

Bernard and Tina Shea

WC-0001-C-2021

34881 MT Hwy 35

February 21, 2025

Polson, MT 59860

Montana Water Court

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

CASE NO. WC- 0001-2021

Request for Evidentiary Hearing

a. Original Objection filed in the Water Court for Case No. WC-0001-C-2021 on Feb. 8, 2023. Docket # 904.00

b. Bernard and Tina Shea request to participate in an evidentiary hearing to present evidence of material injury.

c. Summary

Material Injury - This has not been very clearly defined by the Compact Parties, but a quick look of definitions in the Merriam Webster dictionary finds - material (having real importance or great consequences) and injury (an act that damages or hurts), so damages that have great consequences

1)First off, we must represent ourselves because we can't afford an attorney, so understanding this issue has taken many hours of research in order to even form an objection, let alone follow up with all of the legalities. The loss of our time devoted to work and our family is not inconsequential. We are trying to operate a small farm, run a small landscaping business, and homeschool our children.

2) We are currently not able to correct a split in our water right with a neighbor because the state has no jurisdiction and the Water Board doesn't have the paperwork to do so - we are in limbo still - we would like to have our water rights in order in case we would like to sell our property. Our constitutional right to have our water issues adjudicated by the state of Montana have already been taken away and placed into the hands of the Water Board, even though the compact has not yet been ratified. This is material harm to our family and neighbors.

3) Our water rights could be materially injured in the following cases:

Compact Water Right 76LJ30052822 (Decree Report p. 345-346, Appendix 12)
on Skidoo Creek - which is a Time Immemorial claim of a nonconsumptive instream water flow - the purpose and in stream place of use cannot be changed on Skidoo

Creek. The measurement place of this claim is at a place downstream of the diversion point for our water rights. The claimed flow rates range from 1.50 CFS to 3.6 CFS. Our maximum claim use is 1.55 CFS. We have historically flowed this with diligent and frequent maintenance performed by ourselves. The tribal claim could destroy or severely diminish our water rights on Harrell Ditch, diverted from Skidoo Creek, if there is a dry year and the tribe requires our irrigation water to maintain their flow at the mouth of Skidoo Creek. This would certainly cause material damage by impacting our growing practices of hay/fruit/vegetables and raising of livestock.

Compact Water Right 76LJ 30052667 (Decree Report p. 487-488, Appendix 16) claims all naturally occurring surface and groundwater, Time Immemorial, for wetlands in Sec. 21 T23N R19W (Skidoo Bay) Article III. f of the Compact directs that the Tribes “have the right to all naturally occurring water necessary to maintain the Wetlands identified..” Since Skidoo Creek flows into these wetlands, it is reasonable to assume the Tribe could make a call on the water from Skidoo Creek which could diminish or negate our water right.

In addition, **Water Right 76LJ 30052867 Compact (Appendix 18, p. 505)** has an unquantified flow rate, a time immemorial priority date, and a maximum volume of “all naturally occurring surface water in Flathead Lake up to the shoreline elevation of 2,883” and “The sources of this water right include all named and unnamed tributaries that drain directly into Flathead Lake” including Skidoo Creek. With this unquantified flow and exaggerated volume, the Tribe could make a call on Skidoo Creek water to satisfy the Tribal water right for the maintenance and enhancement of fish habitat, which again would diminish our water right.

In all of these cases, we would have to abide by the decisions of the Unitary administration and management ordinance. The “enforceable level of this water right shall be determined by the process set forth in the law of administration for the development of such enforceable schedule...” As described in **2-1-115 of 85-20-1902** (Unitary administration and management ordinance), which we object to, this enforceable schedule would be determined by the Engineer who is appointed by the Water Management Board. This board has “exclusive jurisdiction to resolve...any controversy over the right to the use of water as between the Parties” (Mont. Code 85-20-1901, art. IV, I. 1). including non-tribal Montanans who purchased land from the successors of tribal allottees. As non-tribal Montanans, our rights are to have our water use adjudicated by the state of Montana - not a Water Management Board where the majority of the members are members of the tribe or who have worked for the tribe and do not answer to the state as members of a state determined board.

Article IX, Section 3 of the Montana Constitution states “The legislature shall provide for the administration, control, and regulation of water rights.” Article III, Section 1 of the Montana Constitution provides for the separation of powers (legislative, executive, and judicial) and deems that “No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

By removing the state as our lawful administrator of water rights and giving these duties to the Flathead Reservation Water Management Board (per **85-20-1902** (Unitary administration and management ordinance), our Constitutional right has been violated - (a material damage) and therefore should render the compact invalid because its provisions are not "in accordance with applicable law". The State of Montana no longer administers, controls, or regulates the water rights of tax paying, Montana citizens who live on private land within the reservation boundaries.

We also object to the Compact, in general, in that it raises many questions (Items of Discovery?) about the future value of our water and property rights.

- * In the Federal bill passed - there is a potential of trade of private lands to the reservation in exchange for federal lands - this would shift the property tax burden to non-natives left in Lake County.
- * If we sold our property, would our water rights transfer in a sale? We have recently received substantial current market value offers for our property. In the future, we could see a diminishment of property values - we wouldn't be able to sell our property for a fair market value, especially if there is no transfer of water rights. Without water for irrigation, our property is worthless. In fact, Judge J.E. Rockwood of the District Court of Montana in his judgement on the case of the water rights on our property (July 16, 1935) noted that the lands of "the plaintiff and defendants were semi arid lands and required the irrigation". If our water right to irrigate is diminished by tribal water right, this would be a 'taking' of our valuable property right without just compensation
- * If we sold our property, would the new owners have to apply for a use of the tribal water right, and could that application be denied? Would our existing use exempt well rights transfer or would the wells be required to have reduced flow rates to satisfy Compact water rights?

In summary, Bernard and Tina Shea are concerned by these actual and potential material injuries:

- 1) Tribal water rights which could diminish our water rights and affect our diversion of water from Skidoo Creek used to irrigate our orchards, numerous gardens, and hay meadow and water stock. This 'taking' of our water right without just compensation would violate our U.S. Constitutional Fifth Amendment right.
- 2) The Unitary Management Ordinance removes our representation in water rights issues from the state to the Water Management Board that is biased toward the tribe. The actual existence and jurisdiction of the UMO violates our Constitutional equal protection rights and rights to have our water use administered by the state.
- 3) The future value of our property will very likely be diminished if our water rights are diminished. Without irrigation water our property is worthless.

Testimony will include personal statements of material injury and potential material injury

d. Evidence will be presented in less than 1 hour

e. Bernard and Tina Shea will be available for a hearing anytime from April 29 to May 1 at the Lake County Courthouse in Polson.

Certificate of Service

Montana Water Court

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