

WC-0001-C-2021

August 22, 2025

Montana Water Court

Adam R.F. Gustafson  
Acting Asst. Attorney General  
David W. Harder  
Senior Attorney for Legal Issues  
United States Department of Justice  
999 18<sup>th</sup> Street, North Terrace, Suite 600  
Denver, CO 80202  
303-844-1372  
[david.harder@usdoj.gov](mailto:david.harder@usdoj.gov)  
[efile-denver.enrd@usdoj.gov](mailto:efile-denver.enrd@usdoj.gov)

Rebecca Ross, Senior Attorney  
United States Department of Justice  
Tribal Resources Section  
Environment and Natural Resources Div.  
150 M Street, NE  
Washington, D.C. 20002  
202-598-3501  
[rebecca.ross@usdoj.gov](mailto:rebecca.ross@usdoj.gov)

Molly M. Kelly, Legal Counsel  
Jennifer C. Wells, Legal Counsel  
Montana Department of Natural Resources  
and Conservation  
1539 Eleventh Avenue  
P.O. Box 201601  
Helena, Montana 59601  
406-444-5785  
406-444-0503  
[molly.kelly2@mt.gov](mailto:molly.kelly2@mt.gov)  
[J.Wells@mt.gov](mailto:J.Wells@mt.gov)  
[jean.saye@mt.gov](mailto:jean.saye@mt.gov)

Daniel J. Decker, Managing Attorney  
Melissa Schlichting, Staff Attorney  
Christina M. Courville, Staff Attorney  
Zach Zipfel, Staff Attorney  
Danna Jackson, Staff Attorney  
Confederated Salish and Kootenai Tribes  
Tribal Legal Department  
P.O. Box 278  
Pablo, MT 59855  
406-675-2700  
[daniel.decker@cstkt.org](mailto:daniel.decker@cstkt.org)  
[melissa.schlichting@cstkt.org](mailto:melissa.schlichting@cstkt.org)  
[christina.courville@cstkt.org](mailto:christina.courville@cstkt.org)  
[zachary.zipfel@cstkt.org](mailto:zachary.zipfel@cstkt.org)  
[danna.jackson@cstkt.org](mailto:danna.jackson@cstkt.org)

Ryan C. Rusche  
Sonosky, Chambers, Sachse, Endreson  
& Perry, LLP  
P.O. Box 2930  
Columbia Falls, MT 59912  
202-682-0240, Ext. 697  
[rusche@sonosky.com](mailto:rusche@sonosky.com)

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. 16**

---

**COMPACT PARTIES' POST-HEARING OPENING BRIEF**  
**REGARDING MATERIAL INJURY HEARING No. 16 [Allen]**

Pursuant to the governing orders,<sup>1</sup> 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 Vivian Allen’s (“Allen”) material injury hearing held on May 7, 2025. As explained below, Allen 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.

At the hearing, Allen offered evidence, but failed to demonstrate a concrete, non-speculative injury to her water right or other property interests that stems from operation of the Compact. Allen’s case consisted primarily of her reading select sections of technical reports free of any broader context. She followed that by opining generally how, in her lay opinion, these reports seemed to relate to her water right in particular, much of it premised on her misunderstanding of the Compact and Montana water law. Much of Allen’s evidence asserted only a general hydrologic connection between surface and groundwater—something the Compact Parties do not dispute. She provided nothing definitive showing how exercise of any aspect of the Tribal water right under the Compact would injure her water right. Finally, and perhaps most fatal to Allen’s claim of material injury, her water right, a domestic well, is protected from call under the Compact.

## **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 (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 -*

---

<sup>1</sup> *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).

*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 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. ALLEN FAILED TO ESTABLISH MATERIAL INJURY**

At her hearing, Allen offered evidence that failed to show a concrete, non-speculative injury to her water right or other property interest that stems from operation of the Compact. Allen is not materially injured by operation of the Compact because: (1) her domestic well is protected from call under the Compact, and (2) being junior to the Tribes’ water rights is not a material injury. Other evidence she produced this Court has determined cannot be the basis of a material injury. Moreover, even if the evidence Allen produced at the hearing painted an accurate picture of the hydrologic connection between Hungry Horse Reservoir, the Flathead River, and her well—a point the Compact Parties dispute—none of that evidence amounted to anything more than speculation about possible future injury.

### **A. Allen’s Injury Claim Is Based on Disproven Lay Testimony How the Future Use of 90,000 Acre-Feet from Hungry Horse Reservoir May Cause Her Domestic Well to Possibly Go Dry**

Allen’s theory of material injury focused primarily on the portion of the Tribal Water Right known as “Flathead System Compact Water” and the component of that right that allows the Tribes to use water from the United States Bureau of Reclamation’s (“BOR”) Hungry Horse

Reservoir. *See generally* Hearing Tr. pp. 23-55, May 7, 2025 (“Tr.”). The Compact provides the Tribes with a right to divert up to 229,383 acre-feet per year (“AFY”) from the Flathead River or Flathead Lake, allow those uses to consume no more than 128,158 AFY, and that right includes up to 90,000 AFY from Hungry Horse Reservoir (“Hungry Horse Allocation”). Section 85-20-1901, MCA, Arts. II.35 & III.C.1.c; *Compact Validity Order* 39, n. 35; 45. Under the federal legislation approving the Compact, the Tribes’ allocation from the Reservoir has a priority date of the water rights held by BOR for Hungry Horse Reservoir. *See Findings of Fact, Conclusions of Law, and Order for the Commencement of Special Proceedings for Consideration of the confederated Salish and Kootenai Tribes—State of Montana—United States Compact*, Dkt. No. 18.00, (June 9, 2022) at 6-9. The priority date for those rights in basin 76J was recently decreed by the Water Court and are either 1947 or 1955. *Hearing 16 Prehearing Order*, Dkt. No. 2594.00, at 2, May 6, 2025 (Agreed Fact No. 4).

Allen lives below Hungry Horse Reservoir above the confluence of the South Fork and Middle Fork of the Flathead River. Tr. 58:1-16; Hearing No. 16, Compact Parties Ex. 01\_001. Allen has one water right, a domestic well (76LJ 30122279) with a priority date of May 22, 1967. *Hearing 16 Prehearing Order*, Dkt. No. 2594.00, at 2 (Agreed Facts No. 5). Allen’s claim of material injury is that in low-water years, the Tribes’ withdrawal of the 90,000-acre-feet of Hungry Horse Allocation water will so dramatically lower the water table in the area it will somehow dry up her domestic well. This was based largely on her lay understanding of the general principle that surface and groundwater have some hydrologic connectivity, combined with a misunderstanding of how the Compact operates and a lack of knowledge concerning state law.

Two witnesses testified at the hearing. Allen testified as a lay witness in support of her objection. Allen does not have any training or education in hydrology, geology or engineering. Her testimony consisted of describing pertinent parts of scientific papers that described either the hydrology/geology of the Columbia Falls area where she lives, Hungry Horse Reservoir, or the concept that groundwater and surface water typically have some connectivity. Tr. 23-55.

The Compact Parties had one witness. Seth Makepeace is a professional hydrologist who has worked for the Tribes for 35 years. Tr. 78:14-21. Makepeace’s testimony contradicted Allen’s on nearly every point.

**B. Allen Did Not Demonstrate that the Tribes' Future Use of the Hungry Horse Allocation Would Materially Injure Her Well**

Allen's allegation that she is materially injured by operation of the Compact is based on the generalized concept that groundwater and surface water are connected. From there, she extrapolates that if the Tribes withdraw their Hungry Horse Allocation from the Reservoir upstream from her home in a dry year the groundwater table her well relies on will, *ipso facto*, be lowered. *See e.g.*, Tr. 38:13-21; 51:12-18; 56:8-14; 64:14-18; 66:13-16. But her theory of material injury is beset by numerous problems. First, Allen's claim of injury is belied by the underlying geology and hydrologic connectivity where she lives. Second, the injury asserted is unsupported by the evidence and, in any event, the Court has ruled that the type of evidence that Allen presented could not establish an injury claim. Her claims are thus speculative, unsupported by the evidence, and cannot form a basis for material injury.

Allen's claim of harm is contrary to the relevant topography and the hydrologic connections and groundwater movement near her well and therefore must be rejected. As Makepeace testified, Bad Rock Canyon, downriver from Allen's well, restricts groundwater flow into the Flathead River. This constriction causes groundwater levels in the Hungry Horse area—where Allen's well is located—to be naturally higher and closely connected to surface water. *See* Tr. 79:12-81:24. While Allen mistakenly believes the Tribes' use of the Hungry Horse Allocation would cause groundwater levels and her well level to drop, Makepeace testified the opposite would happen. According to Makepeace, because of the constriction of Bad Rock Canyon and the interconnectivity between groundwater and surface water in the Columbia Falls area, Hungry Horse water “should lead to a recharge or an increase in water table elevations in the unconfined aquifer underlying Hungry Horse Reservoir.” Tr. 82:11-14.

Allen also testified concerning low water years at Hungry Horse Reservoir in the late 1980s and early 1990s. Tr. 43:14-20; 44:5-10; 46:7-20. According to Allen, if the Compact had been in effect at that time and the Tribes withdrew their Hungry Horse Allocation, “there surely would have been even more ravishment of the environment and the needs of those using the water.” Tr. 46:23-25. Setting aside that this testimony is speculative, Makepeace testified that beginning in 2000, the BOR implemented “Variable Queue Water Management” for Hungry Horse Reservoir. Tr. 83:9-15. Prior to implementation of the Variable Queue Water Management, Hungry Horse Reservoir was drawn down “extensively” for flood control in the Portland, Oregon, area. Tr. 83:22-84:2. Now that the BOR uses Variable Queue Water

Management, however, large drawdowns of Hungry Horse Reservoir are no longer implemented by the Bureau. Tr. 84:3-10. Ultimately, according to Makepeace, Allen's concern about the low water levels in the Reservoir from the late-80s and early '90s are no longer a concern because of BOR's subsequent constraints on Reservoir drawdown and the Variable Queue Water Management. Tr. 84:11-24.

Equally troubling for Allen's argument, however, is that she also ignores that the Compact protects minimum Flathead River levels in times of drought and limits the use of the Hungry Horse Allocation down to 50 percent of the full allocation (45,000 AFY). Section 85-20-1901, MCA., Apps. 7 & 8; Preliminary Decree, App. 2, Decree Report pages 64-66 (Remarks on Flathead System Compact Water right, 76LJ 30063812). These myriad problems with Allen's evidence ultimately led Makepeace to conclude that he could not see a connection between the Compact and Allen's well levels. Tr. 85:2-8.

Prior decisions of this Court also undermine Allen's argument. Her entire case is based on generalized lay testimony that the Court ruled cannot support a valid injury. Allen has no specialized training in the relevant subjects, and she has not conducted the necessary analysis or modeling to demonstrate that her wells would be impacted by the Tribes' withdrawal of the Hungry Horse Allocation. Her testimony consisted largely of her reading selected portions of technical reports, adding her own anecdotal observations, and then speculating as to her harm. She did not hire any expert to conduct any studies. This Court ruled in another hearing with a similar evidentiary posture that an objector must do more than show "a general hydrologic connection exists between surface water and groundwater." *See Hearing 15 Order on Prehearing Motions*, Dkt. No. 2590.00, at 3 (May 5, 2025); *see also* Tr. 28:24-29:1; 29:22-23; 42:21-25; 51:1-2; 63:7-10; 72:4-6; 73:18-25 (Allen asserting she is relying on Objector Carter's arguments or evidence). Likewise, Allen complains that the State never conducted any study to determine the impact of the Tribes' use of the Hungry Horse Allocation on groundwater levels. Tr. 35:12-14. But, again, in another hearing this Court has ruled that this argument cannot support an objector's claim of material injury. *See e.g., Hearing 15 Order on Prehearing Motions*, Dkt. No. 2590.00, at 3 (May 5, 2025); *see also* Tr. 28:24-29:1; 29:22-23; 42:21-25; 51:1-2; 63:7-10; 72:4-6; 73:18-25 (Allen asserting she is relying on Objector Carter's arguments and evidence).

In sum, Allen provided no competent evidence that use of the Hungry Horse Allocation would harm her, and the testimony from the Compact Parties refuted Allen's arguments in their entirety.

Allen's other arguments are unsupported, based on fundamental misunderstandings, or inherently contradictory, leaving the Compact Parties unable to discern exactly what she is arguing. For instance, at various times during her testimony, Allen appears to argue that the Compact endangers fisheries on the Flathead River and Hungry Horse Reservoir. *See* Tr. 61:20-25; 62:1-19; 64:19-22; 65:2-22; 66:6-12. At other times, however, she seems to express skepticism that the Tribes have any interest in protecting fisheries or that the Compact does anything to protect them. *See* Tr. 38:22-39:3; 40:3-14; 40:21-41:7; 47:2-8; 51:12-18; 51:24-52:4. Likewise, Allen attempts to complain about the Tribes' Flathead Lake right, which guarantees the lake level remains at 2883'. Tr. 66:13-71:16. But on cross-examination, it becomes clear she has no understanding of the Tribes' lake right, eventually concluding that, "[S]ince I've been mixed up, I haven't really had a chance to digest and meditate on that --." Tr. 70:10-17 (regarding how she is harmed by the Tribes' Flathead Lake right). Each of these arguments is so lacking in factual foundation and basic understanding that they cannot form the basis of a material injury claim and should be disregarded.

**C. Allen Is Not Materially Injured by Being Junior to the Tribes' Senior Water Rights**

Allen also argues that she is materially injured by being subject to call by other water users who are senior to her. According to Allen, the Tribes will call other junior users, who will then call her water right in turn. Tr. 41:2-16. Allen asserts this equates to "a call by the Tribes using water rights owners, other water rights owners, as their enforcers." Tr. 41:5-7. Allen further argues that she is harmed by being placed in the position to possibly have to call Columbia Falls' municipal well to protect her own water right. Tr. 41:2-13. She finds this "moral dilemma" "reprehensible and disgusting" and believes it "meets every definition of material harm." Tr. 42:10-13.

Allen is wrong about Montana law and this Court's previous holdings. Being subject to call is not a material injury, it is simply a consequence of being a junior user in a priority system. *Compact Validity Order* at 75-76. A fundamental characteristic of Montana's prior appropriation doctrine is that junior users are subject to call by senior users. *State ex rel. Greely v. Conf. Salish & Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 89, 712 P.2d 754, 762

(1985). Neither being a junior user subject to call nor a senior user who can make call is material injury.

**D. Montana Law Protects Allen's Well from Exercise of the Tribal Water Right**

Allen's well is protected from injury by the Tribes' water rights in the Compact in a variety of ways. Specifically, the Tribes cannot utilize the Hungry Horse Allocation without participating in a state statutory process that requires no impact on existing water uses, nor can they call on her well.

If the Tribes sought to develop a use of the Hungry Horse Allocation in the Flathead River close to Allen's well, they could not do so without complying with state law, being subject to an objection by Allen or others, and obtaining the approval of the DNRC. The Compact provides that any direct use by the Tribes, or lease by the Tribes of the Flathead System Compact Water is only allowed if such proposal is reviewed by DNRC and the agency determines that the proposed use does not adversely impact existing state water uses. Section 85-20-1901, MCA., Art. IV.B.5.c & Art. IV.B.6.c.vi (requiring compliance with the change of use state law requirements under §§ 85-2-302, 85-2-307 to -310, 85-2-314, and 85-2-402, MCA). A change of use application is only valid if the proponent demonstrates that the "change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments which a permit or certificate has been issued . . . ." Section 85-2-402, MCA. Thus, Allen's well has existing legal protections from new uses of Flathead System Compact Water, including the Hungry Horse Allocation. The fact that Allen is either unaware of these state-based protections or otherwise does not believe they will be followed does not demonstrate material injury. *See* Tr. 74:2-75:21.

In addition, the Tribes and United States cannot use their water rights to make a call on Allen's domestic well, which is protected from call under the Compact. *Hearing 16 Prehearing Order*, Dkt. No. 2594.00, at 2 (Agreed Fact No. 1); § 85-20-1901, MCA, Art III.G.2. This protection applies, irrespective of whether Allen believes it. *See* Tr. 52:22-53:14; 53:22-25. Existing state law and the Compact protect Allen's water right. Accordingly, she cannot meet her burden to demonstrate a material injury stemming from operation of the Compact.



### III. CONCLUSION

For the foregoing reasons, the Compact Parties request that the Court find Allen has failed to carry her burden of proof to demonstrate material injury to her water right from operation of the Compact. The Court should dismiss all objections, including Allen's, and approve the CSKT Compact.

Respectfully submitted this 22<sup>nd</sup> day of August, 2025.

/s/ David W. Harder  
Attorney for the United States of America

/s/ Melissa Schlichting  
Attorney for the Confederated Salish & Kootenai Tribes

/s/ Molly Kelly  
Attorney for the State of Montana

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Post-Hearing Opening Brief* for Hearing No. 16 was served by mail to the Objector and email to counsel for the Compact Parties as set forth below this 22<sup>nd</sup> day of August, 2025.

/s/ Jean Saye  
Jean Saye  
Paralegal  
Montana DNRC

Adam R.F. Gustafson  
Acting Asst. Attorney General  
David W. Harder  
Senior Attorney for Legal Issues  
United States Department of Justice  
999 18<sup>th</sup> Street, North Terrace, Suite 600  
Denver, CO 80202  
[david.harder@usdoj.gov](mailto:david.harder@usdoj.gov)  
[efile-denver.enrd@usdoj.gov](mailto:efile-denver.enrd@usdoj.gov)

Rebecca Ross, Senior Attorney  
United States Department of Justice  
Tribal Resources Section  
Environment and Natural Resources Div.  
150 M Street, NE  
Washington, D.C. 20002  
[rebecca.ross@usdoj.gov](mailto:rebecca.ross@usdoj.gov)

Molly M. Kelly, Legal Counsel  
Jennifer C. Wells, Legal Counsel  
Montana Department of Natural  
Resources and Conservation  
1539 Eleventh Avenue  
P.O. Box 201601  
Helena, Montana 59601  
[molly.kelly2@mt.gov](mailto:molly.kelly2@mt.gov)  
[J.Wells@mt.gov](mailto:J.Wells@mt.gov)  
[jean.saye@mt.gov](mailto:jean.saye@mt.gov)

Daniel J. Decker, Managing Attorney  
Melissa Schlichting, Staff Attorney  
Christina M. Courville, Staff Attorney  
Zach Zipfel, Staff Attorney  
Danna Jackson, Staff Attorney  
Confederated Salish and Kootenai Tribes  
Tribal Legal Department  
P.O. Box 278  
Pablo, MT 59855  
[daniel.decker@cslktribes.org](mailto:daniel.decker@cslktribes.org)  
[melissa.schlichting@cslktribes.org](mailto:melissa.schlichting@cslktribes.org)  
[christina.courville@cslktribes.org](mailto:christina.courville@cslktribes.org)  
[zachary.zipfel@cslktribes.org](mailto:zachary.zipfel@cslktribes.org)  
[danna.jackson@cslktribes.org](mailto:danna.jackson@cslktribes.org)

Ryan C. Rusche  
Sonosky, Chambers, Sachse, Endreson  
& Perry, LLP  
P.O. Box 2930  
Columbia Falls, MT 59912  
[rusche@sonosky.com](mailto:rusche@sonosky.com)

Vivian Allen  
P.O. Box 190278  
Hungry Horse, MT 59919  
[java@cyberport.net](mailto:java@cyberport.net)