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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

EVIDENTIARY HEARING NO. 1

OBJECTORS WILLIAM SEGO, BILL & IRENE LLC, AND GRACE SLACK'S POST-HEARING REPLY BRIEF REGARDING EVIDENTIARY HEARING 1

Objectors William Sego and Bill & Irene, LLC ("Sego") and Grace Slack ("Slack" and with Sego, the "Sego/Slack Objectors") submit this post-hearing Reply Brief following Evidentiary Hearing 1 held on April 22, 2025 on the issue of Sego/Slack Objectors' material injury suffered by operation of the Confederated Salish and Kootenai Tribes Water Rights Compact ("Compact"), codified at § 85-20-1901, MCA.

I. FACTUAL BACKGROUND

Sego/Slack Objectors incorporate the factual background in their August 22, 2025 Post-Hearing Brief Regarding Evidentiary Hearing No. 1.

II. LEGAL ANALYSIS

A. Material injury under Montana law.

In their Response Brief, the Compact Parties make a critical concession. They do not dispute that the *type* of injuries Sego/Slack Objectors point to are sufficient to establish material injury. That is, while the Compact Parties dispute that Sego/Slack Objectors suffered the injuries they complain about, the Compact Parties do not dispute that those injuries qualify as material injury under Montana law. *See, e.g.*, Compact Parties' Post-Hearing Opening Brief ("CP Opn'g Br.") at 3 (describing Sego and Slack's testimonies related to future water administration and venue for appeals as "speculatory"); *id*. at 6 (arguing that Sego/Slack Objectors have no injury because they are not entitled to "any specific length of irrigation season[]"); *id*. at 7 (alleging that Sego/Slack Objectors' complaints related to channel maintenance are "unspecified and speculative."). As a result, the Court need only determine whether Sego/Slack Objectors have introduced sufficient evidence to support their factual allegations.

To the extent the Compact Parties suggest that Sego/Slack Objectors' allegations are insufficient to satisfy the legal standard for material injury, their argument fails for two distinct

reasons. *First*, the Compact Parties incorrectly suggest that the only way Sego/Slack Objectors can establish a material injury is through "a concrete injury to water rights or other real property interests caused by operation of the Compact." CP Opn'g Br. at 2 (citing *In re Crow Water Compact*, 2015 MT 353, ¶¶ 34–35, 382 Mont. 46, 364 P.3d 584; *U.S. Fish & Wildlife Serv., Bowdoin Nat'l Wildlife Refuge – Mont. Compact*, No. WC2013-04, 2015 WL 9699486, at *10 (Mont. Water Ct. Oct. 07, 2015));[1] *see also id.* at 3 ("At their hearing, the evidence offered by Sego and Slack failed to show a concrete, non-speculative injury to a water right or other property interest that stems from the operation of the Compact."). But in fact, material injury is much broader than harm to "real property interests." It can be established in other ways, and may include harm to an objector's interest in the "institutions for the administration of water rights" under the Compact, the allocation of Tribal water rights under the Compact relative to state-based water rights, the scope and adequacy of the compact's protections for existing state-based water rights, any asserted compromise of state-based water rights under the Compact, or the methods for the enforcement of state-based water rights under the Compact. *In re Crow Water Compact*, ¶¶ 28–31 (Montana Supreme Court's consideration of all those issues under "material injury" inquiry); Apr. 1 Order at 76–77 (recognizing, for instance, that if the Compact implicates FIIP water distribution issues, that could be relevant to material injury).

Second, to the extent the Compact Parties contend that material injuries can never occur in the future, that contention also misses the mark. *See* CP Opn'g Br. at 2 ("Evidence of injury that relies on speculation about future Compact implementation cannot demonstrate material injury."); *id.* at 3 (contending that certain claimed future injuries are too "speculatory"). The

[1] The Court has already distinguished *Bowdoin*. *See* Apr. 1, 2025 Order at 74 & n.44; *see also* April 14, 2022 Objectors' Response to CP's Mot. in Limine at 7–8. The same analysis applies here, and the Compact Parties offer no reason why the Court should revisit its earlier ruling.

Compact Parties cite no authority in support of the claim that a future injury—even if it is concrete, particularized, and inevitable—is categorically insufficient. Nor could they. After all, in many cases the operative terms of the Compact are not yet effective; an objector would be automatically precluded from ever raising a viable challenge to confirmation. Moreover, caselaw in other contexts confirms that the Compact Parties are wrong. *See, e.g.*, *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 32, 360 Mont. 207, 220, 255 P.3d 80, 91 (future injury sufficient to confer standing if it is imminent).

B. Material injury to Sego and Slack's *Walton* rights.

Compact Parties have admitted that there is no water (*i.e.*, no amount or quantification of water) within the Compact's Tribal Water Right from which to provide Sego/Slack Objectors a pro rata share of the federal reserved right attributable to the Indian allottee predecessor owners of the lands currently owned by Sego or Slack. *See* Sego/Slack Objectors' Post-Hearing Brief ("Objectors' Br.") at 6. CSKT counsel have also previously stated that there may be no water left available for appropriation by non-Indian landowners within the exterior boundaries of the Reservation once the Tribal Water Right established under the Compact is fulfilled. *See id.* at 7 n.2. The effect of this—due to the Compact's structure and implementation—is the unavailability of water for Sego/Slack Objectors' *Walton* rights. That is a material injury to Objectors arising from the operation of the Compact. Significantly, the Montana case authorities referenced by the Compact Parties concerning the treatment of *Walton* water rights in prior Montana compacts do not address the specific issue and asserted injury framed by Sego/Slack Objectors. Objectors' Br. at 9–10. Accordingly, the injury to their *Walton* rights represents a concrete harm that satisfies the material injury standard. *See id.* at 5–10.

C. Material injury due to Board's powers and Compact and UAMO Judicial Review Provisions.

As Sego/Slack Objectors noted in their briefing, the Compact created the Flathead Reservation Water Management Board ("Board"). Compact, art. IV, § I(1). The Compact became effective on September 17, 2021. Objectors' Br. at 10. Thus, the administration of Sego/Slack Objectors' water rights, and any new water rights developed in the future, will be determined in the first instance by the Board, and not by any other apparatus of state government. *Id.* Moreover, the Board and the Compact Implementation Technical Team ("CITT") have already begun to exercise their authority under the Compact to make determinations regarding operation of the FIIP. *Id.* at 11. These determinations have resulted in reduced irrigation deliveries to the Sego/Slack Objectors. *Id.* at 11–12.

The Compact Parties do not dispute any of these allegations or any of this evidence. *See* CP Opn'g Br. at 8–9. Instead, they claim that the reduced water deliveries are not the result of the Compact or the UAMO. *Id.* at 3–7. But in making this assertion, the Compact Parties make several errors. *First*, they improperly rely on the testimony of Seth Makepeace and Casey Ryan. As their own brief makes clear, the Compact Parties are treating Makepeace and Ryan as expert witnesses—which the Court expressly forbid them from doing. *See, e.g.*, *id*. at 6 (relying on testimony of Makepeace and Ryan); Tr. Vol. 2 at 16:22–18:23 (Court ruled that Makepeace had not been qualified as an expert witness, and his testimony was therefore limited to lay witness testimony); *see also* Objectors' Br. at 13–15. At the very least, the Court should give little if any weight to Makepeace's and Ryan's testimony—particularly in light of the actual, observational and percipient testimony of Sego and Slack. *See* Objectors' Br. at 13–16.

Second, the Compact Parties challenge causation, contending that neither the Compact nor the Board nor the CITT caused the reduced water deliveries. CP Opn'g Br. at 3–6. In doing

so, the Compact Parties focus on the venue issue raised by Sego/Slack Objectors, stating that this "cannot constitute material injury" by pointing to the Court's April 1 Order at 63–73. But there, the Court evaluated this as a "standalone conformity issue" and determined that

> the UAMO provisions conform to Montana and federal law, as do all other provisions of the Compact described in the Compact Parties' Motion and the Objector cross-motions and responses. The Compact Parties have demonstrated the Compact meets the requisite thresholds necessary to meet the fairness and adequacy standards of review that have been established in prior cases. The Compact Parties have met their burden of proof as necessary to shift the burden of proof to the Objectors.

Id. at 63, 73. The Court did not order that this did not constitute material injury, nor that this venue issue arose "entirely outside of the Compact[,]" as Compact Parties allege.

Third, the Compact Parties misstate Sego/Slack Objectors' challenge to the Compact regarding the Board.[2] The Compact Parties claim that Sego/Slack Objectors "express[] a general objection to being subject to the authority of the Board." Not so. As was explained by counsel for Sego/Slack Objectors at Evidentiary Hearing No. 1, the prefiled testimony of Sego/Slack Objectors cited by the Compact Parties (*see* CP Opn'g Br. at 8) "is not that they [Sego/Slack Objectors] don't want to participate in these proceedings, but the way that the Compact is structured affects their rights to judicial review." Hr'g 1 Tr. Vol. 3, 11:22–24; *id.* at 12:8–10.

Compact Parties also claim that "the Tribes' or the State's exercise of their respective jurisdiction on the Flathead Indian Reservation, which is at bottom an issue of law that is controlled by legal precedent, [is] entirely outside the Compact." CP Opn'g Br. at 9. Again, not

[2] Sego/Slack Objectors maintain their earlier position that the creation of the Board under the Compact was an impermissible delegation of state legislative and executive authority and impermissible special or local legislation. While Sego/Slack Objectors preserve those issues for the purposes of any appeal, the Court's prior resolution of those issues is not before it at the material-injury stage. What is presently at issue are the judicial review issues and the practical effect of same as documented in the factual testimony provided by Sego and Slack as argued in the text above and that was not previously before the Court.

so. How the Sego/Slack Objectors are affected by the Compact's "opt in" process for consent to state court jurisdiction and the judicial review path for Board decisions implicate factual issues, as this Court has recognized. Apr. 1 Order at 74–75.

In their testimony, Sego/Slack Objectors identified, factually, how their guaranteed right of state court review of Board decisions will be harmed by operation of the Compact—specifically in a dispute between two or more non-Indian water rights holders or claimants within the exterior boundaries of the Flathead Reservation concerning water rights arising under state law. *E.g.*, Slack Testimony at 8:23–9:11; Sego Testimony at 11:13–28. The Compact Parties fail to address these points, instead choosing to hide behind the curtain of "exercise of their respective jurisdiction." But this is not a jurisdictional issue. The Compact Parties fail to show—and cannot show—that a state court lacks jurisdiction to review a water rights dispute between two or more non-Indian water rights holders within the exterior boundaries of the Flathead Reservation concerning water rights arising under state law. Instead, the Compact Parties implicitly *concede* this point, because they acknowledge that such state court review might exist if both such parties consent to state court jurisdiction. However, that concession merely sets up the key issue to be addressed and the source of Sego/Slack Objectors' injury from the operation of the Compact. That is, if the Sego/Slack Objectors' right to state court review in such situations can be "guaranteed" only by the independent action of a third party (i.e. someone who is not Sego/Slack or the State), then that right is not guaranteed where it depends on the discretionary action of some third party and is not protected by the State or the Compact from infringement. This is the source of Sego/Slack Objectors' injury on this point, an injury not addressed by the Compact Parties' arguments or any prior determination of this Court made before the establishment of these underlying facts at Evidentiary Hearing No. 1.

For these same reasons, the Compact Parties' citation to the April 1 Order at 63–75, CPOpn'g Br. at 9, is unavailing. The Order did not have the opportunity to consider the specific facts now before the Court. With those facts, Sego/Slack Objectors have conclusively established a category of cases where judicial review in state court is premised on a non-state actor's consent to state court jurisdiction, an infringement of Sego/Slack Objectors' guaranteed right of access to state court for the adjudication of such disputes. *See* MONT. CONST. art. II, § 16; *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 34, 416 Mont. 44, 64, 545 P.3d 1074, 1090 (statute unconstitutional if the law specifically interferes with certain subgroups' protected rights; need not show general interference with protected rights in all situations). On these facts, Sego/Slack Objectors have established material injury to their interests from operation of the Compact.

D. Material injury due to washouts, erosion, and other physical damage from operation of the Compact.

Finally, Sego/Slack Objectors' brief demonstrated that they have suffered physical damage to their property as well. Objectors' Br. at 12–13. In response, the Compact Parties contend that these injuries are the result of unrelated federal law and regulations, and not the Compact. CP Opn'g Br. at 7–8. In support, they cite to three reasons, but none are persuasive. *First*, the Compact Parties claim that the Objectors' "assertion is unspecific and speculative." *Id.* at 7. But as previously noted, Sego/Slack Objectors introduced specific, detailed testimony about the harms they suffered. And as explained above, while *speculative* injuries may not be sufficient, *future, concrete* injuries are.

The *second* and *third* reasons are highly similar and intertwined: the Compact Parties rely on Casey Ryan's testimony to claim that "harm from high flows is not a feature of the Compact, but rather of FIIP's operations." CP Opn'g Br. at 7. Thus, "any harm from FIIP operations is

distinct from the Compact and its administration." *Id.* at 8. For the same reasons discussed above regarding the testimony of Makepeace, Ryan's testimony is improper or, at the very least, should be given minimal weight by the Court. *See, e.g.*, Mont. R. Evid. 701 (lay witness's opinion testimony is limited to those which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue). As with Makepeace's testimony, Ryan's testimony is not based on his perception, so should be afforded little weight.

Perhaps more fundamentally, the FIIP does not operate independent of the Compact. The FIIP is operated by one of the Compact Parties—the United States acting through the Bureau of Indian Affairs of the Department of the Interior—and its operations and use of water rights for the FIIP are a central focus of the Compact. *E.g.*, Compact Art. III.C.1.a. (Tribes' right to water supplied by FIIP); *id*. Art. III.C.1.d.ii. (FIIP instream flows); *id*. Art. III.C.1.e. (minimum reservoir pool elevations in FIIP reservoirs); *id*. Art. IV.C. (exercise of certain portions of the Tribal water right related to the FIIP); *id*. Art. IV.D. (exercise of the FIIP water use right).

The fact that the Compact may not be the *sole* source or cause of the material injury documented by Sego/Slack Objectors—but instead is a significant contributor to that injury—does not defeat a material injury claim. Compact Parties cite to no authority, and Sego/Slack Objectors are unaware of any, holding that a compact must be the sole cause of the material injury. Thus, Compact Parties argument on these points is built upon a false premise.

For example, the Biological Opinion that Compact Parties claim is instead the cause of the injuries to Sego/Slack Objectors may have a coercive effect on FIIP water system operations, but the Biological Opinion by itself does not legally require such operations. *See Bennett v. Spear*, 520 U.S. 154, 169 (1997). It is the Compact that elevates what are recommendatory

measures (in the "advisory" Biological Opinion, *id*.) from the fish and wildlife consulting agency into required elements of law in the Compact. Doing so, combined with the substantial role of the Compact in constraining FIIP operations, is sufficient to establish the Compact as a significant contributing cause of the material injury documented by Sego/Slack Objectors. This is especially so where the Compact Parties are bound by the Compact (but not the Biological Opinion), and those Compact Parties *include* the FIIP operator (the Bureau of Indian Affairs, *see* CP Opn'g Br. at 7) that is an agency of the U.S. Department of the Interior, one of the signatories to the Compact. Compact Art. I.60 (defining Secretary of the Department of the Interior); *id*. at signature block (containing signature of Deb Haaland, U.S. Secretary of the Interior).[3] The Compact Parties attempts to claim that FIIP operations are somehow the independent, sole cause of the Sego/Slack Objectors material injury should be rejected. Those arguments are inconsistent with the facts established before the Court and inconsistent with the plain text and requirements of the Compact, including those requirements that the Compact imposes on FIIP operations.

In sum, the Compact Parties cannot show that Sego/Slack Objectors' injuries are due to factors other than the Compact where the Compact is central to those activities that have already resulted in injury to Sego and Slack. Further, the Compact Parties' "independence" argument is not persuasive. The FIIP's operations and use of the Tribal Water Right for instream flow or other purposes are enshrined and made into law by the Compact, which includes the incorporation into the Compact of existing practices as of December 31, 2014 under the circumstances delineated therein. *See, e.g.*, Compact Art. III.C.1.d.iv.

[3] A copy of the Compact signed by the U.S. Secretary of the Interior on behalf of the United States is contained in Appendix 1 to the Preliminary Decree entered June 9, 2022. *See* Preliminary Decree, App'x 1 at 55.

III. CONCLUSION

For the foregoing reasons, the Court should sustain Sego/Slack Objectors' Amended Objection to the Compact.

Respectfully submitted this 19th day of September, 2025.

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This is to certify that the foregoing was served to the following persons as noted below, on the date herein.

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