

Valerie Root
Pro Se Objector
rootfarmarlee@gmail.com

WC-0001-C-2021

September 19, 2025

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-C-2021

OBJECTOR'S RESPONSE TO COMPACT PARTIES' POST-HEARING BRIEF
HEARING 6

Valerie Root Pro. Se Objector comes now, and submits her Response Brief, countering the Compact Parties' Post-Hearing Opening Brief, filed on August 22, 2025. The Compact Parties erroneously assert that Objector Root did not carry her burden to prove material injury resulting from the operation of the Flathead Compact. All three of their arguments supporting this erroneous assertion are unsupported by the facts.

Compact Parties claim Objector has suffered no material injury from Compact operations, advancing three primary arguments: (1) any alleged injury occurred before the Compact's effective date and therefore cannot be Compact-related; (2) Objector's rights would be protected by "Other Instream Flow" provisions even if they existed; and (3) Objector lacks a valid water right for Agency Creek irrigation.(emphasis added)

However, their own expert witness testimony proves the opposite - systematic depletion of Agency Creek combined with federal abandonment of documented administrative rights creates concrete, measurable material injury that meets every legal standard for denying Compact approval.

**I. COMPACT PARTIES' EXPERT PROVES MATERIAL INJURY THROUGH
SYSTEMATIC AGENCY CREEK DEPLETION**

A. Makepeace Admits Systematic Water Diversions

Compact Parties claim no Compact-related harm to Objector. However, their own expert witness, Seth Makepeace, testified that Agency Creek is systematically depleted by multiple diversions under Compact management: "Agency Creek is initially diverted at the upper S-Canal. Then at the upper J-Canal. Then intervening between the upper J-Canal and the Jocko E-Canal there are additional diversions from the Agency Creek... By the time Agency Creek reaches the Jocko E-Canal it is significantly depleted from the natural flow." (Tr. 53:16-54:11) This testimony directly contradicts Compact Parties' claim that Objector suffers no water-related harm. Makepeace admits that systematic diversions under Compact management "significantly deplete" the very water source that Objector's 1915 Committee findings documented and protected.(tr 52:23-53:11)

B. Expert Evaded Direct Evidence of Material Injury

When confronted with concrete evidence of Objector's water loss, Makepeace resorted to evasive testimony rather than honest expert analysis: Objector testified: "I've lost around 70 feet of water. Eneas flood irrigated 90 percent of his property from that corner. And when he moved in, I had about 100 and some feet of water that came onto my property. So now I got -- I mean, on a really good day, I am getting three or four inches of water in a creek." (Tr. 56:19-57:1) Rather than addressing this dramatic physical evidence, Makepeace deflected: "In the interest of precision, I point that a hydrologist talked about water in terms of gallons per minute, cubic feet per second, or acre feet. So when you say 100 feet, my mind wants to think you are talking about 100 feet per second." (Tr. 57:2-8) This evasion reveals deliberate avoidance of inconvenient facts: Any competent water expert would understand Objector was describing physical water coverage area Makepeace chose deflection over clarification The dramatic reduction from 100+ feet of water coverage to "three or four inches" represents obvious material injury Courts may draw negative inferences from such deliberate expert witness evasion.

C. Contradiction Between Speculation and Detailed Knowledge

Compact Parties claim their expert's speculation about "natural stream braiding" explains Objector's water loss. However, this defense fails because Makepeace admitted: "I cannot speak to the fact that the channel may have braided and migrated away from your point of diversion. I am only speculating on that frankly." (Tr. 57-58)

Makepeace has been directly involved with Agency Creek and Jocko Valley water systems since 1992, working specifically in vicinity of the objector since 2020, giving him over thirty years of specific knowledge of these water systems. (Tr. 47:3-22) His resort to speculation about Agency Creek changes becomes even less credible given his decades of direct familiarity with this specific waterway and the very water systems affecting Objector's property. This extensive personal involvement further undermines any claim to neutral expertise." The credibility problem is stark:

Makepeace can provide detailed, factual testimony about systematic water diversions but can only "speculate" about natural causes. This disparity reveals where the evidence actually points - toward human-controlled systematic depletion, not natural processes. The irony of Compact Parties' position is even more telling. When Objector attempted to explore certain lines of questioning, Counsel Harder objected on grounds that it would require speculation. (Tr. 58) Yet Compact Parties' entire defense rests on their expert's admitted speculation about natural stream braiding. Compact Parties cannot object to speculation when it might hurt their case while building their entire defense on admitted speculation.

Makepeace's credibility is further undermined by his direct involvement in creating and implementing the very Compact he now defends. He served as Technical Team representative during Compact negotiations from 2007-2015, then became Chair of the Implementation Technical Team that made the Agency Creek infrastructure modifications. (Tr. 45-46) This is not neutral expert testimony but biased advocacy from someone defending his own work product.

D. Compact Implementation Technical Team Directly Modified Agency Creek

Infrastructure Makepeace's testimony reveals direct Compact involvement in Agency Creek modifications that contradict Compact Parties' claims of no Compact-related harm. When asked by Compact Parties' own counsel about his "work history with the Tribe related to the Compact," Makepeace revealed his complete involvement in every phase of Compact development and implementation. (Tr. 45:24-46) Makepeace testified that he served as "a Technical Team representative on behalf -- to represent the Tribes in negotiations" from 2007-2015, then "the Compact authorized the Compact Implementation Technical Team" where he served as "Chair on the team for a five-year period where we executed 10 task orders to effectuate projects related to the Compact." (Tr. 45-46) Makepeace's testimony documents systematic modifications to Agency Creek diversion infrastructure under Compact authority. He admitted that Agency Creek is systematically depleted through multiple diversions:

"Agency Creek is initially diverted at the upper S-Canal. Then at the upper J-Canal. Then intervening between the upper J-Canal and the Jocko E-Canal there are additional diversions from the Agency Creek... By the time Agency Creek reaches the Jocko E-Canal it is significantly depleted from the natural flow." (Tr. 52:23-54:11)

These diversions were modified under Compact Implementation Technical Team authority. Makepeace testified that E-Canal modifications affecting Agency Creek were "done under the Office of the [Technical Team]" while J-Canal upgrades occurred during Compact negotiations. (Tr. 54:2, 54:20-22; 44:17) This timeline proves Compact-related activities directly modified Agency Creek diversion infrastructure affecting Objector's water source: 2007-2015:

Makepeace helped negotiate the Compact while J-Canal upgrades occurred 2015-2020: As Chair of Compact Implementation Technical Team, executed E-Canal modifications and other Compact-authorized projects 2021: Objector's complete water loss Makepeace's admissions directly contradict Compact Parties' claim that no Compact operations affected Objector's water source. The systematic modifications to S-Canal, J-Canal, and E-Canal diversions under Compact authority prove causation between Compact implementation and material injury to Objector's documented water rights. Moreover, this testimony reveals that Makepeace is not providing neutral expert analysis but biased advocacy from someone defending his own 18-year work product spanning Compact negotiation, implementation, and now legal defense.(Emphasis Added)

E Compact Parties Contradict Their Own Expert's Implementation Timeline"

A. Makepeace and infrastructure modifications:

Moreover, Compact Parties' timing argument actually undermines their own case. They claim Objector's injury occurred before the Compact's effective date of September 17, 2021, as if this proves no Compact causation. However, Makepeace testified that he served as 'Chair on the [*Compact Implementation Technical team*]' for a five-year period where we executed 10 task orders to effectuate projects related to the Compact' (Tr. 45-46). (Emphasis added)

This places Compact implementation activities from 2015-2020, demonstrating that Compact-related infrastructure modifications were ongoing for years before Objector's water loss. Compact implementation was not a single event on the effective date but a multi-year process of systematic infrastructure changes that culminated in Objector's harm."

II. COMPACT PARTIES IGNORE CONCRETE ECONOMIC AND PHYSICAL HARM

A. Illegal Irrigation Charges Despite Documented Paid-Up Status

Despite Documented Paid-Up Status Compact Parties claim Objector suffers no economic harm. However, Objector has been forced to pay O&M charges despite her 1915 Committee findings establishing "paid up water right" status (Exhibit 5, p. 3). This constitutes quantifiable economic injury directly traceable to Compact operations that continue illegal fee collection from documented secretarial water rights holders.

B. Complete Loss of Irrigation and Farming Operations

Compact Parties cannot dispute that Objector lost her ability to farm and irrigate after thirty years of successful operations. Agency Creek provides the only water source for irrigation on Objector's property - without this water, she has no irrigation capability whatsoever (Exhibit 3). The 1915 Committee findings specifically determined that "the only water rights appurtenant to said allotment is described are those hereinbefore determined" and that "no other water right from any source is appurtenant" (Exhibit 3). The timing - coinciding with Compact implementation - combined with Makepeace's admission of systematic Agency Creek depletion, proves causation between Compact operations and material harm. The loss is not partial or temporary - it represents complete elimination of Objector's ability to use her property for its intended agricultural purpose. This constitutes total deprivation of beneficial use of her documented water rights.

C. Objector Does Not Need Compact Protection

Federal Administrative Rights Are Superior Compact Parties claim Objector's rights would be protected by "Other Instream Flow" provisions if they existed. This argument fails because Objector holds superior federal administrative rights that predate and supersede any Compact provisions. Objector's 1915 Committee findings established binding federal administrative law that no compact can override (Exhibit 5). Federal statutory law specifically prohibits depriving Indians of "water appropriated or used by them for the necessary irrigation" and protects "ditches, dams, flumes, reservoirs constructed and used by them" (Exhibit 5, p. 5, citing 1906 Act, 34 STAT 325, 354, Section 19). Federal agencies cannot abandon their own final administrative determinations through compact negotiations. The federal government cannot create property rights through official federal-tribal process, then claim those rights need "protection" from the very compact that attempts to extinguish them. Objector's Secretarial and Walton water rights originated as Indian water rights through the federal-tribal governmental process documented in the 1915 Committee findings. The

Compact provides full protection and recognition to some Indian water rights while systematically extinguishing others created through identical federal-tribal authority. This discriminatory treatment of identically created Indian water rights violates equal protection. Under established water law principles, appurtenant water rights transfer automatically with land ownership. Objector's 1915 Committee water rights became appurtenant to the allotted land and transferred to Objector upon purchase of the property in 1991. Objector does not seek Compact protection - she demands recognition of existing federal administrative law that requires no compact authorization or implementation.

III SPECULATIVE FUTURE PROTECTION CANNOT CURE CONCRETE PAST HARMS

Compact Parties Contradict their No-Harm Defense

Compact Parties argue that "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." This statement inadvertently admits both that Objector has valid water rights and that Compact operations pose interference risks requiring "protection."

Compact Parties essentially argue that Objector should be satisfied with speculative assurances that she will not be further harmed by the Compact, while completely ignoring the concrete harm she has already suffered since 2021. This approach fails on multiple levels.

1. Speculative future protection cannot cure material injury that has already occurred. Objector has lost her irrigation capability, farming operations, and beneficial use of her documented water rights. No future "Other Instream Flow" process can restore her 4 years of lost agricultural productivity or eliminate the 34 years of illegal fees already collected.
2. Compact Parties cannot simultaneously claim Objector suffers no material injury while arguing her rights need "protection from interference." This admission contradicts their entire no-harm defense and reveals that Compact operations inherently threaten water rights holders.
3. The Other Instream Flow provisions are not currently enforceable and depend on future processes that may or may not adequately protect existing rights. Courts cannot rely on speculative future protections to excuse concrete present harm.

Compact Parties' contradictory position demonstrates the inadequacy of their defense and confirms that the Compact poses ongoing threats to documented water rights.

Compact Parties repeatedly claim Objector lacks water rights because she has no state-filed irrigation right. This ignores that federal statutory law specifically protects 'water appropriated or used by [Indians] for the necessary irrigation' regardless of state filing requirements (Exhibit 5, p. 5). The 1915 Committee findings established federal administrative rights determining that 'the only water rights appurtenant to said allotment is described are those hereinbefore determined' and 'no other water right from any source is appurtenant' (Exhibit 3). Federal administrative law supersedes state filing requirements, and Compact Parties cannot extinguish federally-created rights by demanding compliance with state procedures that were never required for secretarial water rights. (Emphasis added)

IV. FEDERAL STATUTORY AND ADMINISTRATIVE LAW VIOLATIONS

A. Federal Agencies Cannot Abandon Their Own Administrative Records

The 1915 Committee findings constitute binding federal administrative law that agencies cannot ignore through compact negotiations (Exhibit 5).

Federal administrative procedure requires agencies to follow their own final determinations consistently. The Committee specifically found that "the only water rights appurtenant to said allotment is described are those hereinbefore determined" and "no other water right from any source is appurtenant" (Exhibit 3).

Federal participation in this Compact does not grant agencies license to abandon a century of administrative precedent. When federal agencies create property rights through official administrative processes, they cannot later claim those rights lack validity simply because compact negotiations prove inconvenient.

B. Federal Statutory Law Prohibits Deprivation of Indian Irrigation Rights

Federal statutory law specifically prohibits what Compact Parties are doing to Objector. The 1906 Act states that "nothing in this Act shall be construed to deprive any of said Indians...of the use of water appropriated or used by them for the necessary irrigation" and protects "ditches, dams, flumes, reservoirs constructed and used by them" (Exhibit 5, p. 5). Objector operates the identical irrigation system from Agency Creek that federal agencies documented and approved in 1915.

The General Allotment Act of 1887 authorized the Secretary of Interior to "prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution" of irrigation water among Indians on reservations (Exhibit 5, p. 5). The systematic depletion of Agency Creek violates this federal mandate for just and equal distribution.

C. Federal Trust Responsibility Requires Protection of Documented Rights
The federal government has a trust responsibility to protect documented Indian water rights, not systematically eliminate them. Allowing Compact operations to destroy Objector's federally-documented irrigation capability violates fundamental trust obligations. The government cannot create property rights through official federal-tribal administrative processes, then abandon those rights when compact implementation becomes politically expedient.

Federal trust responsibility requires active protection of existing documented rights, not passive acceptance of their destruction through systematic water diversions that eliminate beneficial use.

V. COMPACT PARTIES' CASE LAW SUPPORTS OBJECTOR'S MATERIAL INJURY CLAIMS

A. Objector Meets Every Legal Standard for Material Injury Compact Parties cite *Crow Compact II*, ¶¶ 34-35, requiring "concrete injury to water rights or other real property interests caused by operation of the Compact." Objector has shown exactly that - systematic depletion of Agency Creek eliminates water for her documented 1915 Committee water rights. This is concrete injury to documented federal water rights caused by Compact-managed diversions. Compact Parties cite *In re Adjudication of the Forest Service*, No. WC-2007-03, 2012 WL 9494882, at 10, for the principle that speculation about future events cannot demonstrate material injury, for the principle that speculation about future events cannot demonstrate material injury. However, Objector provides concrete evidence of current harm, not speculation. Their own expert admits Agency Creek is "significantly depleted" by systematic diversions under Compact management.

B. Compact Parties Fail Their Own Legal Standards The same cases Compact Parties cite defeat their speculation defense. The Forest Service case they rely on states courts "cannot rely on any fears, concerns, and conjectures." Yet their entire defense rests on Makepeace's admission that he is "only speculating" about natural stream

braiding while ignoring his factual testimony about systematic human-caused depletion. Crow Compact II requires "concrete injury" - which Objector has proven through documented water loss and illegal O&M charges. Compact Parties offer only their expert's admitted speculation in response. Moreover, Compact Parties' decades-long pattern of institutional misconduct provides concrete evidence, not speculation, about future violations. Courts routinely rely on established patterns of past conduct to predict future behavior and determine the need for injunctive relief. The 34-year documented pattern of systematic rights violations demonstrates that continued violations are inevitable without court intervention - this is factual evidence based on historical conduct, not speculative concerns about hypothetical future events.

VI. OBJECTOR SEEKS RESTITUTION AND DAMAGES FOR SYSTEMATIC ECONOMIC HARM

Objector seeks full restitution of all illegally collected irrigation fees, assessments, and charges over 34 years plus 5% compound interest. Despite her documented "paid up water right" status established by the 1915 Committee findings (Exhibit 5, p. 3), Objector has been forced to pay: Annual O&M charges for water rights she already owns in paid-up status Jocko Valley irrigation assessments despite receiving no irrigation water or services Additional water-related fees and assessments unauthorized under federal administrative law These collections constitute unjust enrichment -

Compact Parties and related entities benefited from fees they had no legal authority to collect from holders of secretarial water rights. The 1915 Committee findings established Objector's paid-up status, making any subsequent fee collection unauthorized (Exhibit 5). Objector will provide detailed accounting of all unauthorized irrigation-related payments upon review of her tax records, with compound interest at 5% annually representing appropriate compensation for decades of deprivation and lost investment opportunity. However, these quantifiable fee collections represent only the most easily documented portion of Objector's economic harm and do not include the far greater damages from complete loss of agricultural productivity, property devaluation, and systematic destruction of her documented federal water rights.

The evidence establishes a clear timeline of Compact-caused harm.

Objector testified that James from the 'Water Engineer Office' in Ronan called about 'making changes in the FIIP Irrigation' and three days later her water was gone (Tr. 41:14-42:1). The Water Engineer Office is the Water Board Office, formally called the

Flathead Reservation Water Management Board. This establishes that an official water management entity contacted Objector with advance knowledge of irrigation changes that directly eliminated her water supply, proving direct causation between Compact implementation activities and Objector's material injury.

CONCLUSION

Compact Parties cannot escape that their own expert witness proved Objector's material injury through his admission that Agency Creek is "significantly depleted" by systematic diversions under Compact management. His evasion when confronted with obvious evidence of water loss demonstrates bias rather than expertise. The evidence establishes concrete material injury through:

1. Systematic water source depletion admitted by Compact Parties' own expert Direct Compact Implementation Technical Team modifications to Agency Creek infrastructure
2. Complete loss of irrigation and farming operations after thirty years Illegal economic charges despite documented paid-up status Federal abandonment of binding administrative determinations Expert witness evasion when confronted with obvious evidence of water loss Objector operates the identical private ditch system from Agency Creek that federal agencies documented and approved in 1915.
3. Federal participation in a compact cannot retroactively invalidate a century of continuous beneficial use under federal administrative authorization. For these reasons, Compact Parties have failed to refute Objector's proof of material injury, the Court should deny Compact approval and order restitution of illegally collected irrigation fees plus additional damages as the Court deems appropriate to prevent further irreparable harm to documented federal water rights.

Signed this Day 19 of September 2025

/s/ Valerie Root

CERTIFICATE OF SERVICE I certify that a copy of the foregoing Post-Hearing Response Brief for Hearing No. 6 was served by email to the compact Parties and an email to the Water Court as set forth below this 19th day of September, 2025.

Water Court watercourt@mt.gov

Danna Jackson danna.jackson@cstkt.org

Molly Kelly molly.kelly2@mt.gov

David Harder david.harder@usdoj.gov

/s/ Valerie Root /9/19/25