

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270
watercourt@mt.gov

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WC-0001-C-2021

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Montana Water Court

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

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CASE NO. WC-0001-C-2021

ORDER DENYING FORMAL OBJECTION TO MEDIATION

On January 3, 2024, objector Valerie Root (“Root”) filed a document titled “Formal Objection to Mediation/Settlement Process/Request for Hearing.” (Doc. 1559.00).¹ Two days later, objectors Rick and Nancy Jore (collectively, “Jore”) filed substantially the same document. (Doc. 1560.00). Although not styled as such, for purposes of this Order the filings are referred to collectively as the “Motions,” and individually as the “Root Motion” and the “Jore Motion,” because they are filings that request relief from the Court. M.R.Civ.P. 7(b).

The Compact Parties oppose the Motions. (Doc. 1595.00). Root and Jore each filed a reply on January 29, 2024. (Docs. 1625.00 and 1626.00). The replies appear to be identical.

BACKGROUND

Some background is necessary for context because the Motions challenge the court-ordered mediation process in this case. The matters before the Water Court in this

¹ “Doc.” is the reference to the document sequence number for documents electronically filed and maintained in the Court’s Full Court Enterprise case management system specific to this case.

case include the somewhat complex process of addressing several hundred objections filed with the Water Court relating to the water rights described in the compact (“Compact”) between the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the State of Montana, and the United States of America (collectively, the “Compact Parties”). The Water Court issued the Preliminary Decree for the Compact on June 9, 2022. The objection period closed on February 9, 2023. Jore and Root both submitted timely objections, which they since have amended with the Court’s approval.² Many others objected too.

After the objection period closed, the Court conducted several conferences to establish case management procedures for this case. In connection with those conferences, the Court issued case management orders formalizing the procedures. *See* Case Management Order No. 1 (Doc. 1042.00, Mar. 3, 2023); Case Management Order No. 2 (Doc. 1084.00, Mar. 27, 2023); Case Management Order No. 3 (Doc. 1395.00, Oct. 18, 2023). The procedures included a Settlement Track that ran through the end of September 2023. The Hearing Track phase of this case commenced in October 2023.

As part of the Settlement Track the Court ordered mediation and appointed a mediator. Over the course of much of the 2023 spring and summer months the Mediator conducted mediation conferences and filed periodic reports with the Court. The majority of objectors, including both Jore and Root, attended at least one mediation conference. *See* Mediation Rpt. No. 3. (Doc. 1338.00, Sept. 15, 2023). Many objectors reached settlements with the Compact Parties. The settlement agreements were filed and reviewed by the Court. Upon approval, the settling parties and their objections have been dismissed. Many other parties withdrew their objections without settlements and have been dismissed. The Court issues orders on a rolling basis documenting dismissals by settlement or withdrawals.

The case management orders in this case specified that participation in mediation was mandatory. The orders cautioned that failure to participate in a mediation would

² *See* Order Nos. 28 and 42 on Motions to Amend Objections (describing the Jore and Root objections, including amendments). (Docs. 1710.00 and 1728.00).

result in dismissal of the objection filed by the non-participant. Following completion of the mediation, the Court issued a show cause order to each objector who did not participate in a mediation session. (Doc. 1372.00). The show cause order provided the opportunity for persons identified in the order to explain why they did not participate in a mediation session. Several objectors responded with explanations, which the Court accepted. The Court then issued an order dismissing the objections of persons who both (a) failed to attend a mediation, and (b) failed to respond to the show cause order. *See* Eighth Order Dismissing Objections (Doc. 1394.00, Oct. 18, 2023). None of the persons with objections dismissed in this order objected to their dismissal.

DISCUSSION

The Motions ask the Court to conduct a hearing on the mediation process. As relief, the Motions request that “all 270 dismissed objectors must be restored to official objection status by this Court.” Jore and Root make several arguments in support of the Motions. The Compact Parties respond to the specific arguments, and also make three threshold arguments as to why the Court should deny the Motions. The Court addresses the threshold arguments first.

A. Compact Parties’ Threshold Arguments.

The Compact Parties first argue the Motions are not properly before the Court under the terms of Case Management Order No. 3. The Compact Parties are correct that the Order set forth a sequenced motion schedule that set deadlines for various categories of motions. Jore and Root did not seek leave of the Court to file this motion, nor do they explain how it fits within the schedule set out in the Order.

In their replies, Jore and Root argue the Motions address issues of law. The July 10, 2024 motion deadline set in Case Management Order No. 3 includes motions for “any issues of law.” Jore and Root evidently decided to file their motions addressing issues of law ahead of this deadline, so technically the Motions fall within the time frames the Order set. As the Order does not contemplate multiple motions addressing issues of law,

Jore and Root must seek leave of the Court prior to filing any future issues of law motions.³ However, these Motions are timely.

Second, the Compact Parties challenge the Jore Motion's statement that it is filed "[f]or and on behalf of" Jore and thirty-one other persons. Root is one of the persons identified in Jore's filing. Root also filed her motion for herself. The other thirty persons are listed on the filing, but are not included on the service list for Jore's Motion. Some of the persons listed in the Jore Motion are represented by counsel, but their counsel also was not served. None of the persons with objections dismissed in the Court's Eighth Order Dismissing Objections are listed in the Jore Motion.

The Compact Parties argue the Jore Motion's filing as a "representative" of other parties violates the case management orders, the Water Court's rules, and Montana law generally. Jore replies with policy arguments and hyperbole, but does not directly address the issue. Neither of the Jore parties provided evidence they are licensed attorneys. The practice of law in Montana requires a license. Section 37-61-210, MCA. A pro se litigant like Jore "cannot represent or appear on behalf of another person or entity." *Rafes v. McMillan*, 2022 MT 13, ¶ 20. Jore's filing falls into this category.

Additionally, none of the other objectors referenced in the document signed the document, nor did any objector referenced in the Jore Motion ratify it in a separate filing.⁴ The lack of ratification violates M.R.Civ.P. 11(a) (requiring that every written motion or other paper filed with the court be signed by an attorney or the unrepresented party). Given the lack of any evidence that either of the Jores is a licensed attorney who properly appeared for any objector, or that any self-represented litigant other than Jore or Root properly signed the Motions, the Court addresses the Motions solely from the

³ Jore has made several other filings in this case that the Court regards as moot and waived because they either predated the Hearing Track case management conferences, or state objections that Jore did not incorporate into Jore's subsequent motion to amend objections. *See* Docs. 1381.00 and 1383.00 (Clarification on jurisdiction); 1382.00 and 1384.00 (Phase 1 briefing schedule); 1437.00 (Objection to Order).

⁴ On January 11, 2024, Jore filed a correction stating Paradise Water District, one of the listed pro se objectors, should not have been included in Jore's Motion. (Doc. 1593.00).

standpoint of Jore and Root alone and not from any other objector. The Court will reject any future filings from Jore that purport to be filed as the representative of third parties.

Third, the Compact Parties argue the Motions are improper because Jore and Root do not have standing to challenge dismissal of other parties. The Court did not dismiss Jore or Root. They remain active objectors in this case. No objector the Court did dismiss joined the Motions, nor did any dismissed objector complain to the Court about being dismissed. The Motions provide nothing to show how Jore or Root are somehow injured by the dismissal of any third party objector who they do not and cannot represent. The Compact Parties are correct that Jore and Root lack standing to assert the interest of any party that the Court dismissed for failure to participate in the mediation proceedings.

B. Jore and Root Arguments.

While lack of standing is grounds to deny the Motions, the Court also addresses the merits of the arguments raised in the Motions.

Jore and Root first argue the Water Court lacks authority to impose a settlement track and require mediation. They are not correct. Issuing a settlement track order, requiring mediation, and dismissing non-participating objectors all are within the scope of the Court's case management authority. The Water Use Act specifically states, "a water judge may require the parties to participate in settlement conferences or may assign the matter to a mediator." Section 85-2-233(5)(b), MCA. Settlement track orders are embedded in the Court's procedural rules, and are not a procedural tool created just for this case. *See* Rule 16, W.R.Adj.R. ("Settlement Conferences and Mediation"). As provided in the Court's rules, all settlement agreements reached in this case were reviewed and approved by the Court before objections were dismissed. Rule 17(a), W.R.Adj.R. As already noted, to date the Court has issued many orders approving settlements and dismissing objections. These voluntary settlements contradict Jore and Root's arguments that the settlement process was flawed.

Jore and Root also argue the Court lacks authority to dismiss an objector for non-participation in mediation. Even if Jore and Root could manufacture a rationale for how they are injured by the Court's dismissal of third parties but not them, their argument

lacks merit. The dismissal remedy is not a remedy the Court fashioned for this case. Instead, the Court's authority under its rules includes the power to dismiss any objector who "fails to appear at a scheduled conference or hearing, or fails to comply with an order issued by the water court." Rule 22, W.R.Adj.R. The Montana Supreme Court recognizes dismissal as an appropriate remedy for failure to participate in court-ordered mediation. *See, Jones v. Jones*, DA 23-0400, 2023 Mont. LEXIS 1009, *4 (Montana Supreme Court order dismissing appeal after failure to comply with mediation process); *Stafford v. Fockaert*, 2016 MT 28, 382 Mont. 178, 366 P.3d 673 (upholding default judgment against party who failed to participate in court-ordered mediation).

Jore and Root also raise several arguments attacking the mediation process itself. They begin by asserting the process was flawed because the Court appointed a senior water master employed by the Court as mediator. In Case Management Order No. 2, the Court appointed senior water master Madeleine Weisz as the Mediator for the settlement track. The case management order also specified the procedural aspects of the mediation, which included the instruction that the Mediator "not disclose any such confidential settlement information with any other person, including any person at the Water Court other than those staff persons specifically assigned to assist the Mediator." There is no suggestion in the record that the Mediator violated this provision or any other statute or law that applies to mediators. Jore and Root point to nothing that prohibits the Court from appointing Court employees as mediators, and the Court regularly does so. From the positive results produced by the mediation and the lack of any other complaint from anyone but Jore and Root, the Court is confident the Mediator approached and conducted these complex mediation conferences professionally and competently.

The remainder of Jore and Root's mediation process arguments rely on unattributed quotes from third parties who evidently participated in the mediation. This line of argument is entirely inappropriate. As set forth in Section 1.f. of Case Management Order No. 2, all "communications, discussions, representations, and settlement proposals made during the settlement proceedings are privileged and confidential and are not subject to discovery or admissible at any trial or hearing in this

case.” Based on this provision, and the provisions of § 26-1-813, MCA, the Court declines to consider any of this information.

Finally, Jore and Root challenge the mediation process on the basis that the Compact Parties participated jointly, which Jore and Root contend violates provisions of the Montana Constitution. As the Compact Parties note, this joint defense provision is a common feature of negotiated compacts in Montana, and does not forbid the joint participation during mediation.

Based on these reasons, the Court concludes the Motions lack merit and do not state any grounds to conduct a hearing or any other further inquiry into the mediation process.

ORDER

Therefore, the Formal Objections to Mediation/Settlement Process/Request for Hearing filed by Jore and Root are DENIED. Jore and Root shall comply with the provisions of this Order for the remainder of their participation in this case as objectors.

Stephen R. Brown
Water Judge

Service via Electronic Mail:

Todd Kim, Assistant Attorney General
David W. Harder, Senior Attorney for Legal
Issues
Bradley S. Bridgewater, Trial Attorney
U.S. Department of Justice
Indian Resources Section
Environment & Natural Resources Div.
999 18th St., South Terrace, Suite 370
Denver, Colorado 80202
david.harder@usdoj.gov
bradley.s.bridgewater@usdoj.gov
efile_denver.enrd@usdoj.gov

Yosef Negose, Trial Attorney
United States Department of Justice
Indian Resources Section
Environment and Natural Resources Div.
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20004
yosef.negose@usdoj.gov

Rebecca M. Ross, Senior Attorney
James Cooney, Trial Attorney
United States Department of Justice
Indian Resources Section
Environment and Natural Resources Div.
150 M Street, NE
Washington DC 20002
rebecca.ross@usdoj.gov
james.cooney@usdoj.gov

Daniel J. Decker
Melissa Schlichting
Christina M. Courville
Zach Zipfel
Confederated Salish & Kootenai Tribes
Tribal Legal Department
PO Box 278
Pablo, MT 59855
Melissa.Schlichting@cskt.org
Christina.Courville@cskt.org
Daniel.Decker@cskt.org
zachary.zipfel@cskt.org

Ryan C. Rusche
Sonosky, Chambers, Sachse, Enderson &
Perry, LLP
PO Box 2930
Columbia Falls, MT 59912
(202) 682-0240, Ext. 697
rusche@sonosky.com

Molly M. Kelly
Montana Department of
Natural Resources and Conservation
1539 Eleventh Avenue
PO Box 201601
Helena, MT 59601
(406) 444-5785
Molly.kelly2@mt.gov
Jean.saye@mt.gov

Interested Party:
Terisa Oomens
Agency Legal Counsel
Agency Legal Services Bureau
P.O. Box 201440
Helena, MT 59620-1440
Tel: (406) 444-7375
Terisa.oomens@mt.gov

Root, Valerie
73503 Greywolf Dr.
Arlee, MT 59821
rootfarmarlee@gmail.com

Service via USPS Mail:

Jore, Nancy L.
Jore, Rick D.
30488 Mount Harding Lane
Ronan, MT 59864