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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. 1**

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**COMPACT PARTIES' POST-HEARING RESPONSE BRIEF**  
**REGARDING MATERIAL INJURY HEARING No. 1 [Sego and Slack]**

Under the governing orders,<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 opposing Objectors William Sego and Bill & Irene, LLC (“Sego”) and Grace Slack (“Slack”) (collectively, “Objectors”) *Post-Hearing Brief Regarding Evidentiary Hearing 1*, Dkt. No. 2638.00 (Aug. 22, 2025) (“Objectors Opening”). As the Compact Parties explained in their *Post-Hearing Opening Brief Regarding Material Injury Hearing No. 1*, Dkt. No. 2645.00 (Aug. 22, 2025) (“Compact Parties’ Opening”) and below, the Objectors have not proven material injury by operation of the Compact. The Court already rejected most of Objectors’ arguments, and the Compact Parties refuted the rest. Objectors’ attacks on the Compact Parties’ witnesses miss the mark as either distortions of the record or improper roadblocks to testifying. The Court should thus 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 (“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 submit admissible evidence establishing a concrete injury to water rights or other real property interests caused by operation of the Compact. Compact Parties’ Opening at 2-3. After summarizing the Court’s description of material injury in the *Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00 at 74-76 (Apr. 1, 2025) (“*Compact Validity Order*”), Objectors’ Opening at 16, Objectors complain that opponents of other compacts were protected from any interference by a more senior tribal water right somehow changing the material injury calculus. *Id.* at 17. Yet non-interference by the settling tribe with all potentially affected water rights is not a requirement for a valid compact. From the beginning, this Court has rejected the contention that tribal rights must be entirely subordinate to private rights, because “it would be unreasonable to expect the Tribes to do” so and “[r]equiring all concessions to be applied equally across-the-board would unduly restrict and likely defeat the negotiation and settlement process.” .....<sup>2</sup>

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

<sup>2</sup> *In re Adjudication of Existing and Reserved Rights of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation within the State of Montana in Basins 40E, 40EJ, 40O, 40Q 40R, & 40S*, WC-92-1, 2001 WL 36525512, at \*22 (Mont. Water Ct., Aug. 10, 2001).

Here, the Court aptly found that being a junior user in a prior appropriation system is not material injury. *Compact Validity Order* at 75-76. Objectors’ attempt to evade these rulings must be rejected.

## **II. OBJECTORS FAILED TO ESTABLISH MATERIAL INJURY**

Objectors’ first attempt to prove material injury by improperly rehashing the legal argument that their *Walton* rights have been extinguished. As explained below this contention is both too late and incorrect. Objectors next take a scattershot approach to showing material injury by alleging incorrectly that various entities caused reduced Flathead Indian Irrigation Project (“FIIP”) irrigation deliveries or that the Compact repurposed FIIP water. As explained below, the length of the 2022 irrigation season was consistent with earlier years and irrigation in 2022 started when the water supply and climatic factors allowed.

### **A. Objectors’ *Walton* Rights Extinguishment Argument Is Untimely, but If Considered, the CSKT Compact Treats Those Rights Fairly**

Objectors assert that they are materially injured by their *Walton* rights not being determined and protected in the Compact. Objectors’ Opening at 5-10. This argument must be rejected as one already determined in the *Compact Validity Order*, but if not, the contention is contrary to all other tribal water rights compacts and the priority system, and disregards the Compact’s multiple protections for irrigation rights not otherwise available to Objectors.

#### **1. The Court Has Rejected Objectors’ *Walton* Rights Extinguishment Argument.**

Objectors’ initial argument is that the Compact is infirm because it “does not include as part of the federal reserved right for the reservation the quantity of water appurtenant to the land of the Indian allottee predecessors of the current *Walton* right claims holders[.]” Objectors’ Opening at 8, 9 (“The amount of water for those ‘pro rata shares’ [of the *Walton* right] must first be included now, in the Compact and Decree, as part of the overall determination and allocation of the tribal reserved right.”).<sup>3</sup> This assertion is identical to what Objectors argued in 2024 when they responded to the Motion.<sup>4</sup> The Compact Parties opposed this assertion in their Reply given that Objectors’ alleged *Walton* rights are properly not part of CSKT’s right under the Compact.<sup>5</sup>

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<sup>3</sup> Consistent with a limiting stipulation, the Compact Parties do not address at this time the merits of whether Objectors have any valid *Walton* rights. Hearing Transcript, Vol. 3, at 3:4 – 7:17; *Joint Stipulation*, Dkt. No. 2536.00 at 2 (Apr. 25, 2025).

<sup>4</sup> Dkt. No. 1970 at 22-25 (Sept. 13, 2024); *id.* at 25 (“the Compact [] do[es] work to take present *Walton* rights of [Objectors] and provide no process to protect or recognize those rights.”).

<sup>5</sup> *Compact Parties’ Reply to Objectors’ [ ] Answer Brief (Dkt. No. 1970)*, Dkt. No. 2069 at 13-14

Objectors and the Court addressed the same argument at length during the November 14, 2024 Oral Argument.<sup>6</sup> The Court ruled against Objectors and found that the Compact did not extinguish *Walton* rights and treated them properly. *Compact Validity Order* at 50-51, 58. The Court should summarily dismiss Objectors’ misguided and rebuked contention.<sup>7</sup>

Objectors acknowledge the similarity of their 2024 and 2025 situations, Objectors’ Opening at 8, but contend that this is a new *Walton* argument because they now understand how implementation of the Compact will work after discovery on the Compact Parties. *Id.* at 6-7. This rationalization does not bear scrutiny. They first cite to responses to admissions by the Compact Parties on legal issues—that the *Walton* rights are not included in the Compact and that private *Walton* rights would have the same 1855 priority date as the Tribal consumptive use right—and then to the Compact’s definition of the “tribal water right.” *Id.* at 6 & 8. But there are no revelations from the Objectors’ discovery, as the same positions were in front of the Court in 2024: the Compact Parties asserted similar positions in their Reply Brief as found in the discovery, and the Court understood the same premises that Objectors rely on now during oral argument.<sup>8</sup> And the Compact’s definitions are unchanged since 2024. Objectors also cite comments by CSKT’s counsel about the potential unavailability of water for other water users in Basin 76L after determination of the CSKT’s claims during the November 14, 2024 Oral Argument. Objectors’ Opening at 7, n. 2. Again, these statements of counsel were made during the argument on the legal motions, fully considered by the Court when ruling in the *Compact Validity Order*, and cannot be considered a new revelation.<sup>9</sup> In sum, the thin veneer Objectors affix to their current *Walton* extinguishment argument cannot hide that the Court rejected it.

2. Objectors’ *Walton* rights Are Not Determined By the Compact, Share the Same Priority as the Same Tribal Rights, and Have Protections Unavailable in Litigation

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(Nov. 1, 2024) (“*Compact Parties’ Reply*”).

<sup>6</sup> *Transcript of Oral Argument*, November 14-15, 2024, at 120:13 – 124:8 (“*Oral Arg. Tr.*”). Objectors appear to have ordered a partial transcript of just the morning session of the two-day argument. The cited text appears in that version on pages 116:15 – 120:10.

<sup>7</sup> This Court explicitly stated that the 2025 factual hearings were not the time to reargue legal issues. *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).

<sup>8</sup> *Compact Parties’ Reply* at 13-14; *Oral Arg. Tr.* 120:13 – 124:8 [116:15 – 120:10].

<sup>9</sup> Further, counsel’s remarks concerned a different situation than Objectors face here. Counsel for CSKT described the legal landscape if there was no Compact. So, the premise counsel advanced was entirely different than Objectors make now. [On the Transcript of the entire *Oral Argument*, Objectors’ cited remarks are at pages 145-146 and 152.]

If the Court considers Objectors' *Walton* rights argument, it should reject it as myopic and wrong. Chiefly, Objectors complain that the Compact does not include provisions that quantify privately held *Walton* rights. Objectors' Opening at 8-9. But as the Court recognized at the oral argument in 2024 (and Objectors profoundly did not), no tribal compact in Montana has included such a provision. *Oral Arg. Tr.* 124:1-8. Like CSKT's Compact, every other compact has handled this situation the same way: not include the water rights of private landowners within the tribe's compact and include only the relevant tribe's water right. Next, Objectors insinuate that any *Walton* rights they might receive in the adjudication will not be treated as well as other water rights with the same priority date. Objectors' Opening at 8. Yet all *Walton* rights that emerge from the Basin 76L adjudication will have the same July 16, 1855 priority date as CSKT's consumptive rights<sup>10</sup> and share available waters under the prior appropriation doctrine. But what all the 1855 priority dates share, and what seems to be at the heart of Objectors' complaints, is that they are junior to CSKT's instream flow and other nonconsumptive rights.<sup>11</sup> *See supra* section I; *Compact Validity Order* at 5.

And Objectors never acknowledge that their irrigation water rights are protected under the Compact in ways that would not occur in litigation. For example, Sego's Ashley Creek water right has protections from the Tribal Instream Flow right for that Creek under the "Other Instream Flow" process. *Compact Validity Order* at 40-41; *Compact Parties' Reply* at 9-10.<sup>12</sup>

### **B. Objectors Do Not Suffer Material Injury By Operation of the Compact**

As explained in the Compact Parties' Opening, Objectors' written direct testimony identified nothing that (i) linked the Compact to their allegation that the FIIP<sup>13</sup> delivery season

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<sup>10</sup> Section 85-20-1901, MCA, Arts. III.C.1.a (Flathead Indian Irrigation Project ("FIIP") priority date), III.C.1.b.v (priority date for existing uses of CSKT, their members, and allottees), III.C.1.c.viii (priority date for Flathead System Compact Water).

<sup>11</sup> Section 85-20-1901, MCA, Arts. III.C.1.d.v (instream flow rights on the CSKT Reservation with time immemorial priority date), III.C.1.f – h (same priority date for wetlands, high mountain lakes, and Flathead Lake).

<sup>12</sup> Additionally, Objectors' FIIP water entitlements are partially protected from exercise of CSKT's FIIP instream flow rights because FIIP's River Diversion Allowances have priority over CSKT's Target Instream Flows. Section 85-20-1901, MCA, Art. IV.C.1. And Objectors' state-law water rights can be protected in an amount equal to FIIP's annual water entitlement quota. *Id.*, Art. III.G.3 (protection through "consensual agreements" that irrigators within the FIIP Influence Area make with the Tribes, Project Operator, and United States).

<sup>13</sup> Like other Objectors in this case, Sego and Slack refer to the "Flathead Indian Irrigation Project" as the "Flathead Irrigation Project" or "FIP" throughout their Opening in disregard of

became shorter after the Compact became effective, (ii) showed any entity created by the Compact, such as the Compact Implementation Technical Team (“CITT”)<sup>14</sup> or the Flathead Reservation Water Management Board (“Board”),<sup>15</sup> caused the alleged problems with shorter FIIP seasons; or (iii) demonstrated how the Compact caused high flow events in 2022 that allegedly flooded Objectors’ land. Moreover, the Compact Parties’ witness established that recent irrigation season start and stop dates were consistent with historic practice and that the late start of the irrigation season in 2022 was because of standard climatic factors. Objectors’ Opening failed to refute this evidence and pinpointed nothing new in the record or the Compact to support their allegations of material injury. Instead, Objectors largely repeated unsupported allegations in their direct testimonies, and rather than rebut the Compact Parties’ witnesses’ testimony, sought to distort it and challenge its admissibility. These fail to prove material injury.

1. Compact-created Entities Did Not Impact the FIIP Irrigation Season.

Objectors make several spurious charges about what Compact-related entity allegedly caused the shortened FIIP irrigation season but fail to recognize the actual entity that manages FIIP: the Bureau of Indian Affairs (“BIA”). Objectors assert that other entities that have no role in FIIP management somehow caused their FIIP injuries, without ever addressing the role of the BIA, which made those decisions. For example, Objectors allege that the Board caused the alleged shorter FIIP irrigation season. Objectors’ Opening at 10-12. But the Board has nothing to do with FIIP’s management of Project water. Compact Parties’ Opening at 5-6 (quoting § 85-20-1902, MCA, § 3-1-101(1)); *Compact Validity Order* at 48-49 (review of complaints about FIIP management decisions are handled by BIA). Beyond their own conclusory testimony, Objectors support this allegation with citation to the Compact Parties’ witness, Seth Makepeace. Objectors’ Opening at 11 (citing to Vol. 2, 36:19 – 37:4 and 37:15-17). But Makepeace testified regarding the Board only on matters unrelated to FIIP (Vol. 2, 36:19–37:4 (the Board’s processing of exempt well applications); Vol. 2, 37:15–17 (the time when the Board first organized). There is nothing the Board did to affect FIIP.<sup>16</sup>

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the proper name of the Project. See Hearing 1\_Compact Parties Ex02\_001 (title page of the 2008 Operation and Maintenance Guidelines for the “Flathead Indian Irrigation Project”); Hearing 1\_Compact Parties Ex03\_001 (title page of the 2017 Biological Opinion for the “Flathead Indian Irrigation Project”).

<sup>14</sup> Section 85-20-1901, MCA, Art. IV.G.

<sup>15</sup> Section 85-20-1901, MCA, Art. IV.I; § 85-20-1902, MCA

<sup>16</sup> Objectors’ material injury allegations about the Board administering water rights on the

For another, Objectors allege that the CITT had a role in causing shorter FIIP irrigation seasons. Objectors' Opening at 10-12. Objectors only citations supporting their position are inapt. Objectors' identical, conclusory allegations are really statements of position rather than of fact. Objectors' Opening at 11 (citing Sego at 12:2-5) and 12 (citing Slack at 9:13-16). Objectors then reference Makepeace's testimony about the various measurement and data gathering improvements on FIIP that the CITT performed from 2015 to early 2020. Objectors' Opening at 11 (citing Vol. 2, 11:19-12:11) and 12 (same). But Objectors do not explain how these salutary CITT actions to improve FIIP water management caused shorter irrigation seasons. Finally, Objectors cite selected portions of Casey Ryan's testimony regarding his time as a CSKT hydrologist and then the chair of the CITT to blunt his refutation of Sego and Slack's allegation that FIIP drastically reduced irrigation deliveries in 2022 with new Compact-related instream flows. Objectors' Opening at 11 (citing Vol. 2, 85:23 – 87:3) and 12 (same). Objectors discontinue their citation to Ryan's testimony at the point where he testified to the pertinent issue. Immediately thereafter, Ryan testified that the Compact's minimum enforceable flows were not implemented in 2022 when Sego and Slack suffered their primary injuries. Vol. 2, 87:4-6.<sup>17</sup> Thus, the CITT did not cause the FIIP irrigation season to be shorter.

Finally, Objectors ignore that the BIA operated FIIP before and after 2022 pursuant to a 2008 Operation and Maintenance Guidelines and 2018 Biological Opinion. *See* Hearing 1\_Compact Parties\_Ex02; Hearing 1\_Compact Parties\_Ex03. This omission undermines Objectors' material injury claim. *See* Compact Parties' Opening at 4-5 (delineating how the Compact leaves significant operational decisions about distributing Project water to the BIA, as the Project Operator), 5-6 (FIIP's Operations Guidelines explain the factors influencing when project water is turned on each season and how such was properly done in 2022), 6 (Compact's potential irrigation season is the same as that in the 2008 FIIP Operations Guidelines).

In sum, Objectors point the finger at the wrong entities for setting the irrigation season, failing to prove material injury from operation of the Compact.

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Reservation, Objectors' Opening at 10-12, have been resolved. Compact Parties' Opening at 8-9 (citing *Compact Validity Order* at 63-73).

<sup>17</sup> Objectors attack Ryan's testimony because of its brevity. Objectors' Opening at 16. But what stands out is the clarity of the denial that the Compact's new flow provisions were implemented when Objectors' injury allegedly occurred. And Ryan's testimony that nothing was being implemented is consistent with the applicable schedule showing 2022 as the first year for any implementation of operational improvements. Compact App. 3.4(2) (Mission Valley South).

## 2. The FIIP Irrigation Season Was Consistent With Past Practices and the Project Operators' Governing Documents

Objectors' recite several arguments directed at the Compact's alleged control of FIIP flows. All have largely been addressed in the Compact Parties' Opening. For example, Objectors assert that the FIIP irrigation delivery period has been truncated by the Compact. Objectors' Opening at 3, 4, 10, 11. The Compact Parties effectively countered these same assertions. Compact Parties' Opening at 4-6 (when FIIP begins delivering water is a decision of the BIA, the Project Operator, not the Compact; FIIP has its own governing documents that predate the effective date of the Compact and list factors relevant to starting water deliveries within larger irrigation season; the irrigation start dates after 2021 are consistent with those two decades ago). Objectors next incorrectly attack Makepeace's testimony. First, they allege he was only "equivocal" about the role the CITT had on FIIP operations. Objectors' Opening at 15. But Counsel asked Makepeace twice to itemize the requirements the CITT imposed on FIIP operations, and twice he answered, "None." Vol. 2, 32:4-8 (omitted from Objectors' recitation); 36:10-14. That is sufficiently definitive. Second, Objectors hypothesize that Makepeace "walked back" on cross-examination his conclusions regarding the consistent start dates for FIIP deliveries. Objectors' Opening at 15. But this characterization is illusory as the Objectors' cited testimony is on topics unrelated to when FIIP started deliveries<sup>18</sup> or purposelessly chides him for doing something unnecessary to his investigation.<sup>19</sup>

Both Sego and Slack allege that under the Compact, FIIP can now use Project water for undisclosed purposes other than irrigation. Objectors' Opening at 3, 4, 11, 12. Objectors do not explain in their brief or in their testimony what Compact provision they are relying on and hence the Court should summarily reject it. And as explained, the Compact defines the FIIP right and provides detailed abstracts governing their use. Compact Parties' Opening at 4.

Objectors repeat their claims that the Compact caused high flow events in 2022 that did or could cause them material injury. Objectors' Opening at 12-13. Yet the Compact Parties

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<sup>18</sup> Two citations concern Objectors' ability to use their private water rights when the FIIP supply is unavailable. Objectors' Opening at 15 (citing Vol. 2, pages 65 & 67). While two others describe why flooding might occur on Objectors' property during channel maintenance flows. *Id.* (citing Vol. 2, pages 74 & 76).

<sup>19</sup> Makepeace relied on data from electronic databases, making Objectors' desired field observations unnecessary. And Objectors fault him for not taking field notes in summer 2022, months before Objectors even filed their objection. *See Objection*, Dkt. No. 506 (Jan. 18, 2023).



thoroughly rebutted these precise allegations. Compact Parties' Opening at 7-8.<sup>20</sup>

### 3. The Compact Parties' Two Witnesses Properly Testified

Objectors renew their objection to Seth Makepeace and Casey Ryan, arguing they were not given notice of their testimony and Makepeace improperly testified as an expert. Objectors Opening 13-14. At the hearing, Objectors raised the lack of notice issue about both witnesses, Vol. 2, 7:5-22, and repeatedly asserted Mr. Makepeace was offering improper expert testimony, sometimes limiting, or redirecting his testimony.<sup>21</sup> The Court properly overruled such objections and allowed these witnesses to testify. Objectors offer the Court no basis to revisit those rulings.

Nevertheless, the Court should reject Objectors' complaints because Objectors did have the requisite "adequate notice" of Makepeace and Ryan's testimony as hybrid witnesses in the context of this case. *Norris v. Fritz*, 2012 MT 27, ¶¶ 32-33, 364 Mont. 63, 270 P.3d 79. This phase of the case is about Objectors' material injury, a matter wholly within their control. The Compact Parties' only duty was to submit evidence responding to Objectors' specific contentions. Therefore, the Compact Parties were initially unaware of what allegations they should rebut and properly disclosed that they may call tribal employees, designated as hybrid witnesses, and would "elicit opinion testimony for rebuttal purposes."<sup>22</sup> Discovery and depositions ensued over a six-week period in sixteen different hearings.<sup>23</sup>

Objectors filed written, direct testimony on April 8, 2025,<sup>24</sup> providing for the first time sufficient description of their injury allegations from the Compact such that the Compact Parties could discern what response to provide and who should do so. On April 15, the Compact Parties proposed Pre-hearing Order ("PHO") identified Makepeace and Ryan as rebuttal witnesses and disclosed the witnesses' exhibits. Dkt. No. 2440.00 at 4 and attachment. The exhibit list was a road map to their testimony, revealing the precise gage number used to evaluate Objectors' claims of less irrigation deliveries, time studied, and some relevant URLs. On April 17, the

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<sup>20</sup> Objectors critique Ryan for testifying that channel maintenance flows occurred in 2022, but fail to acknowledge that those flows occurred pursuant to the 2018 Biological Opinion, *see* Hearing 1 \_ Compact Parties Ex03, not the Compact. Tr. 87:19-88:14.

<sup>21</sup> Vol. 2, Tr. 17:9-10, 13-14; 18:18-20; 23:17-13. In other instances, Objectors' testimonial objections were overruled. 61:3-10; 65:4-5; 67:17-22.

<sup>22</sup> *Compact Parties' Witness Disclosures*, Dkt. No. 2255.00 at 2 (Mar. 18, 2025).

<sup>23</sup> *Case Management Order No. 6*, Dkt. No. 2142.00 at 2 (Feb. 27, 2025); *Clarification Order and Case Management Order No. 7*, Dkt. No. 2147.00 at 1 (Mar. 5, 2025).

<sup>24</sup> *Testimony of Grace Slack*, Dkt. No. 2385.00; *Testimony of William Sego*, Dkt. No. 2386.00.

Compact Parties provided the exhibits, showing the data and the public data sources, allowing Objectors to check them. *See Hearing 1 – Compact Parties’ Amended Witness Disclosures*, Dkt. No. 2469.00 (Apr. 18, 2025); *Hearing 1 Prehearing Order*, Dkt. No. 2456.00 at 6-7, & attachment. On April 18, Objectors did not object to the Compact Parties’ witness list at the prehearing conference, *Recording of April 18, 2025 Prehearing Conference*, 25:10-30, and did not seek to depose the two witnesses or delay the proceedings. Later that day, the Compact Parties amended their witness disclosure to align with that in the PHO three days earlier (specifying the tribal employees as Makepeace and Ryan and denoting the topics raised in Sego and Slack’s testimony). Dkt. No. 2469.00 at 2. Objectors knew before the hearing what the Compact Parties’ rebuttal witnesses would testify to and chose to proceed to the hearing.

Additionally, Makepeace only provided admissible information from his personal knowledge, drawn from publicly-accessible sources he regularly used in his work, to assist the Court in determining issues of fact. The Compact Parties did not ask Makepeace to, nor did he provide, any opinions. Even if he had, lay witnesses may testify in the form of opinions or inferences when (a) rationally based on the witness’s perceptions and (b) helpful to a clear understanding of the testimony or the determination of facts in issue. M. R. Evid. 701. Makepeace offered no testimony exceeding Rule 701, and Objectors objected if he got close. *See supra* n. 21.

To the extent Makepeace offered any observations or inferences, they were based on his perceptions gained from 35 years of experience related to hydrology and the water resources of the Reservation and FIIP. Vol 2, 8:25 – 13:4; 14:15 – 16:5; 20:15 – 22:24; 25:5-12; 25:24 – 28:1; 29:1 – 31:6. The Court may use this information to reach a clear understanding of his testimony and to determine facts.

Objectors’ examples of purported inappropriate expert opinions exclude important context from the testimony. Objectors’ Opening at 13-14. For example, Objectors allege that Makepeace improperly testified that he “applied a very simple procedure to quantify that information” and “prepared a number of maps,” *id*, but fail to acknowledge that Makepeace consulted publicly-available sources—previously disclosed and easily accessible to Objectors and their counsel—that he managed or regularly used during 35 years of employment. Vol 2, 27: 20-25; 28:1, 4-9; 30:8 – 31:6. Objectors also disregard that at this point in Makepeace’s testimony he explained that he “tried to understand the assertion made in the direct testimony of

Sego and Slack.” Vol. 2, 55:18-19.<sup>25</sup> Makepeace did not provide an opinion about why FIIP deliveries were disrupted or the cause of any of Objectors’ material injury claims, but merely described how he attempted to understand their bald assertions and provided information that bears on them. *See, e.g., id.* 55:14-19.

Objectors go further and rewrite Makepeace’s testimony to conclude that he applied expert methodology to reach opinions. Objectors’ Opening at 14. However, the Court addressed this precise issue when ruling on Objectors’ objections and appropriately directed the inquiry and testimony into safe territory.<sup>26</sup> Makepeace’s testimony was thus delivered in the context of many challenges by Objectors and judicial management of his testimony. *See supra* n. 21.

Objectors’ complaints with Makepeace’s preparation of “maps using this data,” Objectors’ Opening at 14, referring to Compact Parties Ex\_04 and Ex\_05, ignore that these exhibits were admitted into evidence by the Court without objection. Vol. 2, 24:19-22. Any objections Objectors may have had with those exhibits should have been raised at the hearing. Objectors are also incorrect that Makepeace “acknowledged that he inferred certain conclusions” by admitting no gages existed on certain streams. Objectors’ Opening at 14. But Objectors misrepresent the testimony as this admission of where gages are located is not opinion testimony, but rather information offered to assist the Court in determining the facts at issue. But if it was, the topic of why Objectors’ private water rights were insufficient to make up for the allegedly disrupted FIIP deliveries, Vol. 2, 65: 9-12, 66:11-16, is unrelated to Objectors’ injury claim that 2022 FIIP deliveries were disrupted.

In sum, the Court should reject Objectors’ procedural challenges to the Compact Parties’ witnesses as unfounded, unsubstantiated, and meritless.

### **III. CONCLUSION**

Therefore, the Court should dismiss all objections and approve the CSKT Compact.

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<sup>25</sup> Sego provided just a single short sentence that the Compact disrupted FIIP deliveries: “Yes, during the 2022 irrigation season, FIIP deliveries began later, and ended earlier, than in previous years.” Dkt. No. 2386.00, 8:14-15; Dkt. No. 2385.00, 6:22-23 (nearly identical statement by Slack). These very general allegations do not establish material injury.

<sup>26</sup> For example, the Court stated: “I think the question was more narrow than that. It had to do with information from these gauges. Maybe you could ask a more clear question on that because I think I’m hearing the question differently than what your objection is.” 58:9-10. Counsel for the Compact Parties then clarified: “I was asking if there was any subjectivity or any – or any qualitative analysis that Mr. Makepeace conducted.” *Id.* at 58:15-17.

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. 1 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.

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