

**FILED**  
OCT 07 2015

**Montana Water Court**

**IN THE WATER COURT OF THE STATE OF MONTANA  
UNITED STATES FISH AND WILDLIFE SERVICE, BOWDOIN NATIONAL  
WILDLIFE REFUGE—MONTANA COMPACT**

**CASE WC-2013-04**

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**ORDER GRANTING SUMMARY JUDGMENT AND APPROVING COMPACT**

**I. STATEMENT OF THE CASE**

The subject of this case is the Bowdoin Compact. The Bowdoin Compact is a water rights settlement agreement between the State of Montana and the United States Fish and Wildlife Service (“United States” or “the Service”). The Compact defines reserved water rights claimed by the United States for the Bowdoin National Wildlife Refuge (the Refuge).

Pursuant to Montana statutes, the Compact was incorporated into a Preliminary Decree issued by the Water Court in 2014. An objection period was established, and several objections were filed. Over time, all but one of those objections were withdrawn. The sole remaining objector is Colleen Barnard, who owns property east of the Refuge.

Barnard objects to the Compact on three grounds. Barnard’s principal objection raises concerns about alkaline soils and saline water in the Refuge. She asserts that future discharges of saline water from the Refuge into Beaver Creek could cause her injury.

Second, she objects to possible construction of an injection well. The Compact includes a Memorandum of Understanding (“MOU”) referencing construction of an injection well to reduce salinity within the Refuge. Barnard contends the well could harm her groundwater and mineral interests.

Finally, Barnard contends that management of the Refuge, specifically the authorization of hunting and the presence of avian botulism, is harmful to waterfowl populations.

The United States and the State of Montana have filed a motion for summary judgment. The Settling Parties contend that the Compact prohibits discharges of saline surface water into Beaver Creek, and that Barnard would not receive such protection without the Compact. They also assert that construction of a deep ground water injection well is not mandated by the Compact; that other solutions exist to control salinity; that there is no funding available to construct such a well; and that irrespective of the Compact, other requirements of state and federal law must be satisfied before constructing a well. Even assuming such a well is constructed in the future, they contend there is no evidence of potential injury to Barnard.

The United States asserts that management decisions such as the authorization of waterfowl hunting on the Refuge is not part of the Compact. The United States also asserts this Court does not have jurisdiction to review management decisions by federal agencies.

The motion for summary judgment asks that Barnard's objection be dismissed, and the Compact approved. Barnard has not filed a response.

## II. ISSUES

1. Is the Compact entitled to a presumption of validity?
2. Do provisions of the Compact pertaining to discharges of saline water into Beaver Creek violate applicable law?
3. Do provisions of the Compact pertaining to potential construction of a deep water injection well violate applicable law?
4. Does the Compact contain provisions that will increase waterfowl mortality on the Refuge in violation of applicable law?

## III. FINDINGS OF FACT

### *1. History of the Refuge*

The Bowdoin National Wildlife Refuge consists of over 15,000 acres of lakes, wetlands, and prairie east of Malta, Montana. The largest water feature on the Refuge is Lake Bowdoin. Water for the Refuge is supplied by the Milk River, Beaver Creek, and

Black Coulee, and other smaller surface water sources. The Refuge also obtains 3,500 acre-feet of water annually from Fresno Reservoir.

Water is delivered to wetlands and lakes within the Refuge using a series of control structures. Soils in and near the Refuge have moderate to high alkalinity caused by the presence of soluble salts. Water flowing into the Refuge also carries salts. Salts can be concentrated by evaporation of water, thereby causing the alkalinity of water and soils within the Refuge to increase.

The Refuge is situated on two flyways for migratory birds and is used by waterfowl and other wildlife. Portions of the Refuge are open to waterfowl hunting.

The lands now comprising the Refuge were withdrawn from the public domain by two Executive Orders issued in 1936 and 1940. The purpose of the Refuge is to provide sanctuary and breeding grounds for migratory birds and other wildlife.

## *2. The Bowdoin Compact*

The Montana Compact Commission was created by statute to negotiate settlement of reserved water rights. It has represented the State of Montana in the negotiation of numerous Compacts settling water rights on both federal and Indian reservations.

The Compact Commission and the United States Fish and Wildlife Service began negotiations regarding water rights for the Bowdoin Refuge in 1982. An agreement was eventually reached and approved by the Compact Commission, and the Compact was brought before the Montana Legislature in 2007. Both houses of the Legislature approved the Compact, and it was signed by the Governor on April 6, 2007. The Compact was also reviewed and approved by the United States Fish and Wildlife Service, the Department of Interior, and the Department of Justice.

## *3. Water Rights for the Refuge and Terms of the Compact*

The Compact defines some but not all of the water rights used in the Refuge. Excluded from the Compact are water rights from the Milk River and water rights obtained from Fresno Reservoir pursuant to a contract with the Bureau of Reclamation. The remaining water rights for the Refuge are included in the Compact.

The Compact divides water rights for the Refuge into three categories. These categories are Natural Flow, water from Beaver Creek, and Ground Water.

The term Natural Flow is defined as surface flow in basin 40M that drains naturally into the Refuge. § 85-20-1301, MCA (Art. III.A.1.). Under the terms of the Compact, the United States is entitled to natural flow remaining in basin 40M after state based rights with priority dates before the effective date of the Compact have been satisfied. § 85-20-1301, MCA (Art. III.A.1.(a)-(c)).

The Compact allocates 24,714 acre-feet per year from Beaver Creek to the United States. In addition, the Compact allocates certain groundwater rights to the United States, including the right to develop up to 5,300 acre-feet of Deep Ground Water from wells located within the Refuge. § 85-20-1301, MCA (Art. III.A.2. and Art. III.A.3.). Deep Ground Water is defined as “water extracted from any deep regional Aquifer that is located in any geologic formation dating from the Jurassic Period or older.” § 85-20-1301, MCA (Art. II(10)). The water rights in the Compact are subordinated to state based rights. § 85-20-1301, MCA (Art. III.B.2.).

Exercise of water rights in the Compact is subject to provisions in a Memorandum of Understanding between United States Fish and Wildlife Service and the State of Montana, attached to the Compact as Appendix 3. § 85-20-1301, MCA (Art. III.I.). Modifications to the MOU cannot occur without prior notice to water users in affected basins within the State of Montana; public meetings regarding the proposed modifications in Malta and Glasgow, Montana; and an opportunity for public comment concerning proposed changes to the MOU. § 85-20-1301, MCA (Art. III.I.).

#### IV. PRINCIPLES OF LAW

##### *1. Federal Reserved Water Rights*

The doctrine of federal reserved water rights was set out in *Cappaert v. United States*, 426 U.S. 128, 138 (1976):

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the

reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

The amount of water reserved by the United States depends on the purpose of the reservation.

While many of the contours of what has come to be called the “implied-reservation-of-water doctrine” remain unspecified, the Court has repeatedly emphasized that Congress reserved “only that amount of water necessary to fulfill the purpose of the reservation, no more.” Each time this Court has applied the “implied-reservation-of-water doctrine,” it has carefully examined both the asserted water right and the specific purposes for which the land was reserved....

*United States v. New Mexico*, 438 U.S. 696, 700 (1978) (citations omitted).

A federal reserved right may only be recognized for the primary purposes of the reservation. Water rights for secondary purposes must be based on state law.

Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress’ express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

*United States v. New Mexico*, 438 U.S. 696, 702 (1978).

## 2. *Review of Objections to Compacts*

Objectors to Compacts have the burden of proof. An objection “must state the specific grounds and evidence on which the objections are based.” § 85-2-233(4), MCA. The Water Court may declare a Compact void if it sustains an objection to a Compact.

§ 85-2-233(8), MCA. Failure to object to a Compact bars any subsequent action before the Water Court. § 85-2-233(7), MCA.

The Water Court reviews objections to Compacts using standards applied to consent decrees.

[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

*Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 625 (9th Cir. 1982).

The purpose of the court's inquiry is not "to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute," nor is it to judge the settlement "against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Id.*

Different standards apply depending on whether an objector is a party or non-party to the Compact. The present objector was not a party to the Compact. When considering objections from non-parties, the Court determines whether the Compact is "fair and reasonable to those parties and the public interest who were not represented in the negotiation, but have interests that could be materially injured by operation of the Compact." *Chippewa Cree Tribe Compact Memorandum Opinion*, p. 6, Water Court Case No. WC-2000-01 (filed June 12, 2002) (emphasis omitted) (citing *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990)).

The Water Court also follows the rule that "once the court is satisfied that the decree was the product of good faith, arms-length negotiations, a negotiated decree is presumptively valid and the objecting party then 'has a heavy burden of demonstrating that the decree is unreasonable.'" *United States v. Oregon*, 913 F.2d at 581; see *Fort Peck Compact Memorandum Opinion*, p. 7, Water Court Case No. WC-1992-01 (filed August 10, 2001).

The presumption of validity given to Compacts negotiated in good faith recognizes that agreements reached between adverse parties are entitled to deference from the courts.

It is the policy of the law to encourage settlements. That policy has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement.... Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sits at the table. That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance.

*United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) (citations omitted).

The first question applied to objections by a non-party is whether the Compact was the product of good faith, arms-length negotiations. If the answer to that question is yes, then the Compact is entitled to a presumption of validity.

Once a Compact is entitled to a presumption of validity, a non-party objector faces the heavy burden of establishing that the Compact is unreasonable. Discharging this burden requires a showing that the objector has been materially injured, *and* that the objector's injury occurred because the Compact does not conform to applicable law. *Order Approving Compact*, p. 4, Water Court Case No. WC-2012-06 (filed May 27, 2015).

The possibility of future injury only precludes summary judgment if the injury is caused by a failure of the Compact to conform to applicable law. This distinction exists because Compacts are settlements of disputed federal and Indian water rights. Exercise of water rights recognized in Compacts is virtually certain to have adverse impacts on parties to the Compact as well as non-parties.

Although the potential for such injury may be great, such impacts are not an impediment to recognition of reserved rights. In *Winters v. United States*, 207 U.S. 564

(1908), the non-Indian owners of state based rights asserted that their water rights in the Milk River were “indispensable” and that if prior Indian reserved rights were recognized, “their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged.” *Winters v. United States*, 207 U.S. 564 (1908) (Justice McKenna’s statement of prior history, which preceded the Opinion of the Court). Reserved rights were recognized in favor of the Indians despite these claims of injury. The presence of injury alone does not invalidate a Compact if the rights it recognizes are based on applicable law.

Because avoidance of impacts is unrealistic, requiring Compacts to meet a no injury standard would prevent such agreements from being reached and result in litigation of all federal and Indian reserved rights. In many cases, such litigation would ironically increase the potential for injury to third parties. It is for this reason that the Water Court requires an objector to demonstrate both injury and a connection between that injury and a failure of the Compact to comply with applicable law.

### 3. *Review of Motions for Summary Judgment*

“Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.” *Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 16, 321 Mont. 432, 92 P.3d 620 (citing Rule 56(c), M. R. Civ. P.). To determine the existence or nonexistence of a genuine issue of material fact, the Court will look to the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 24, 304 Mont. 356, 22 P.3d 631. All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing the summary judgment motion. *Lee*, ¶ 25. The party seeking summary judgment has the burden of demonstrating an absence of genuine factual issues. *Id.* Where the moving party is able to demonstrate that no genuine issue of material fact remains in dispute, the burden shifts to the party opposing the motion. *Lee*, ¶ 26. To raise a genuine issue of material fact, the party opposing summary judgment must “present material and substantial evidence, rather than merely conclusory or speculative statements.” *Id.*

If the nonmoving party fails to make a sufficient showing on an essential element of the case with respect to which the nonmoving party bears the burden of proof, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 34, 356 Mont. 417, 234 P.3d 79 (acknowledging “that a complete failure of proof concerning an essential element of a claim makes judgment appropriate as a matter of law”). When a nonmoving party bears the burden of proof at trial on a dispositive issue, the burden on the moving party for summary judgment purposes “may be discharged by ‘showing’-- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325.

## V. ANALYSIS

### 1. *Is the Compact entitled to a presumption of validity?*

The Settling Parties have requested a determination that the Compact is entitled to a presumption of validity. The test for such a presumption is whether the Compact is the product of good faith arm’s length negotiations. *United States v. Oregon*, 913 F.2d at 581; see *Fort Peck Compact Memorandum Opinion*, p. 7, Water Court Case No. WC-1992-01 (filed August 10, 2001).

Barnard has not challenged the history of Compact negotiations. That history indicates that Compact negotiations occurred over two decades. The negotiating parties were the Montana Compact Commission and the United States. Thirteen negotiating sessions were held in a variety of locations in Montana. These sessions were noticed in advance and open to the public. Opportunity for public comment was provided at each session.

The Compact was reviewed and debated by the Legislature, and passed both Houses with strong support. Passage in the Senate was unanimous.

In recognition of ongoing problems with salinity at the Refuge, the Compact also requires that use of water rights for the Refuge conform to a Memorandum of Understanding negotiated between the parties. The purpose of the MOU is to address water and land management in a manner that reduces salinity problems in the Refuge,

improves the Refuge's saline balance, reduces the occurrence of wind born salts, and reduces discharges of saline water into and out of the Refuge. Numerous technical experts were involved in the development of a salt model for the Refuge and the negotiation of the MOU. The MOU cannot be changed without public notice and public input.

Barnard has not pointed to any evidence, nor does she assert, that negotiation of either the Compact or the MOU was in bad faith. Accordingly there is no genuine issue of fact regarding the history of Compact negotiations. The Compact and the MOU were the products of good faith arm's length negotiations and are entitled to a presumption of validity.

*2. Do provisions of the Compact pertaining to discharges of saline water into Beaver Creek violate applicable law?*

Although the initial burden required to obtain summary judgment is to show the absence of a genuine issue of fact, the particular showing required depends on which party has the burden of proof at trial. If the moving party does not have the burden of proof, it can obtain summary judgment with evidence negating an essential element of the nonmoving party's claim or by demonstrating that the nonmovant cannot prove an element of its claim at trial. *Celotex*, 477 U.S. at 323.

Here, the objector has the burden of proof at trial. Discharging that burden requires Barnard to show material injury, *and* that her injury is caused by a failure of the Compact to conform to applicable law.

Barnard contends she will be injured by future discharges of saline water into Beaver Creek. For the purposes of this summary judgment discussion, it is reasonable to infer that Barnard could be injured by such discharges.

The possibility of such injury does not, however, mark the end of the analysis regarding the Settling Parties' request for summary judgment. The Settling Parties contend that Barnard cannot prove her claims of future injury are attributable to a failure of the Compact to comply with applicable law. Determining whether the Compact complies with applicable law is a question of law, not a question of fact. "The

construction and interpretation of a contract is a question of law for the court to decide.” *Ophus v. Fritz*, 2000 MT 251, ¶ 19, 301 Mont. 447, 11 P.3d 1192. Statutory interpretation is also a question of law. *State v. Madsen*, 2013 MT 281, ¶ 8, 372 Mont. 102, 317 P.3d 806.

The objector cites evidence of a single discharge event over thirty years ago which allegedly injured downstream water users. The objector does not cite any subsequent examples of such discharges, nor does she show that such discharges are more probable because of the Compact.

The record provided by the Settling Parties indicates that a central objective of the Compact is management of salinity both within and outside of the Refuge. As part of the Compact, the Settling Parties retained experts to negotiate an MOU. § 85-20-1301, MCA (Appendix 3). One of the purposes of the MOU is to prevent saline discharges to Beaver Creek. The MOU states: “No water will be released into Beaver Creek from Lake Bowdoin except when floodwater from Beaver Creek encroaches into Lake Bowdoin and the releases will not cause harm to the owners of downstream water rights.” § 85-20-1301, MCA (Appendix 3, MOU, ¶ 3).

The MOU requires that the Montana Department of Environmental Quality (“DEQ”), the DNRC, and local irrigation districts be informed when “a release is eminent [sic]... .” *Id.* Water quality must be monitored and releases must stop if the Service or the DEQ determines that “continued discharges from the Refuge pose a risk to the water quality or soils of downstream water users.” *Id.*

These protections are intended to address and prevent the problem complained of by Barnard and would not exist without the Compact. In this regard, Barnard is better off with the restrictions placed on the United States by the Compact than without them. Barnard cannot show that the Compact makes her more vulnerable to future saline discharges into Beaver Creek.

In addition, Barnard has not shown, and cannot show at trial, that provisions of the Compact or MOU placing limits on saline discharges are contrary to applicable law.

Barnard's concern is that potential future saline discharges may harm her property. Her concern is not about the water rights recognized in the Compact, but about administration of those rights in a manner that might cause her injury. Because the MOU expressly precludes saline discharges, such discharges would be a violation of the Compact. Barnard's concern therefore pertains to potential violations of the Compact, not defects in the Compact that will cause injury.

Barnard's argument is that the Compact should not be approved because it might be violated. Such an argument does not meet the second element of the test for an objection, which requires a showing that the Compact fails to conform to applicable law.

A simple method of testing whether there is a causal connection between the failure of a Compact to comply with applicable law and injury to the objector is to consider what would happen if the Compact were declared void. If a causal connection exists, voiding the Compact should decrease injury to an objector.

The opposite is true here. Invalidating the Compact, and the protections it contains against saline discharges, makes Barnard more vulnerable to injury.

To prevail with her objection, Barnard would need to prove that saline discharges are authorized or will be caused by the Compact, and that such an authorization is unlawful. Barnard cannot make such a showing with or without a trial because the Compact does not directly or impliedly authorize discharges of saline water into Beaver Creek.<sup>1</sup> Summary judgment is therefore appropriate under the rationale of *Celotex*.

The Settling Parties have met their burden under *Celotex* by showing that there is no set of facts enabling the objector to prove an element of her claim at trial. Even if injury is assumed, Barnard can't prove it will be caused by the Compact's departure from applicable law.

The Settling Parties are entitled to summary judgment. Barnard's claim that the Bowdoin Compact will injure her by triggering future releases of saline water into Beaver Creek is dismissed.

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<sup>1</sup> Barnard admitted in her response to Request for Admission 16 that the Compact complies with applicable state and federal laws. Even without this admission, she does not have the ability to prove this element of her objection.

3. *Do provisions of the Compact pertaining to potential construction of a deep water injection well violate applicable law?*

The salinity problem in the Bowdoin Refuge is caused in part by flows of water containing dissolved salts into the Refuge, and by salts found naturally within Refuge soils. Over time, evaporation of water from lakes and wetlands within the Refuge has caused concentrations of salts within the Refuge to increase. The result is that more salts enter the Refuge than are discharged.

To manage this salt balance, the Settling Parties analyzed how water rights belonging to the United States could be used to reduce the accumulation of salts within the Refuge without posing risks to other water users or landowners. This analysis was part of the MOU, which prescribes a number of actions to improve the salt balance.

Among these actions is potential construction of a deep well injection system to remove salts from the Refuge at a rate greater than the annual rate of salt input. The amount of salt input is estimated at 7,000 tons per year.

Barnard opposes use of a deep well injection system, asserting that pumping “poisoned water deep into the earth does not solve anything but, instead will simply create a problem elsewhere.” *Barnard Objection*, October 10, 2014. Barnard has water rights east of the Refuge, including groundwater wells. Barnard also claims oil and gas interests adjacent to the Refuge.

In response, the Settling Parties assert that funding does not exist for a deep water injection well, but that if such a well is built it would be subject to all applicable federal and state environmental laws. What protections these laws offer and how they might operate to address the concerns of the objector is not explained.<sup>2</sup>

The Settling Parties also assert that the MOU commits the Service to work with the Montana Bureau of Mines and Geology to determine how deep the injection well or

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<sup>2</sup> How these laws operate to protect third parties depends on the nature of the well being drilled. At present, there is no information on details of the well or wells that would enable either the objector or this Court to determine whether the well complies with or violates applicable law. Relevant details include well depth, location, casing, operating pressures, geology, and a host of other factors. Because the well may or may not be drilled, there is no requirement that the Service design a well prior to trial.

wells should be drilled to avoid potable ground water. § 85-20-1301, MCA (Appendix 3, MOU, ¶ 8(e)).

Paragraph 8 of the MOU identifies “strategies” to “reduce the delivery of salt to the Refuge.” Although one of the identified strategies is “working with the Montana Bureau of Mines and Geology,” the Service is not expressly obligated to do so, nor is it obligated to accept any limitations recommended by the Montana Bureau of Mines and Geology. *Id.* At most, the Service agreed to discuss well depth.

The Settling Parties have not supplied sufficient information to rule out injury to the Objector from drilling an injection well. Looking at the evidentiary record from a standpoint most favorable to the Objector, it is reasonable to infer the possibility of future injury.

Notwithstanding this inference, the viability of Barnard’s objection at trial requires more than just a showing of injury. To sustain an objection, Barnard must show that the MOU’s statement of intent regarding construction of an injection well violates applicable law, thereby causing her injury. Barnard has not met this burden and has not demonstrated she could do so at trial.

The MOU acknowledges that the salinity problem “threatens the viability of the Refuge and poses risks to the off-Refuge community.” § 85-20-1301, MCA (Appendix 3, MOU, p. 1). The MOU further recognizes that thoughtful use of the water rights recognized in the Compact can reduce the salinity problem, while incorrect use can make it worse. *Id.*

The purpose of drilling an injection well is to “reverse the trend of salt accumulation in Lake Bowdoin.” § 85-20-1301, MCA (Appendix 3, MOU, ¶ 5). The well would accomplish this goal by removing “salts from Lake Bowdoin at an average annual rate that is equal to or greater than the annual rate of salt input.” *Id.*

Notably, however, the Compact and the MOU do not require a well to be drilled. The MOU states only that “the Service intends to install a deep well injection system.” *Id.* The objector has not shown that such a statement of intent is unlawful.

Before drilling a well, the Service contends it must first comply with a variety of state and federal environmental laws. If the proposed well does not comply with these laws, then it will not be constructed. Conversely, if the well survives state and federal review, then it would be lawful and construction can proceed.

The thrust of Barnard's objection is that this Court should reject the Compact because an MOU attached to the Compact contains a statement of intent to drill a well in the future. A statement of intent does not amount to a violation of laws applicable to reserved water rights or the laws constraining formation of a Compact. Barnard failed to make a showing sufficient to establish that the Compact does not comply with applicable laws. Such a showing is essential to her case. The Settling Parties are entitled to summary judgment on this issue and this portion of Barnard's objection is dismissed.

*4. Does the Compact contain provisions that will increase waterfowl mortality on the Refuge in violation of applicable law?*

Barnard asserts that waterfowl mortality associated with management practices on the Refuge precludes approval of the Compact. Barnard contends that waterfowl mortality is caused by avian botulism and waterfowl hunting.

The Compact and the MOU are silent regarding management of waterfowl. Accordingly, there is no connection between the water rights recognized in the Compact and the waterfowl mortality of concern to the objector. The waterfowl losses complained of by Barnard are connected to past events, not provisions in the Compact which might increase waterfowl losses in the future.

One of the enunciated purposes of the Refuge is to permit hunting of waterfowl. It is therefore probable that hunting on the Refuge will continue with or without the Compact. While Barnard has strong opinions about hunting on the Refuge, future management of hunting is an operational decision of the Service, not a policy objective of the Compact.

It is not the purpose of this proceeding to review management of hunting on the Refuge. The purpose of this proceeding is to determine whether recognition of water

rights in the Compact will cause material injury to the objector, and if so, whether that injury is caused by a failure of the Compact to comply with applicable law.

Operation of the Refuge in a manner that conflicts with Barnard's opinions does not meet the material injury standard required to sustain an objection to the Compact. That standard requires injury to water rights or real property interests. The Settling Parties have demonstrated there is no genuine issue of fact that Barnard's interests in real property or water rights are, or can be, materially impacted by hunting on the Refuge.

Once the Settling Parties met their burden, the burden shifted to Barnard, whose obligation was to come forward with substantial and material evidence establishing the existence of genuine issues of fact. Barnard has not responded and has not met her burden. Barnard is not entitled to maintain an objection to the Compact based on her opinion that hunting on the Refuge should be prohibited. This portion of her objection is dismissed.

#### VI. CONCLUSIONS OF LAW

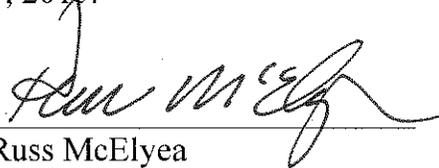
1. The Compact is entitled to a presumption of validity.
2. Compact provisions pertaining to discharges of saline water into Beaver Creek do not violate applicable law.
3. Compact provisions pertaining to potential construction of a deep water injection well do not violate applicable law.
4. The Compact does not contain provisions that will increase waterfowl mortality on the Refuge in violation of applicable law.

#### VII. ORDER

The Settling Parties' summary judgment motion is GRANTED. Colleen Barnard's objections to the Bowdoin Compact are DISMISSED.

The Bowdoin Compact is APPROVED.

DATED this 7<sup>th</sup> day of October, 2015.

  
Russ McElyea  
Chief Water Judge

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**Note: Service List Updated 10/6/2015**