by all appearances, that and other evidence has been effectively disregarded. The Compact fails to protect the historic use of irrigation water and, under the guise of the UMO and Water Management Board; it violates Objectors' procedural and substantive due process rights; and it results in an unconstitutional taking of Objectors' property rights. The Compact does not reflect the compact ratified by the Montana Legislature and is inconsistent with the Hellgate Treaty and other treaties, issues which have also been effectively disregarded.

Objectors therefore respectfully request that the Court find in favor of the Objectors. The Compact should not receive this Court's final blessing.

DATED this 19th day of September, 2025.

/s/ Kimberly L. Field

KIMBERLY L. FIELD

EXHIBIT "A"

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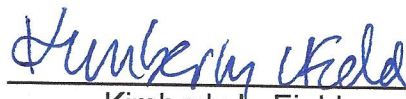
CERTIFICATE OF SERVICE

I, Kimberly L. Field, do hereby certify that on the 19th day of September, 2025, I served a true and correct copy of the foregoing document by email with a request for delivery receipt upon the person(s) named below.

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