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Adam R.F. Gustafson
Acting Asst. Attorney General
David W. Harder
Senior Attorney for Legal Issues
United States Department of Justice
999 18th Street, North Terrace, Suite 600
Denver, CO 80202
303-844-1372
david.harder@usdoj.gov
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

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
J.Wells@mt.gov
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@cslkt.org
melissa.schlichting@cslkt.org
christina.courville@cslkt.org
zachary.zipfel@cslkt.org
danna.jackson@cslkt.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

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. 2

COMPACT PARTIES' POST-HEARING OPENING BRIEF
REGARDING MATERIAL INJURY HEARING No. 2 [Ammens]

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 23, 2025 regarding Objectors James F. and Alice A. Ammen. As the Compact Parties explain below, the Ammens have not carried their 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. The Ammens base their allegations of material injury on inaccurate legal conclusions regarding the Compact’s provisions setting enforceable instream flow schedules and the prior appropriation doctrine. Their alleged material injury is speculative as it relies on a water right that Objectors have not used for over 35 years.

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 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

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).

*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. AMMEN OBJECTORS FAILED TO ESTABLISH MATERIAL INJURY

At their hearing, the Ammens offered no evidence that demonstrated a concrete, non-speculative injury to a water right or other property interest that stems from the operation of the Compact. Specifically, the Ammens’ complaint is based on legal issues that the Court has already addressed and rejected when setting enforceable schedules for instream flows and explaining the prior appropriation doctrine. The Ammens are not materially injured by operation of the Compact because: (1) their water right claim on Magpie Creek is protected pursuant to the Compact’s Other Instream Flow provisions; (2) being junior to the Tribes’ water rights is not a material injury; and (3) their reliance on a water right that they have never used and cannot use is too speculative to establish material injury.

A. The Ammens are Not Materially Injured Because Their Water Right Claim is Protected by the Other Instream Flow Process Established by the UAMO

The Ammens’ water right, which they base their injury on, is statement of claim 76L 141798-00 on Magpie Creek for 3.98 CFS for irrigation (Hearing 2_Compact Parties Ex04_001). The Ammens identify the Tribes’ Magpie Creek Other Instream Flow right (76L 30052855) as the Tribal right harming them. Hearing Tr. 5:21-24, April 23, 2025 (“Tr.”). But any complaint regarding the Tribes’ right is unfounded because the Ammens’ Magpie Creek right is protected from any interference under 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 “Other Instream Flows” rights are not enforceable until the process outlined in § 2-1-115 of the UAMO is finalized. That UAMO 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 irrigation rights recognized in the adjudication. This Court discussed these provisions in its April 1, 2025 Order, concluding that the provisions are “extensively detailed in the UAMO, and includes 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).

Alice Ammen testified that she understood that the Other Instream Flows would be set through a process outlined in the UAMO, that the enforceable schedule for the Other Instream Flows would be based on a water budget that protects water rights on the source, and that they would have the opportunity to participate in the process. Tr. 11:18-25, 12:1-16.

Because the Ammens’ claimed water rights are protected by these provisions of the Compact and the UAMO, any claims of injury cannot relate to the operation of the Compact and do not establish material injury arising from the Compact.

B. The Ammens are not Materially Injured by Being Junior to the Tribes’ Senior Water Rights

The Ammens assert that regardless of the Other Instream Flow process, their water right will always be junior to the Tribal Water Right and, thus, they are injured by being junior appropriators. Tr. 12:14-16. They assert that being subject to call—being junior to the Tribes’ senior water rights—is the material injury.

As this Court has recognized, 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). The fact that the Ammens’ water right claim is junior to the Tribes’ senior rights is not a material injury. And it is especially not a material injury when any valid existing water rights must be recognized and kept whole in the water budget that will be developed under the Other Instream Flows process.

C. The Ammens are not Materially Injured Because Their Alleged Injury Relies on Speculation of Future Injuries to a Water Right which They Have Never Used

Finally, the Ammens’ general assertion that the Compact will cause property devaluation and loss of potential income based on their Magpie Creek water right is entirely speculative,

because the Ammens have never even used the Magpie Creek right since purchasing the property in 1992. Tr. 10:11-24. Alice Ammen testified that due to an alleged ditch disturbance that occurred years before they purchased the property in 1992, they are unable to use the water right. Tr. 10:15-17.

Any material injury to a water right that the Ammens have never used is too speculative to meet the burden to prove material injury. *Crow Compact II* at ¶¶ 34-35; *Bowdoin National Wildlife Refuge - Montana Compact*, at *10. The Ammens have not met their burden to demonstrate how the Compact harms their water rights or causes them any other material injury.

III. CONCLUSION

For the foregoing reasons, the Compact Parties request that the Court find that the Ammens have not carried their burden of proof to demonstrate material injury to their 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
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. 2 was served by email to the Ammen Objectors and email to counsel for the Compact Parties as set forth below this 22nd 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 18th Street, North Terrace, Suite 600
Denver, CO 80202
david.harder@usdoj.gov
efile-denver.enrd@usdoj.gov

Rebecca Ross, Senior Attorney
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Environment and Natural Resources Div.
150 M Street, NE
Washington, D.C. 20002
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
J.Wells@mt.gov
jean.saye@mt.gov

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P.O. Box 278
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daniel.decker@cslkt.org
melissa.schlichting@cslkt.org
christina.courville@cslkt.org
zachary.zipfel@cslkt.org
danna.jackson@cslkt.org

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

James and Alice Ammen
1409 Gerald Ave.
Missoula, MT 59801
j.ammen@earthlink.net