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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. 2

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

Pursuant to the governing order,¹ the Confederated Salish and Kootenai Tribes (“the Tribes”), the State of Montana, and the United States (collectively, “Compact Parties”), submit this post-hearing response brief rebutting Objectors James and Alice Ammen’s assertions of material injury in their *Post-Hearing Brief Ammen – No. 2*, Dkt. No. 2646.00 (Aug. 22, 2025) (“Ammens’ Opening”). As the Compact Parties explained in their *Post-Hearing Opening Brief Regarding Material Injury Hearing No. 2*, Dkt. No. 2648.00 (Aug. 22, 2025) (“Compact Parties’ Opening”) and below, the Ammens have not carried their burden of proof to show material injury by operation of the Confederated Salish and Kootenai Tribes–State of Montana–United States Compact (“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 (July 10, 2025) (“Motion”), and approve the Compact, §§ 85-20-1901, -1902, MCA.

The Ammens showed no material injury at their hearing. They 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 claim that Objectors have not used for over 30 years, and is not a basis for material injury caused by operation of the Compact.

I. MATERIAL INJURY LEGAL STANDARD

The Compact Parties’ Opening explained that this Court and the Montana Supreme Court have held that to demonstrate material injury from a Compact, an objector must establish, through admissible evidence, a concrete injury to water rights or other real property interests caused by operation of the Compact. Dkt. No. 2642.00 at 2-3. The Ammens’ Opening has no discussion of case law defining when a water rights compact causes material injury. The Compact Parties’ description of the governing law regarding their material injury assertion is thus uncontested.

II. AMMEN OBJECTORS FAILED TO ESTABLISH MATERIAL INJURY

The Ammens offer no evidence that demonstrates a concrete, non-speculative injury to a water right or other property interest that stems from the operation of the Compact. The Ammens are not materially injured because: (1) their alleged injury rests on legal issues already resolved by this Court; (2) their water right claim on Magpie Creek is protected pursuant to the

¹ *Order Modifying Briefing Schedule*, Dkt. No. 2626.00 (August 13, 2025).

Compact's Other Instream Flow provisions; (3) the flow rate established by the Compact for Magpie Creek instream flow is not excessive—the Ammens' attempted calculation of the Tribes' maximum flow rate on Magpie Creek is incorrect and inflated; and (4) their reliance on a water right that they have never used and cannot use is too speculative to establish material injury.

A. The Ammens Raise Legal Issues Already Resolved by this Court not Relevant to the Question of Material Injury

The Ammens' complaint is primarily based on legal issues that the Court has already addressed and rejected. Specifically, that: they will be junior to and subject to call by the Tribes' time immemorial instream flow water rights; that by quantifying the Tribes' water rights, the Compact has resulted in a taking of their water right; and that their water right is not being properly adjudicated. Ammens' Opening at 1-2. This Court has explicitly stated that the material injury evidentiary hearings were not an opportunity to relitigate legal issues the Court already addressed. *Hearing 2 Prehearing Order*, Dkt. No. 2464.00 at 9 (Apr. 18, 2025); *Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00 at 75-76 (April 1, 2025) (“*Compact Validity Order*”) (confirming the time immemorial priority date for off-Reservation instream flows); 58 (holding that adjudicating the Tribes' water rights was not a taking of state-based water rights); *Id.* (explaining that the Court will adjudicate claimed rights in basin-specific proceedings).

B. 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 allege that their surface water right claim for irrigation from Magpie Creek (76L 141798-00) will be harmed by the Tribes' instream flow right on Magpie Creek (76L 30052855). Ammens' Opening at 1. They assert that the right does not have any call protection and are thus injured. *Id.* But the Ammens disregard the fact that their Magpie Creek right claim 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); *see also* Compact Parties' Opening at 3-4.

Though the Ammens admit that they understand the process set by the Other Instream Flow provisions, it is apparent that they do not. Ammens' Opening at 3. The Ammens state that even after the Other Instream Flow process is completed—setting enforceable levels based on a water budget that allows for valid water rights to be exercised—they will still be harmed because “[a]t the end of the day, we will still be junior to the new senior Tribal water right for wetlands

and be subject to call.” Ammens’ Opening at 3. However, this is not an issue caused by the Other Instream Flow provisions, which protect their Magpie Creek claim, but rather a consequence of the priority system of administration applicable in Montana. The Ammens ultimately take issue with the Tribes’ having an instream flow right on Magpie Creek and the fact that the Tribes’ rights are senior, regardless of the protections the Compact affords through the Other Instream Flow process. Being subject to call as a junior user is not material injury from operation of the Compact. *Compact Validity Order* at 75-76.

The Ammens failed to establish how the operation of the Compact causes them material injury. Indeed, the admitted evidence only establishes that operation of the Compact would *prevent* interference with any decreed irrigation water rights.

C. The Flow Rate Established by the Compact for the Tribes’ Instream Flow on Magpie Creek is Not Excessive

The Ammens assert that the flow rate for the Tribes’ Magpie Creek instream flow right (76L 30052855) is 121.1 cfs and is “excessive” because it goes beyond the amount the Ammens’ predecessors recognized as available in Magpie Creek. Ammens’ Opening at 2. Setting aside the legal and factual basis for the Ammens’ water right claim, the Ammens misinterpret the abstract for the Tribes’ Magpie Creek instream flow right and thus their argument fails. The abstract, contained in Appendix 12 to the Compact, sets forth an overall maximum flow rate of 30.80 cfs for the nonconsumptive instream flow right. It then establishes monthly flow rates for the right, mimicking natural streamflow variations. *See also Compact Validity Order* at 40-41. The Ammens’ assertion that the Tribes’ Magpie Creek right flow rate is 121.1 cfs is based on a sum of all monthly flow rates combined, not the actual maximum flow rate of 30.80 cfs as recognized in the abstract. Despite the Ammens’ apparent confusion, monthly flow rates are not cumulative, but rather the abstract sets different flow rates for different months.

D. The Ammens’ Material Injury Claims Fail Because They Rely on Speculation of Future Injuries to a Water Right They Have Never Used

Finally, the Ammens assert that they are injured because, by recognizing the Tribes’ time immemorial instream flow water right, they could be subject to call, which in turn would cause them a loss of income stemming from potential lack of water and lack of ability to irrigate. But this claim is entirely speculative for the simple fact that the Ammens do not currently, and have *never*, irrigated using their surface water right claim from Magpie Creek. Hearing Tr. 10:11-24, April 23, 2025. Neither they nor their immediate predecessor have irrigated since the late 1980s.

Id. Any evidence of material injury to a water right that they have never used is too speculative to meet the burden to prove material injury. *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.

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 Compact.

Respectfully submitted this 19th day of September, 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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Post-Hearing Response 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 19th day of September, 2025.

/s/ Jean Saye
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