

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

Montana Water Court

No. WC-0001-C-2021

DELBERT PALMER and RANDOLPH DOTY, Petitioners,
v.
STATE OF MONTANA, et al., Respondents.

**POST-HEARING BRIEF OF PETITIONERS PALMER
AND DOTY**

I. INTRODUCTION

Petitioners Delbert Palmer and Randolph Doty submit this Post-Hearing Brief pursuant to the Court's scheduling order, following the evidentiary hearing held on April 24, 2025. The issues before the Court include:

1. The admissibility and consideration of the December 12, 2022 DNRC Staff Report on the Confederated Salish and Kootenai Tribes (CSKT)-Montana Compact;
2. The scope of evidence to be considered in light of Petitioners' full abstracts and testimony; and
3. Whether Rule 408 of the Montana Rules of Evidence may be invoked to exclude this public record.

The Montana Supreme Court's decision in *MEIC v. The Office of the Governor* makes clear that governmental transparency under Article II of the Montana Constitution supersedes broad claims of confidentiality. Rule 408 does not apply to factual agency reports, nor can it shield public operational data affecting adjudicated water rights. Petitioners request that the Court admit and consider the full DNRC report, their complete abstracts, and all related evidence.

II. STATEMENT OF FACTS

A. Negotiation History

As recorded in the DNRC Staff Report, the Tribes designated official representatives for negotiations with the Montana Reserved Water Rights Compact Commission in early 1980. Two informational meetings were held in 1979 and 1980, followed by two negotiation sessions in late 1980 and early 1981.

These were "strictly preliminary in nature."

In May 1981, the Tribes notified the Commission in writing that they were "terminating further discussion or negotiations," without explanation. Later that year, the Tribes filed suit in federal court challenging the validity of Montana's statewide adjudication process as applied to their claims. This litigation, and its appeals, consumed resources and shaped the context of subsequent negotiations.

B. Sunshine Laws and Open Meetings

The DNRC Staff Report (pp. 14-15) identifies three Montana constitutional provisions-right of participation (**Art. II, § 8**), right to know (Art. II, § 9), and right of privacy (Art. II, § 10)-collectively known as Montana's "Sunshine Laws." These provisions and their implementing statutes directly affected Compact negotiations (April 24, 2025 Tr. 58:10-24).

From the beginning, open/closed meeting policies were contested. Commission Chair Henry Loble expressed concerns about conducting public negotiating sessions, while the Tribes preferred closed meetings. At a June 18, 1980 meeting, Tribal counsel Richard Baenen acknowledged that applying open meeting laws to such negotiations was "plowing new ground" and that the process was inherently political. Staff attorney David Ladd concluded that the Open Meetings statute applied to the Commission, reinforcing the public's constitutional right to know and participate, even during negotiations.

C. Irrigation Season Entitlements vs. Actual Deliveries

The abstracts admitted into evidence confirm that:

- Randolph Doty is entitled to 163 days of irrigation water

(April 24, 2025 Tr. 34:12-16);

- Delbert Palmer is entitled to 153 days of irrigation water (April 24, 2025 Tr. 36:3- 8).

Both abstracts were entered in full, and Mr. Palmer's abstract must be considered in its entirety to reflect his full rights as provided in deposition to the DNRC and CSKT. Testimony established that actual deliveries fell short of these periods, with operational deficiencies impacting Petitioners' ability to beneficially use their water. These facts are central to determining the scope of Petitioners' injuries.

III. LEGAL ARGUMENT

A. Rule 408's Scope Does Not Extend to Public Agency Reports

Rule 408, M.R.Evid., protects settlement offers and related negotiations from being admitted to prove liability or invalidity of a claim. It does not, and cannot, apply to factual agency reports prepared in the course of regulatory duties.

The DNRC Staff Report is an official, post-Compact evaluation-not a settlement negotiation. Objections under Rule 408 were raised at the April 24, 2025 hearing (Tr. 75:1-14) but do not apply to this public document cycling that the law itself prohibited at the time.

B. MEIC and the Constitutional Right to Know Control

In MEIC v. Office of the Governor, the Montana Supreme Court confirmed that Article II, Section 9 extends broadly to "any matter in which the State of Montana is involved." In that case, the Court rejected attempts to narrow the reach of the constitutional guarantee, holding instead that when the State participates in negotiations or agreements, the right-to-know protections necessarily apply.

The DNRC Staff Report dated December 12, 2022, specifically identifies the Federal Government, the Confederated Salish and Kootenai Tribes, and the State of Montana as participants in the Compact process. Because the State of Montana is integrally involved, the constitutional right of access attaches. The State cannot avoid its obligations by entering agreements with tribal or federal governments, nor can it bargain away transparency that the Montana

Constitution mandates.

Moreover, Petitioners Randolph Doty and Delbert Palmer both filed [Walton] water rights for their property. These filings represent vested property rights recognized under both state and federal law. As this Court has held, water rights are vested property rights protected by due process. Matter of Clark Fork River Drainage Area, 254 Mont. 11, 16 (1992). When decisions are made that may affect such rights, transparency and public access are essential. To deny Petitioners access to deliberations and records in which their property rights may be impaired is to deny them both their constitutional right to know and their right to defend their property.

C. Sunshine Laws Reinforce the Public Nature of the DNRC Report

The DNRC itself recognized that Sunshine Laws applied to Compact negotiations, even in their earliest phases. As such, The Commission operated with the understanding that the public had a right to participate and know. Applying Rule 408 to excluding the Staff Report would retroactively impose a level of secrecy or fraud on the people of Montana,

D. Relevance to Petitioners' Claims

DNRC findings with Petitioners' complete filings, along with abstracts, directly address the operational implementation of the Compact and the delivery to the DNRC find water. Anyone with even the most basic understanding of agriculture knows that without timely water, a ranch or farm operation fails. As common sense dictates-and as any farmer, rancher, or agricultural worker can attest-late water deliveries cause severe production losses, conservatively in the range of 50% to 70% of a crop (April 24, 2025 Tr. 102:5-23).

Moreover, when water arrives unpredictably or after the critical early growing period, it becomes impossible to determine in advance which crops can be planted and brought to harvest. This uncertainty destroys the ability to plan for the season, and the resulting economic harm cannot be precisely quantified. It is unreasonable for the Court to expect Petitioners to "declare" or calculate a specific dollar value for such losses. The nature of agricultural production

under these conditions makes precise valuation impossible, and the compounding effect over five generations of family operations magnifies the harm beyond any single-season calculation.

IV. CONCLUSION

We respectfully request that the court:

1. Admit and consider the December 12, 2022 DNRC Staff Report in its entirety;
2. Admit and consider the complete abstracts of Petitioners' water rights;
3. Reject the Respondents' Rule 408 objections as inapplicable to these public records;
4. Apply MECA and Montana's Sunshine Laws to uphold the constitutional right to know; and
5. Find that the evidence shows Petitioners are receiving fewer days of irrigation water than their adjudicated rights require, with late deliveries causing substantial and measurable crop losses.

In agricultural operations, the only reliable and objective measure before this Court is the difference between the number of irrigation days adjudicated and the number of irrigation days actually delivered. Any attempt to force Petitioners to assign a speculative dollar value to these losses ignores the unpredictable nature of crop production when water is late or uncertain, and compounds the harm over multiple years and generations. The Court should ground its findings in these concrete, proven facts rather than speculative valuations that cannot be calculated with accuracy.

Respectfully submitted,

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Appendix A, and Table of Authorities (Bluebook style).

APPENDIX A-Table of Transcript Citations

Topic Description	Transcript Citation
Irrigation Entitlement - Doty	Mr. Doty testifies his abstract provides 163 days of irrigation water (May 1-Oct 13). Tr. 34:12-16
Irrigation Entitlement -	Mr. Palmer's entitlement confirmed at 153 days (Apr 15-Sept 15). Tr. 36:3-8
Palmer Sunshine Laws	Discussion of Montana Const. Art. II §§ 8-10 and DNRC open meeting obligations. Tr. 58:10-24
Rule 408 Objections	Respondents object to DNRC Staff Report under Rule 408; Court discussion. Tr. 75:1- 14
Late Water / Crop Loss	Testimony that late deliveries cause 50- 70% crop loss . Tr. 102:5-23
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TABLE OF AUTHORITIES	
Case	Citation
Nelson v. City of Billings	2018 MT 36, 390 Mont.290, 412 P.3d 1058
Great Falls Tribune v. Mont. Pub. Serv. Comm'n	2003 MT 359, 319 Mont. 38, 82 P.3d 876.
Crites v. Lewis & Clark Cnty.	2019 MT 161, 396 Mont. 336, 444 P.3d 1025.
Mont. Env'tl. Info. Ctr. v. Office of the Governor	(citation pending official reporter).
In re Clark Fork River Drainage Area	254 Mont. 11, 16, 833 P.2d 1120 (1992).