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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. 6

COMPACT PARTIES' POST-HEARING OPENING BRIEF
REGARDING MATERIAL INJURY HEARING No. 6 [Root]

Pursuant to the governing orders,¹ the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States (collectively, “Compact Parties”), submit this opening post-hearing brief in connection with the material injury hearing held on April 24, 2025 regarding Objector Valerie Root (“Root”). As the Compact Parties explain below, Root has not carried her burden of proof to show material injury by operation of the Compact. Therefore, the Court should 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 (“Motion”), and approve the CSKT Compact, §§ 85-20-1901, -1902, MCA. Specifically, Root does not have a water right that is affected by the Compact, and she provided no evidence about how any aspect of the Compact would injure her. Instead, she made ill-defined and speculative claims of harm not tied to actual Compact operation. For example, her allegations regarding a disturbance to her use of Agency Creek occurred before the Compact was in effect and thus cannot be the basis for material injury caused by the Compact. Root has failed to meet her burden to show material injury.

I. MATERIAL INJURY LEGAL STANDARD

As this Court and the Montana Supreme Court have held, to demonstrate material injury from the Compact, an objector here must establish, through admissible evidence, a concrete injury to water rights or other real property interests caused by operation of the Compact. *See In re Crow Water Compact Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Crow Tribe of Indians and the State of Montana*, 2015 MT 353, ¶¶ 34-35, 382 Mont. 46, 364 P.3d 584 (“*Crow Compact II*”) (rejecting argument that Objectors had “property interest in future appropriations or changes in use” harmed by a Compact’s basin closure provision); *United States Fish and Wildlife Service, Bowdoin National Wildlife Refuge - Montana Compact*, No. WC2013-04, 2015 WL 9699486, at *10 (Mont. Water Ct., Oct. 07, 2015) (determining material injury “requires injury to water rights or real property interests” rather than difference of opinion over correct government policy).

Evidence of injury that relies on speculation about future Compact implementation cannot demonstrate material injury. *In re Adjudication of the Existing and Reserved Rights to*

¹ *Case Management Order No. 9*, Dkt. No. 2602.00 (May 16, 2025); *Court Minutes and Order Setting Deadlines*, Dkt. No. 2608.00 (July 11, 2025); and *Order Modifying Briefing Schedule*, Dkt. No. 2628.00 (August 13, 2025).

the Use of Water, Both Surface and Underground, of the United States Department of Agriculture Forest Service within the State of Montana, No. WC-2007-03, 2012 WL 9494882, at *10 (Mont. Water Ct., Oct. 31, 2012) (court cannot “rely on any fears, concerns, and conjectures expressed by the Objectors about the future application of the Compact provisions or other future Forest Service actions. The expressed uncertainty of feared future events is too speculative upon which the Court can base a decision.”). Additionally, injury stemming from the consequences of the prior appropriation system cannot establish material injury. *Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00 at 75-76 (April 1, 2025) (“*Compact Validity Order*”) (“[N]either the Water Court nor the Montana Supreme Court ever has held that confirmation of tribal reserved rights with senior priority dates alone is sufficient material injury to disapprove a compact.”).

II. ROOT FAILED TO ESTABLISH MATERIAL INJURY

At her hearing, Root offered evidence that failed to show a concrete, non-speculative injury to a water right or other property interest that stems from the operation of the Compact. Root relied on vague and unsupported allegations of harm without identifying any provision in the Compact or the Tribal Water Right that harms her. Root’s burden was to show that her “interests are materially injured by operation of the Compact.” *Crow Compact II*, ¶ 20. Failing to specifically and cogently identify what aspect of, or how the operation of, the Compact harms her, let alone even identify any of the Tribes’ water rights that could cause such harm, should be dispositive against a finding of material injury.

Nor does Root have a water right that is affected by the Compact. Root bases her injury allegations on water she received via a ditch from Agency Creek, but she does not have a water right on record for that purpose. Lastly, the alleged injury could not have occurred because it occurred before the Compact was operational.

A. Root Does Not Have a Water Right That is Materially Injured by Operation of the Compact

It is undisputed that Root has one domestic well serving her property, which is not subject to call under the Compact. *Hearing 6 Prehearing Order*, Dkt. No. 2519.00 at 1 (April 23, 2025) (Agreed Fact No. 1); § 85-20-1901, MCA, Art. III.G.1. Root does not have a water right on record for irrigation from Agency Creek. *Hearing Tr.* 49:21-25; 61:22-25, April 24, 2025 (testifying that she was unable to get a water right for her irrigation use) (“Tr.”). Much of the evidence presented by Root was an attempt to show that she has “valid but unregistered”

“Secretarial” and Walton water rights. *Hearing 6 Prehearing Order* at 4 (Objector’s Issue of Fact No. 3); Tr. 27:7-25. This Court has determined that the Compact does not “define or otherwise limit the ability of any Objector to claim Walton or other rights” and that adjudicating individual rights is not the purpose of these proceedings. *Compact Validity Order* at 50-51. Evidence of the validity of her claimed individual water rights is immaterial to the question of material injury by operation of the Compact.

Yet even if Root had a valid water right for irrigation from Agency Creek, it would still not be a basis for material injury because it would be protected from interference by the Other Instream Flow provisions of the Compact. *See* § 85-20-1901, MCA, Art. III.C.1.d.iii; § 85-20-1902, MCA, Unitary Administration and Management Ordinance (“UAMO”), § 2-1-115 (3).

The Compact provides that rights from “Other Instream Flows” are not enforceable until the process outlined in § 2-1-115 of the UAMO is finalized. That process requires that the adjudication of all state-law rights be completed, and then the Other Instream Flow is created in amounts that do not interfere with any state-law water rights recognized in the adjudication. This Court discussed these provisions in its *Compact Validity Order*, concluding that the provisions are “extensively detailed in the UAMO, and include[] the opportunity for objections *and the recognition of ‘a water budget that allows valid water rights to be exercised.’*” *Compact Validity Order* at 41 (emphasis added).

Seth Makepeace, the witness for the Compact Parties, is a hydrologist for the Tribes who was a technical team representative during the negotiations of the Compact and has continued to work on Compact implementation. Tr. 44-45. He explained that there is an Other Instream Flow right on Agency Creek with a place of use extending through the source adjacent to the Root property. Tr. 51:12-17. If Root has an adjudicated irrigation right from Agency Creek after the final decree, it will be protected through the Other Instream Flow process.

The evidence submitted in these proceedings demonstrates that Root does not have a cognizable irrigation water right that could be materially injured by operation of the Compact. Even if she did, however, it would be protected under the Other Instream Flow provisions and therefore could not be a basis for material injury. While enforcement of the Tribe’s senior water rights against Root would not constitute material injury, *Compact Validity Order* at 75-76, here, the Compact *protects* any state-law based rights Root might have on Agency Creek. Accordingly, Root has failed to meet her burden to show a concrete injury to water rights or

other real property interests caused by operation of the Compact.

B. The Alleged Agency Creek Diversion Preventing Root's Irrigation Occurred Before the Compact was Effective

Finally, Root alleges injury from Agency Creek no longer carrying as much water, but that change she identifies happened before the Compact was operational. She testified that in June or July 2021, some unknown entity diverted the creek and somehow prevented her from irrigating her property from a ditch. Tr. 28:6-17; 41:9-25. First, this vague and bare assertion of injury without identifying what provision of the Compact and its operation caused the injury does not meet her burden to prove material injury. Second, the salient fact is that the Compact was not effective at that time. The Compact's Effective Date was September 17, 2021, after the Secretary of the Interior's execution signifying the United States' approval.² Seth Makepeace's testimony confirmed that there was no Compact-related reason why she allegedly received less water from Agency Creek in the summer of 2021. Tr. 55:5-7.

Root offered no evidence to refute such testimony or otherwise prove that her alleged Agency Creek-related injuries stemmed from operation of the Compact in any way. Root's vague allegations that the Compact somehow authorized these undefined changes to Agency Creek before the Compact was operational and caused her harm are not sufficient to meet her burden to prove material injury.

CONCLUSION

For the foregoing reasons, the Compact Parties request that the Court find that Root has not carried her burden of proof to demonstrate material injury to her water rights from operation of the Compact. The Court should dismiss all objections and approve the CSKT Compact.

Respectfully submitted this 22nd day of August, 2025.

/s/ David W. Harder
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/s/ Melissa Schlichting
Attorney for the Confederated Salish & Kootenai Tribes

/s/ Molly Kelly
Attorney for the State of Montana

² See *Compact Validity Order* at 9; Preliminary Decree Appendix 1 at 57; Compact, § 85-20-1901, Art. II.28.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Post-Hearing Opening Brief* for Hearing No. 6 was served by email to the Objector and email to counsel for the Compact Parties as set forth below this 22nd day of August, 2025.

/s/ Jean Saye
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