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Montana Water Court

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

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**CASE NO. WC-0001-C-2021**  
**EVIDENTIARY HEARING No. 6**

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**COMPACT PARTIES' POST-HEARING RESPONSE BRIEF**  
**REGARDING MATERIAL INJURY HEARING No. 6 [Root]**

Pursuant to the governing order,<sup>1</sup> the Confederated Salish and Kootenai Tribes (“CSKT”), the State of Montana, and the United States (collectively, “Compact Parties”), submit this post-hearing response brief rebutting Objector Valerie Root’s assertions of material injury in her *Post-Hearing Brief*, Dkt. No. 2654.00 (Aug. 22, 2025) (“Root Opening”). As the Compact Parties explained in their *Post-Hearing Opening Brief Regarding Material Injury Hearing No. 6*, Dkt. No. 2641.00 (Aug. 22, 2025) (“Compact Parties’ Opening”) and below, Root has not carried her burden of proof to show material injury caused 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 (July 10, 2024) (“Motion”), and approve the CSKT Compact, §§ 85-20-1901, -1902, MCA.

In her Opening, Root does not discuss any evidence admitted at the April 24, 2025 evidentiary hearing that establishes material injury caused by operation of the Compact. Instead, Root focuses on (1) legal issues the Court already addressed and (2) unsupported allegations regarding lack of water on Agency Creek without proving how the Compact causes such an alleged injury. Root has shown no credible evidence of a concrete, non-speculative injury to a water right or other property interest from operation of the Compact and has thus failed to meet her burden in this case.

## **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. Compact Parties’ Opening at 2-3. Root’s 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. OBJECTOR ROOT FAILED TO ESTABLISH MATERIAL INJURY**

Root offered 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. Root is not materially injured because: she does not have a water right that could be affected by the

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

Compact; adjudicating her alleged Walton and “Secretarial” water rights is outside the scope of these proceedings; finally decreed valid water rights on Agency Creek are protected under the Compact’s Other Instream Flow provisions; and her alleged injury is not caused by the Compact and it occurred, if at all, before the Compact was effective.

**A. Root Does Not Have a Water Right that Could be Affected by the Compact**

Root has one filed water right on her property for a domestic well. *Hearing 6 Prehearing Order*, Dkt. No. 2519.00 at 1 (Apr. 23, 2025) (Agreed Fact No. 1). Under the Compact’s call protection provisions, such water right is not subject to call by the CSKT or the United States. Section 85-2-1901, MCA, Art. III.G.1. Objector Root’s testimony at the hearing and post-hearing briefing focus on establishing that she has valid but unregistered “Secretarial” and Walton rights. *Hearing 6 Prehearing Order* at 4 (Objector’s Issue of Fact No. 3); Hearing Tr. 27:7-25 (Apr. 24, 2025) (“Tr.”). She further asserts that her due process and equal protection rights were violated because Secretarial water rights holders were excluded from compact negotiations. Root Opening at 8.

Root’s equal protection and due process arguments about representation during the negotiations are irrelevant as they relate to the Compact’s validity, which Root raised in prior briefing and which the Court has ruled on. *See Answer Brief*, Dkt. No. 1916.00 at 12-13 (Sept. 13, 2024); *Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00 at 77 (Apr. 1, 2025) (“*Compact Validity Order*”) (holding that the Compact was the product of good faith, arms-length negotiations); *id.* at 59-61 (holding that the Compact does not violate equal protection or due process). The Court made clear that the material injury evidentiary hearings were not an opportunity to relitigate legal issues that were, or could have been, raised in the context of briefing the Compact’s validity. *E.g., Clarification Order and Case Management Order No. 7*, Dkt. No. 2147.00 at 1 (Mar. 5, 2025) (“The hearing is not intended as another opportunity to re-argue motions pending before the Court”). The current phase of this case concerns factual allegations about material injury. Root’s legal arguments regarding compact negotiations have no bearing on that issue and are thus irrelevant.

Further, it is well-established that the purpose of the Compact was to quantify CSKT’s reserved water rights claims, not individual state user claims. The Compact does not extinguish Walton rights, or any other water right held by a person not party to the Compact. *Compact Validity Order* at 50-51, 58 (“The Compact does not define or otherwise limit the ability of any

Objector to claim Walton or other rights and have them adjudicated during the proceedings for Basin 76L or 76LJ.”). The Compact specifically preserves the rights of parties to litigate issues not resolved by the Compact and prohibits the taking of such rights. Section 85-20-1901, MCA, Art. V.B.6 & 7.

Even if Root has a valid water right for irrigation from Agency Creek, she still would not be materially injured by the Compact, because that right would be protected from interference by 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 4. CSKT’s Other Instream Flows are not enforceable until the process outlined in § 2-1-115 of the UAMO is finalized. After the final decree is issued for the basin, the enforceable schedule for the Other Instream Flow right must be based on a water budget that allows valid water rights to be exercised. Section 2-1-115(3), UAMO. There is an Other Instream Flow right on Agency Creek with a place of use extending through the source adjacent to the Root property. Tr. 51:12-17; *Preliminary Decree*, Dkt. No. 19.00 at App. 2, Decree Report 419-20 (June 9, 2022). If Root has a final decreed irrigation right from Agency Creek, it will be protected under the Other Instream Flow process and thus the Compact does not materially injure her.

**B. Root Does Not Establish How the Compact Caused the Alleged Loss of Water in Agency Creek**

Root alleges, with no supporting explanation, that in summer 2021 she was no longer able to irrigate from Agency Creek. Root Opening at 1. She cursorily asserts that it was caused by the Compact Parties’ “systematic water diversion from Agency Creek” but provides no evidence of any diversions by the Compact Parties or any Compact provision allowing such a diversion. *Id.* The only explanation Root offers is that “a phone call from James at the water place in Ronan stating that they were making changes in the irrigation. I lost my water three days later. Coinciding with preparing for the Compact implementation.”<sup>2</sup> *Id.* She does not establish who James is, or what entity employs James. She does not explain how she was receiving irrigation water when she does not have a filed water right for irrigation. She does not point to any specific provision of the Compact or any specific water right, or any aspect of the

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<sup>2</sup> Root cites to her Exhibit 8 which is merely a written narrative of her assertions. It does not establish any facts or refer to any provisions of the Compact or its implementation.

Compact that could have caused this alleged injury.

Root could not establish a causal link between her alleged injury and the Compact in any event. While she claims injury from not being able to irrigate in summer 2021, the Compact was not in effect until September 17, 2021. *Preliminary Decree*, Appendix 1 at pdf pages 56-57. Seth Makepeace, CSKT hydrologist, testified as the Compact Parties' witness at the hearing. He confirmed that there was no Compact-related reason why Root allegedly received less water from Agency Creek in summer of 2021. Tr. 55:1-12. Root did not refute this testimony at the hearing, nor has she refuted it in her brief. Root appears to simply believe that her alleged injury of undefined changes to Agency Creek is a result of the Compact, but such belief does not make it true. Nor do her conclusory, vague assertions about "compact implementation" meet her burden to prove material injury caused by operation of the Compact.

Root focuses on Mr. Makepeace's "speculation" when he was asked to described Agency Creek's hydrology during cross-examination. Root Opening at 2, 6. She asserts that because Mr. Makepeace did not explain exactly what happened to Agency Creek that allegedly caused her to receive less irrigation water, that his testimony is flawed. First, Root's brief mischaracterizes Mr. Makepeace's testimony. He did not assert that he knew what had caused her alleged injury. He instead provided background information that geographically situated Root's property (Tr. 48:2-49:25); he explained the surrounding Flathead Indian Irrigation Project canals and diversions affecting Agency Creek (Tr. 52:13-54:14); and he explained that there had not been any major changes to those diversions in the past few decades (Tr. 53:16-54:5). He also conclusively testified that the Compact could *not* have caused Root's alleged injuries. Tr. 54:18 - 55:12. Root offered no explanation or rebuttal evidence contradicting Mr. Makepeace's testimony. Second, it was not Mr. Makepeace's role to provide Root's evidence supporting her theory of material injury. The burden was on Root to show material injury caused by operation of the Compact, but she has failed to meet that burden.

### **III. CONCLUSION**

For the foregoing reasons, the Compact Parties request that the Court find that Root has not carried her burden of proof to demonstrate material injury to her 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.

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/s/ Molly Kelly  
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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Post-Hearing Response Brief* for Hearing No. 6 was served by mail/email to the Objectors and email to counsel for the Compact Parties as set forth below this 19<sup>th</sup> day of September, 2025.

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