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

CASE NO. WC-0001-C-2021

POST-HEARING BRIEF
AMMEN – NO. 2

I. INTRODUCTION

Objectors James F. and Alice A. Ammen participated in an evidentiary hearing on April 23, 2025 in Missoula, Montana. We claim that our property interests will be materially injured by operation of the Compact based on potential loss of income and property devaluation. Our water right will become junior to the Tribes' new senior surface water right for a wetland at the mouth of Magpie Creek.

This claim is based on the fact that we have no call protection in the Compact for our surface water right 76L 141798 00, [Ex. 2-CP4, pages 1-2]. Our water right does not fall under any category listed in § 85-20-1901, MCA, Article III.G, "Call Protection". We are not in the Flathead Indian Irrigation Project (FIIP), or in a FIIP influence area.

We have two types of Federally authorized/patented water rights that, combined, are recognized as water right 76L 141798 00 by the State of Montana.

For the purpose of this Brief, we will assume that the issues surrounding the inaccessibility of our surface water right will be resolved in the adjudication of Basin 76L.

The Tribal water right in the Preliminary Decree that could be a source of material injury is 76L 30052855 (Appendix 12). This is a non-consumptive instream flow water right with a priority date of time immemorial. If a particular monthly target flow rate is not met for a wetland at the mouth of Magpie Creek, then our water right could be subject to call, which would cause us to suffer a loss of income due to lack of water and, thus, a lack of ability to irrigate. This would devalue our property.

The right to use water is a property right. Operation of the Compact will cloud our title with a new senior, surface Tribal water right. The uncertainty of when call might be exercised, in addition to loss of water, will burden and devalue our property. The injury will affect the reasonable exercise of our water right. The loss of water will lead to financial loss. The use of our property could be severely restricted. The Compact is akin to a regulatory *taking* because it gives a new senior Tribal water right for a wetland that was never imagined in 1914 when our predecessors in interest appropriated water [Ex. 2-Ammen6]. If not a *taking* - as in we will still have a water right in name - then a diminution of our water right. This is reminiscent of our current situation in which we have an active surface water right, but are blocked from accessing the water.

II. ARGUEMENT

A. Prior appropriation was in effect in 1915. The Compact injures us by creating a new senior Tribal water right for a wetland. The Federal Government wrote documents with intention; if it wanted to subject non-Indian water usage to prior rights of Indians, it said so. See examples of wording in three Federal documents pertaining to our property:

1. In 1909, the United States filed a Notice of Appropriation for 100cfs of water out of Magpie Creek [Ex. 2-Ammen2]. The stated purpose of the water appropriation was to irrigate 2,000 acres of land in Township 18N, Ranges 22 and 23W, M.M.M., as well as for domestic and power purposes. **No mention was made of water being appropriated for the benefit of the Indians *or* non-Indians.** (Tr. [page 8/lines 3-10])
2. When issuing a patent [Ex. 2-Ammen4] to one of our non-Indian predecessors in interest, Ray Schulstad, the United States confirmed the patentee's water rights and rights to ditches "*as may be recognized and acknowledged by the local customs, laws, and decisions of Courts*." **There was no wording on the patent acknowledging prior water rights of Indians.** (Tr. [page 6/lines 12-19])
3. *But,* in the 1915 Federal water usage contract of our other non-Indian predecessor in interest, Axel Schulstad, [Ex. 2-Ammen3], the contract stated in part that **the water use was, "…subject to the prior rights of existing Indian canals."** Notably, the water use was not subject to nonexistent, possible future water rights of Indians.

B. The Federal Government defends Tribal reserved water rights, yet fails to equally defend Federally assured patented water rights and Federal water use contracts with non-Indians. (Tr. [page 6/lines 24-26] & [page 7/lines 1-2). The United States opened up the Flathead Reservation to non-Indians who complied with the rules at the time only to have their successors in interest, *us*, abandoned. Now, after our property has been in non-Indian ownership for 110 years, the Compact Parties spring on us that the Tribes were always first in time, even back to time immemorial! The United States sacrifices our rights in order to settle Tribal water rights. That injures us.

C. The amount of water claimed in the Compact for Tribal water right 76L 30052855 is excessive and will always necessitate call on junior users, if approved. We know this because both the United States and the Tribes have claimed all of the water of Magpie creek, with the Tribes claiming 21% more the US. (Tr. [page 7/lines 21-25] & [page 8/lines 1-6)]).

When the United States claimed all of the water out of Magpie Creek in 1909, it appropriated 100cfs [Ex. 2-Ammen2]. Axel Schulstad's 1915 water usage contract with the US Reclamation Service states that the US previously appropriated *all* of the water of Magpie Creek [Ex. 2-Ammen3]. In the Flathead Compact, the Tribes claim 121.1cfs of Magpie Creek, which is 21% more than claimed by the US. When call is exercised, we will be injured.

D. Contrary to what the Compact Parties contend, we do not have call protection in the Compact for our surface water right. We know that the Tribes' Instream Flow water rights have not been finalized. That the UAMO will set enforceable flows for Magpie Creek water after final adjudication. That there will be a water budget that allows for valid water rights to be exercised pursuant to statute. That we will be given an opportunity to participate in the process to set the enforceable limit. (Tr. [page 11/lines 18-25] & [page 12/lines 1-16]). At the end of the day, we will still be junior to the new senior Tribal water right for wetlands and subject to call. That injures us.

III. CONCLUSION

After our April 23, 2025 court hearing, a CSKT representative told us that we would probably never get our Magpie Creek water right back and, because the Tribes have so much water stored in a reservoir, we could lease water from them! This is but one example of the financial damage we face from the Compact. Why won't we get our water right back via a ditch that the Federal Government authorized be built over what was surplus land in 1915 and used for 70 years? Why would we want to pay for water? Why would we want to pay for power to pump water uphill when we have a right to gravity-fed irrigation water?

We can't show actual harm due to operation of the Compact because the most important parameters of the Compact are not finalized, i.e., water flow-rate amounts. Those amounts are *to be determined* after Compact approval and after devisement of a water budget. This is irrational and surreal. Who in their right mind would agree something that is to be determined at a later date? How can an objector provide facts to demonstrate they would be adversely affected by exercise of the Compact when there are no final numbers? We don't know how much water the Tribes will get for wetlands at the mouth of Magpie Creek. All we know is that we will be junior to the new Tribal senior water right and subject to call. That is not speculation.

We have heard repeatedly that *all the Compact does is quantify the Tribal Water Right*. We believe that our Federally assured, patented water right and Federal water usage contract should not be subjugated to a newly claimed senior Tribal surface water right. When the Federal Government opened the Flathead Reservation to non-Indians, it implicitly reserved enough water to fulfill the requirements of Federal patents and water use contracts. The focus of the Federal Government at the time was *irrigation* of the arid west, not wetland maintenance.

It is a little late and disingenuous for the Compact Parties to claim that the Tribes were *first in time, first in line* when in the early part of the 20th century, the Federal Government fostered the notion that the Flathead Reservation ceased to exist by referencing the *"...**former** Flathead Indian Reservation"* in an Act of Congress. [Online: https://indianlaw.mt.gov/_docs/fed_state/acts_of_congress/cskt/38Stat510.pdf]

We often think about our predecessors in interest, father and son, Axel and Ray Schulstad. Would Axel have purchased a former Indian allotment [Ex. 2-Ammen5] and would son Ray have homesteaded [Ex. 2-Ammen4] next to his father had they known that the Tribes would claim a senior water right for Magpie Creek with a priority date of time immemorial? Would

they have filed a Notice of Appropriation in 1914 for water out of Magpie Creek [Ex. 2-Ammen 6]? Would they have built a half mile long ditch and laterals if they had any inkling that their water right could be diminished or extinguished? Probably not. As far as we know, they were the first to file a notice of appropriation for water out of Magpie Creek after the United States appropriated all of Magpie Creek water. They were given rights. The Federal Government has reneged on its commitment to those rights.

We've been waiting 33 years for resolution of our Magpie Creek water access problem. We hoped the Flathead Compact would finally end the misery. We were wrong. It appears we will be working on water rights until we die. That injures us.

The Flathead Compact Parties could have made it easier on everyone if they had copied verbiage from 85-20-901 MCA - Crow Tribe - Montana Compact Ratified, which explicitly protects water rights recognized under State Law, e.g., Article III A.6, B.6, C.6, D.6, etc.

Because we are not in FIIP or a FIIP influence area, we will not reap the benefits of the Federal dollars injected into the improved Flathead irrigation system.

We ask the Judge to find that we have met the threshold for proving material injury as specified in Court Order on Pending Motions Regarding Compact approval dated April 1, 2025. (Doc. 2336.00).

Court Exhibits Referenced:
2-CP4, pages 1-2 – Ammen's Water right 76L 141798 00
2-Ammen2 - 1909 US Notice of Appropriation for Magpie Creek;
2-Ammen3 - Axel Schulstad's Water Usage Contract with the United States;
2-Ammen4 - Ray Schulstad's US patent;
2-Ammen5 - Axel Schulstad's US patent
2-Ammen6 – Axel and Ray Schulstad's Notice of Appropriation for Magpie Creek

DATED: August 22, 2025 */s/ James F. and Alice A. Ammen, Objectors*