Mickale Carter
Bar Number 2594
Pro Se Objector
2231 Middle Road
Columbia Falls, MT 59912
Phone: (406) 407-2129
Email: MickaleCarter@hotmail.com

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

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CASE NO. WC-0001-C-2021

POST HEARING BRIEF
HEARING 15

Comes now, Objector Mickale Carter, Pro Se, and presents her Post Hearing Brief for Hearing 15, which was held on May 7, 2025. The factual issue to be determined by the hearing is whether Objector Carter's water rights or other protectable interest are negatively affected, i.e., materially harmed, by the Flathead Compact. The determination of this factual issue with regard to her water rights requires an analysis of the interactivity between the surface and ground water in the Flathead Drainage System, including the Kalispell Subarea of the Flathead Lake Watershed, and in specific the East Side Aquifer where Objector Carter's water rights are located. It also requires an analysis of the priority dates of Objector Carter's water rights as compared with those held by the Compact Parties.

Carter Exhibits 1-9 and Compact Parties Exhibits 1-7 were prepared by agencies and/or employees of the Compact Parties. Consequently, all are admissions of a party opponent. Montana Rules of Evidence 808(d)(2)(C) and (D). These documents, along with the testimony of CSKT hydrologists Seth Makepeace and Casey Ryan, reveal that in times of drought, Objector Carter's groundwater rights are lowered by the taking of the off reservation water, including the 90,000 acre-feet stored in the Hungry Horse Reservoir. This lowering of the groundwater is a

material harm. Furthermore, Objector Carter has water rights that are superior to those held by the CSKT. The Court is compelled to void the Flathead Compact.

Carter Exhibits 7, 8 and 9 and the testimony of Casey Ryan reveal that the Flathead Compact actually endangers the fisheries in the Flathead River by failing to guarantee sufficient water flow rates necessary to sustain fisheries. As a citizen of the State of Montana, Objector Carter has a constitutionally protected right to the opportunity to harvest wild fish from everywhere in the state, including from the Flathead River. The endangerment of the fisheries in the Flathead River caused by the Flathead Compact, harms Objector Carter's protected right to harvest wild fish from the Flathead River. The right of Citizens of the Territory, which was to become the State of Montana, to harvest wild fish off the reservation was recognized in the Treaty of Hellgate, 1855. Consequently these rights existed prior to the signing of the Treaty of Hellgate, 1855, i.e., July 16, 1855, the priority date given by this Court to the CSKT for off reservation water. The Court is compelled to void the Flathead Compact.

I. CARTER PROVED MATERIAL HARM TO HER WATER RIGHTS

Objector Carter has the burden of proving that the Flathead Compact will materially harm her water rights. MCA 85-2-233. The Flathead Compact gives the CSKT a right to off reservation surface water. Objector Carter's water rights are all ground water rights. Consequently, Objector Carter's water rights can only be materially harmed if the taking of the off reservation surface water, as allowed by the Flathead Compact, will negatively impact the ground water levels in the East Side Aquifer of the Kalispell Subarea where Objector Carter's water rights are located.

The question becomes: Will the taking of the 229,383 acre-feet, including the 90,000 acre-feet stored in the Hungry Horse Reservoir, as allowed by the Flathead Compact, cause the ground water levels in the East Side Aquifer to be lowered? Testimony at the hearing, and Carter Exhibits 1-10 and Compact Parties Exhibits 2, 3 and 7 reveal that the answer to this question is a resounding "yes."

A. Objector Carter's Water Rights

All of Objector Carter's water rights are ground-water rights located in Basin 76LJ. Agreed Facts 6. Compact Parties Exhibit 2. Her water rights are 43 miles north of Polson, 1.3

miles east of the Flathead River, 4.8 miles south of Columbia Falls, and 2 miles west of the base of the Swan Range. Carter Testimony, TR page 17 line 23 - page 18 line 23. Compact Parties Exhibit 2. The soil is sand. Carter Testimony, TR page 18 line 25 - page 21 line 12. Ground-Water Resources of the Flathead Lake Area, Carter Exhibit 1 at page 7 of 10, reiterates the sandy nature of Objector Carter's soil, describing it as "surficial sand deposits (ice-contact stratified drift)." See also, Compact Parties Exhibit 7, Figure 1, page 152 which shows sand and gravel (shallow alluvium) where Objector Carter's water rights are located.

Objector Carter's water rights are located in the Shallow Aquifer of the Kalispell Subarea, known as the East Side Aquifer. See Ground-Water Resources of the Flathead Lake Area, Carter Exhibit 1 page 7 of 10 and Compact Parties Exhibit 2. The elevation where Objector Carter's water rights are located is 3,064 ft above sea level. Carter Testimony, TR page 40 line 4. "The Kalispell valley has a flat floor where surface elevations range from just less than 2,900 ft above sea level at Flathead lake to 3,000 ft near Whitefish and Columbia Falls. The Swan Range, with peaks higher than 7,000 ft above sea level, rises abruptly from the east side of the valley floor." Carter Exhibit 1 page 5 of 10. Carter Testimony, TR page 39 line 21 - page 40 line 4. Doing the math, Objector Carter's property is 64 feet above the flat floor of Flathead Valley through which the Flathead River flows. Id., TR page 40 lines 3-5. It comes as no surprise that in the East Side Aquifer "(g)round-water flow is generally from the western front of the Swan Range toward the Flathead River." Carter Exhibit 1 page 7 of 10.

The median well depth in the East Side Aquifer is 35 feet. Carter Exhibit 1 page 5 of 10. Objector Carter's 1920 and 1916 water rights have no indication of well depths on their respective abstract. They are both hand dug wells which were dug by Objector Carter's grandfather. Objector Carter estimated that they were no deeper than 10 to 20 feet. Carter Testimony,TR page 17 lines 6-18. This is consistent with the findings of the Ground-Water Resources of the Flathead Lake Area, Carter Exhibit 1 page 7 of 10, which indicates that the median static water level of the East Side Aquifer is 20 feet below the surface, i.e., 45 feet above the valley floor through which the Flathead River flows. Objector Carter's other three ground-water rights have the following well depths: 2004 right, 188 ft; 2019 right, 178 ft; and 2025 right,

157 ft. Carter Testimony, TR page 17 lines 19-22. See also, abstracts of Objector Carter's water rights on file with DNRC.

"Ground water flows from higher topographic positions over short distances (generally < 2 mi) to nearby streams and lakes." Ground Water Resources of the Flathead Lake Area, Carter Exhibit 1 page 4 of 10. Makepeace Testimony, TR page 134 line 32 - page 135 line 7. Groundwater that is close to the discharge area takes days to reach the discharge area. The further away the ground water, the longer the time taken to reach the discharge area. The further away groundwater sources take from years, and even millennia, to reach the discharge area. Carter Exhibit 4, Figure 3 page 7 of 14.[1]

"Ground water flows from high altitude to low altitude." Potentiometric Surface Map of the Deep Aquifer, Kalispell Valley: Flathead County, Montana, Compact Parties Exhibit 10 page 146. Objector Carter has two water rights which are 45 feet above the Flathead River and a little over a mile away. The groundwater of these water rights flows toward the Flathead River. Both of the Compact Parties' hydrologist witnesses agree. Ryan Testimony, TR page 157 lines 4-6: "I think that if the groundwater level were higher than the river, then it would flow towards the river." Makepeace Testimony, TR page 132 lines 14-21: "So per your description that you're 64 feet above the Flathead River, I would assume that based on topography, that the shallow aquifer would move from your property towards the river."

B. Impact of the Taking of the 90,000 acre-feet on Flathead River Water Levels.

The Flathead Compact allows the CSKT to take 229,383 acre-feet of off reservation surface water including 90,000 acre-feet stored in the Hungry Horse Reservoir. The US Department of Interior, Appendix 7 to the Compact, and the State of Montana, Appendix 8 to the Compact, did evaluations to determine the impact on fish habitat resulting from the taking of this water. See Carter Exhibits 7 and 8 respectively. The studies revealed that the taking of the 90,000 acre-feet in the summer "caused the elevation of the reservoir to be approximately 4 feet lower at the end of the summer. The increased fall drawdown affected the ability of Hungry

[1] Makepeace testified that water "typically moves at the rate of about one foot per year." Makepeace Testimony, TR page 139 lines 5-6. This testimony is not inconsistent with Figure 3 of Carter Exhibit 4 page 7 of 14. If the flow rates of days from nearby and years from far away are averaged, that could very well amount to the "typical' rate of one foot per year.

Horse Reservoir to fill the following spring during dry years." Carter Exhibit 7 page 5. This would cause "reservoir releases to be reduced substantially in the following spring and summer . . . impacting the ability to comply with 2008/2010 (NOAA Fisheries Service Federal Columbia River Power System Biological Opinion) FCRPS BiOp." Id. page 7. NOAA had set minimum flows in the Columbia River System, which includes the Flathead River System, required in order to protect fish habitat. This would occur between 20 percent of the time, Id. page 6, and/or 15 percentile of water years. Carter Exhibit 8 page 2. These shortages occur in the March through June period and in October. Carter Exhibit 7 page 6. Carter Testimony, TR page 23 line 10 - page 31 line 4.

"Minimum flow requirements below Hungry Horse Dam and below Columbia Falls were established by the USFWS (United States Fish and Wildlife Services) BiOp" for wildlife preservation including fisheries. Carter Exhibit 8 page 5. The minimum flow requirement below Columbia Falls was set to be between 3,500 and 3,200 cfs (cubic feet per second). Id. Carter Exhibit 7 page 15. There are provisions in the Flathead Compact to maintain the minimum water flow requirements of the USFWS BiOp.[2] Preliminary Decree, Part III.C.1.c.ii., iv., vi. Carter Testimony, TR page 30 line 11 - page 31 line 4.

C. Impact of Lowering of Flathead River Water Levels on Ground Water Levels.

The average annual surface water discharge of the Flathead River, at Columbia Falls, is approximately 7 million acre-feet. Of this average annual discharge, about 3.6 million acre-feet are attributed to ground water. Flathead Watershed Sourcebook, Carter Exhibit 6 page 2 of 3. "The baseflow of a river or stream is the portion of total discharge that is supported by groundwater. The groundwater component sustains streamflow between periods of rain or snowmelt." Id. The baseflow, i.e., groundwater portion of the Flathead River below Columbia Falls, is approximately 5,000 cubic feet per second. Id. See Carter Testimony, TR page 46 line 10 - page 48 line 24.

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[2] But see testimony of Casey Ryan who stated that the CSKT may continue taking water even if the water at Columbia Falls is below 3200 cfs. The CSKT will reduce its water taking by only 45,000 acre feet, Ryan Testimony, TR page 157 lines 8-21, i.e., will continue to take up to 45,000 acre feet no matter how low the Flathead River becomes.

Carter Exhibits 7 and 8 reveal that in times of drought, i.e., between 15 and 20 % of the time, the taking of the 90,000 acre-feet of water stored in the Hungry Horse Reservoir will result in diminished surface water levels on the Flathead River. Assuming that the Flathead Compact requires that the flow rate below Columbia Falls be maintained at a minimum of between 3,500 and 3,200 cubic feet per second (cfs),[3] the question becomes: What impact does having the flow rate below Columbia Falls maintained at between 3,500 and 3,200 cfs, which is below the baseflow level of 5,000 cfs, have on the the ground water levels in the East Side Aquifer where Objector Carter's water rights are located? In other words, does the lowering of the Flathead River flow rate, which necessarily lowers the surface level of the Flathead River, lower the ground water levels? The answer is yes. The ground water level is necessarily lower when the surface water level is lower.

The movement from one system to another is largely controlled by the difference between the surface water stages, i.e, elevation of the water surface, and ground water levels. "Where the water table is higher than the surface-water state (river, lake, and wetland) and groundwater is discharging into the surface water, effluent conditions occur (figure 4). The surface-water feature gains from groundwater discharge when effluent conditions are present." Groundwater Surface Water Exchange, Carter Exhibit 10 page 4. "The surface-water stage reflects the local water table." Id. See also, Makepeace Testimony, TR page 138 lines 10-20 and page 141 line 4-7. See also, Compact Parties Exhibit 3 figure 4. Consequently, the lower the surface level of the Flathead River, the lower the water table. Carter Testimony, TR page 49 lines 8-21.

As the river level lowers, the flux rate of the groundwater, i.e., the force of the groundwater flow toward the river, gets stronger. However, as the groundwater level lowers as it fills, i.e., raises the level of the river, the flux rate, i.e., force of flow, becomes lower. See Carter Exhibit 10 page 4: "Flux rates of groundwater are dependent on the magnitude of the hydraulic gradient." The gradient is the difference in elevation. See also, Makepeace Testimony, TR page 138 lines 14-20: "If the water level of an effluent system is lowered, the groundwater gradient

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[3] See footnote 2.

would steepen adjacent to the surface water feature. So it would steepen to match that point where the surface water and the groundwater system are at the same elevation."

The minimum flow below Columbia Falls required to be maintained by the Flathead Compact is less than the normal baseflow, i.e., the groundwater component of the surface water discharge. That means that during times of drought, i.e., 15 to 20 % of the time, the groundwater baseflow will be reduced by between 1,800 cfs and 1,500 cfs, i.e., reduced from 5000 cfs to either 3500 or 3200 cfs.[4] That is a reduction of groundwater flow of between 30 and 36%. That substantial reduction in groundwater flow could only happen if the ground water level is substantially lowered.

Because the Compact Parties, including the DNRC, did not do a study to determine the actual extent of this lowering of the groundwater which would be required to reduce the flow by 30 to 36%, we do not know the actual corresponding lowering of the water table resulting from this 30 to 36% reduction in groundwater flow. We only know that the ground water level would necessarily be substantially lowered.

D. Impact on Carter's Water Rights Resulting from the Taking of 90,000 Acre-feet.

1. The lower the surface water of the Flathead River, the lower the groundwater level of Objector Carter's water rights. The reports of the federal and state agencies, Carter Exhibits 1-6, and Compact Parties Exhibit 9, reveal the interconnection between the ground water and the surface water of the Flathead Drainage System which includes the Kalispell Subarea where Objector Carter's water rights are located. If the Flathead River is lowered several feet, then the groundwater levels are similarly lowered.

Ground and Surface Water A Single Resource, Carter Exhibit 4 pages 6-7, discusses the interaction of groundwater and surface waters in different landscapes. Figure 5 shows the groundwater flowing directly toward the surface water through sand. Carter Exhibit 4 page 7. Figure 4 of Carter Exhibit 4 page 7, shows that the closer the groundwater is to the stream, the faster the groundwater moves toward the stream. The closest being days. The groundwater

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[4] See footnote 2. Because the CSKT will only reduce their taking by 45,000 acre feet, in times of drought, the actual flow levels may be lower than either 3,500 cfs or 3,200 cfs.

flows from higher elevations to lower elevations. Potentiometric Surface Map of the Deep Aquifer, Kalispell Valley: Flathead County, Montana, Compact Parties Exhibit 7 page 146.

Objector Carter's water rights are only a little over a mile from the Flathead River. Her soil is sand. The altitude of her property is 3064 feet. Two of her water rights are between 10 and 20 feet below the land surface, which makes her groundwater levels at least between 54 and 44 feet above the 3000 ft valley floor through which the Flathead River flows. See Groundwater Surface Water Exchange, Carter Exhibit 10 page 4. Consequently, the ground water in which Objector Carter's water rights are located, moves quickly toward the Flathead River.[5]

"The water table commonly intersects land surface at the shoreline." Carter Exhibit 4 page 10 of 14. In other words, the water table is even with the shoreline. The lower the shoreline, the lower the groundwater level becomes, because the groundwater of Objector Carter's water rights, having been replenished by spring melt off from the Swan Range, rushes toward the Flathead River to replenish the river the following spring. after the taking of the 90,000 (or 45,000) acre-feet. Makepeace Testimony, TR page 141 line 4-7. The lower the flow rate of the Flathead River, the lower the shoreline. The lower the shoreline, the greater the groundwater discharge. See Makepeace Testimony, TR page 140 lines 14-18. Consequently, Objector Carter's groundwater discharges into the Flathead River until the groundwater level and the Flathead River surface water level are equal. Thus, the lower the level of the Flathead River, the lower Objector Carter's groundwater level.

2. CSKT Hydrologist Makepeace tacitly admits that the groundwater levels reflect the surface water levels of the Flathead River. Makepeace testified that Objector Carter's groundwater flows from east to west and that her groundwater is recharged by the snowmelt from the Swan Mountains. TR page 122 line 1-22. Objector Carter's water rights are due east of the Flathead River, so Makepeace essentially stated that her groundwater flows toward the Flathead River.

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[5] Makepeace testified that groundwater would flow directly to the Flathead River unless there was a site specific geologic factor like a fault or there might be lake silt that would slow it down. TR page 135 line 17 - page 136 line 11. He did not identify either a fault or lake silt relevant to Objector Carter's water rights. Nonetheless, Compact Parties Exhibit 7 page 151, reveals, no bedrock to obstruct flow. Id., page 150 shows that there is no lake silt to slow it down. It rather reveals Qe deposits which is Eolian Deposit.

Makepeace then testified that the surface water level of the Flathead River would increase when the 90,000 acre feet is released from the Hungry Horse Dam. He testified further that this elevated surface water level would recharge groundwater levels. TR page 124 line 14 - page 125 line 9. This is a tacit admission that in the 15 to 20% draught years, when water is not released from the Hungry Horse Dam in the spring as is normally done, that this would result in a lowered elevation of the surface water in Flathead River and that because the water level of Flathead River would be lower, the groundwater levels would be similarly lower. In other words, Makepeace tacitly admitted that the surface elevation of Flathead River correlates directly with the groundwater levels. The higher the higher. The lower the lower.

3. The Compact Parties tacitly admit in the Compact, that the ground water and surface water are interconnected and that resulting from that interconnectivity, the ground water replenishes the surface water. In Part III.G.4.a.,b. the Flathead Compact reserves the right of the CSKT to make a call on water rights (i.e., force the water right owner to stop using their water right) "[w]hose purpose is irrigation, whose source of supply is Groundwater connected to one of the sources identified in [Part] III.G.4.a. [of this Decree], and whose flow rate is greater than 100 gallons per minute." The sources listed in Part III.G.4.a., in addition to the North, Middle and South Forks of the Flathead River, include the "mainstem of the Flathead River."

There would be no reason to call any groundwater use unless the groundwater is interconnected with the surface water and through that interconnectivity, the surface water is replenished by the ground water. See Makepeace Testimony indicating that the groundwaters of the deep aquifers move toward the west, i.e., toward the Flathead River. TR page 122 lines 7-9. See also, Makepeace Testimony indicating that the source of recharge of this groundwater is the Swan Range. TR page 122 lines 20-22. The reservation of the right to make a call is a tacit admission of the interconnectivity between the ground and surface water. Furthermore, it is a tacit admission that the groundwater replenishes the surface water taken from the Flathead Subarea pursuant to the Flathead Compact.

Because of this tacit admission, the Compact Parties, as a matter of law, cannot deny that the off reservation waters taken pursuant to the Flathead Compact, including the 90,000 acre-feet stored in the Hungry Horse Reservoir, is replenished by ground water. Also as tacitly admitted

by the Compact Parties, see discussion supra, the replenishing of this surface water by the groundwater necessarily lowers the ground water levels. This lowering of the groundwater levels negatively impacts, i.e., materially harms, Objector Carter's water rights. The Court must void the Flathead Compact.

E. Uncertainty of Ground Water Availability Puts a Cloud on Carter's Title.

Pursuant to the terms of the Flathead Compact, 15 to 20% of the time Objector Carter has no certainty that she will have access to her groundwater rights. See supra. This uncertainty puts a cloud on her title. Having a cloud on her title is material harm.

1. The Flathead Compact negatively affects, i.e., materially harms, Objector Carter's water rights. Due to the interconnectivity of the surface and ground water, the lowering of the surface water level will necessarily lower the ground water level. Exhibits 1-6 and 9. As a result of the lowering of the groundwater levels caused by the Compact during times of drought, i.e., 15 to 20% of the time, Objector Carter has no certainty as to the availability of groundwater. This puts a cloud on her water rights. Indeed, if she tried to sell her property she would have an ethical obligation to inform a potential buyer that there is no certainty of availability of water 15 to 20% of the time. This will certainly diminish the value of her property. Carter Testimony, TR page 61 line 13 - 62 line 2. This is a material harm which requires that the Court void the Compact.

In spite of this interconnectivity, the Compact Parties did not do a study to determine the impact of the diversion of the 229,383 acre-feet per year, including the 90,000 acre-feet stored in the Hungry Horse Reservoir, would have on the groundwater levels in the Kalispell Subarea of the Flathead Basin where Objector Carter's water rights are located. Agreed Facts 3. Furthermore, the Flathead Compact provides no protections in order to maintain groundwater levels at levels required to assure the availability of ground water in the East Side Aquifer where Objector Carter's water rights are located. See supra.

This failure to provide safeguards to protect groundwater levels in the Flathead Compact puts a cloud on Objector Carter's water rights. That is a material harm. See Flathead Lakers Inc. v. Montana Artesian Water Company, 2023 MT 85. Indeed, the failure of the Compact to

provide protections to protect the levels of off reservation groundwater is sufficient basis alone to void the Compact. Id.

The situation at bar is on all fours with Flathead Lakers Inc. v. Montana Artesian Water Company, 2023 MT 85. In that case, the DNRC had not made sufficient analysis of the impact the taking of water for the bottling plant would have on ground water in the area. Because of that failure, the Montana Supreme Court vacated the DNRC's final order granting the water right for the bottling plant. In the case at bar, the Compact Parties did not make any analysis whatsoever of the impact the Flathead Compact would have on ground water in the Kalispell Subarea of the Flathead Lake Watershed. In line with Flathead Lakers, this Court must void the Flathead Compact.

2. Not Being Subject to Call by CSKT Provides No Protection**.** The Compact Parties have made great todo about the fact that Objector Carter's water rights are not subject to call by CSKT. See, e.g., Agreed Facts 8. However, because Montana has a prior appropriation doctrine, i.e., first in time first in right, her water rights are subject to call by all holders of water rights that are superior to hers. That means that if the CSKT calls the water rights of an irrigator in the Flathead Drainage System, that irrigator could then call all water right possessors with inferior priority dates. In other words, there would be a trickle down affect. Objector Carter's water rights could be called whenever CSKT calls a water right. Carter Testimony, TR page 65 lines 13-23.

Furthermore, not being subject to call does not protect Objector Carter's water rights from the negative impacts discussed supra, i.e., when the taking by CSKT of the off reservation water allowed by the Flathead Compact results in the lowering of the surface water levels which causes the lowering of the ground water levels. Ironically, the lowering of the ground water results in Objector Carter not being able to use her water rights without them having to be called.

II. OBJECTOR CARTER HAS SUPERIOR WATER RIGHTS

Objector Carter has water rights that are superior to the CSKT's off reservation Flathead System Compact Water rights. She has rights that have an earlier priority date than CSKT has to the 229,393 acre-feet including the 90,000 acre-feet stored in the Hungry Horse Reservoir.

A. 90, 000 Acre-feet Stored in the Hungry Horse Reservoir

The CSKT's right to the 90,000 acre-feet stored in the Hungry Horse Reservoir has the same priority date as is held by the United States Bureau of Reclamation. Preliminary Decree, Part III. C.c.vii. See, also, Agreed Facts 4. The priority dates of the Bureau of Reclamation's water rights are either December 31, 1955 or June 16, 1947. Water Court Case 76J-0009-R-2022. See also, Agreed Facts 4.

Objector Carter has five water rights with priority dates ranging from 2025 to 1916. Objector Carter has two water rights that have a priority date before 1947, the earlier of the Bureau of Reclamation's priority dates. Objector Carter's water right 76LJ 30124301 has a priority date of 01/01/1920. Water right 76LJ 30124300 has a priority date of 01/01/1916. Agreed Facts 6. Thus, Objector Carter has two water rights that are superior to the rights held by the CSKT for the 90,000 acre-feet stored in the Hungry Horse Reservoir. These two water rights are the 10 to 20 foot, hand dug wells that are discussed supra, i.e., the rights in the shallow aquifer whose groundwater would rush to replenish the Flathead River when its surface level is lowered as a result of the taking of the off reservation water by the CSKT.[6] See Supra.

B. 229,383 Acre-feet

CSKT's right to off reservation waters from the Flathead Drainage System is based on the Treaty of Hellgate, 1855, Article 3, i.e., "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." The priority date of that right was determined by this Court to be July 16, 1855.

Pursuant to the caselaw, the off reservation water right the Treaty of Hellgate, 1855, gives to the CSKT is the amount of water necessary to maintain off reservation fisheries. United States v. Adair, 723 F.2d 1394, 1413 (9th Cir. 1983). Consequently, the only use allowed pursuant to the Treaty of Hellgate, 1855, of the off reservation water, i.e., the 229,383 acre-feet of water allowed by the Compact, is to maintain fisheries off the reservation. Any use other than to

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[6] Makepeace testified concerning Objector Carter's water right number 5436 which is a 2025 water right that is in an intermediate aquifer rather than in the shallow aquifer in which Objector Carter's 1916 and 1920 water rights are located. TR page 121 lines 18-21. See also., TR page 90 line 23 - page 91 line 23. He spent some time discussing Compact Parties Exhibit 7 page 146, which reveals the direction of flow of deep aquifers in the Flathead Drainage System. He acknowledged that the shallow aquifer is not depicted on the map. TR page 123 lines 10-15. He nonetheless stated that the water of the shallow aquifer would follow the topography, and consequently flow toward Flathead River. TR page 132 lines14-21.

maintain fisheries off the reservation is a "new use" which has a priority date of the date that use is filed for with the DNRC. MCA 85-2-401(2). CSKT's right to the 229,383 acre-feet per year of off reservation water, pursuant to the Compact, is a right of diversion on the reservation and is not for the protection of fisheries in Flathead River. Thusly, it is a "new use." The CSKT has not filed with the DNRC for this new use. Thus, the CSKT has no priority date for the on reservation use of this off reservation water. Consequently, all of Objector Carter's water rights are superior to the CSKT's rights to the 229,383 acre-feet per year of off reservation water.

III. THE COMPACT DAMAGES CARTER'S RIGHT TO HARVEST WILD FISH

MCA 85-2-233 sets forth the burden that Objectors have of proving material harm. This Court has held that material harm includes injury to water rights as well as to "other protectable interests." Montana Constitution, Article IX, Section 7 gives Montanans the right to harvest wild fish, stating: "The opportunity to harvest wild fish and wild game animals is a heritage that shall forever be preserved to the individual citizens of the state." The Montana legislature enacted the laws of Title 87 in order to protect the opportunity of Montanans to harvest wild fish guaranteed by the Montana Constitution. MCA 87-1-107.

The Montana Department of Fish, Wildlife and Parks (DFWP) has Murphy Rights for flow rates on the Flathead River from Flathead Lake to the South Fork. Murphy Rights are water rights determined by DFWP to be necessary to protect fish and wildlife. The Murphy Right flow rates are from August 1 to April 15; 3500 cfs, from April 15 till April 30; 6650 cfs, from May 1 till July 15; 8125 cfs and from July 16 till July 31; 5402 cfs. Carter Exhibit 9 page 8 of 10. Carter Testimony, TR page 52 line 6 - page 54 line 9. See Ryan Testimony, TR page 157 line 22 - page 160 line 22.

These flow rates, deemed by DFWP to be necessary to protect fish habitat, are considerably higher than the between 3200 and 3500 cfs, depending on the expected rainfall, flow rates established by the USFWS (US Fish and Wildlife Service). This is especially the case between April 15 and July 31. For example the DFWP requires 4625 more cfs in July as compared to USFWS's requirement, i.e., 3500 cfs vs 8125 cfs. The Court should take judicial notice that DFWP is more qualified to determine the river flow requirement necessary to sustain

fish habitat in Montana, than is USFWS, and hold that the river flows necessary to sustain fish in the Flathead River are those set by DFWP.

Ryan, hydrologist for the CSKT, testified that no matter how low the river flow rate gets below Columbia Falls, the maximum that the CSKT would reduce their taking of the 90,000 acre feet stored in the Hungry Horse Dam would be down to 45,000 acre feet. Ryan Testimony, TR page 156 line 22 - page 157 line 21. As a result, in times of severe drought, i.e., 15 to 20 % of the time, the river flow rate could be below the 3200 cfs and 3500 cfs, set by USFWS in order to maintain fisheries. In other words, the river flow rate below Columbia Falls would then be lower than even the flow rate that USFWS deemed to be necessary to protect fisheries.

Furthermore, the report prepared by the U.S. Bureau of Reclamation, Carter Exhibit 7, reveals that the flow rates set at 3200 cfs and 3500 cfs, in fact may provide insufficient protection for the fisheries. Carter Exhibit 7 page 6 states:

> This modeling analysis is not a proposal for current or future operations; it only gives results of possible effects that the new Tribal diversions could have on the Flathead basin given some predefined modeling assumptions. The results are intended to provide a starting point for further analysis of what effects new Tribal diversions could have in the Flathead Basin.

Finally, the CSKT has given up the claim to the maintenance of the instream flows of the Flathead River required to maintain fisheries. Ryan Testimony, TR page 157 line 22 - page 158 line 12. See also, Appendices 28 and 29 to the Preliminary Decree. Appendices 28 and 29 reveal that CSKT's claimed right to maintain the DFWP Murphy Rights stream flows, i.e, make the priority date for the Murphy Rights to be July 16, 1855, was abandoned by the CSKT. This is further evidence that the fisheries are not being protected by the Flathead Compact. This also demonstrates the irony created by the Flathead Compact. The basis for CSKT's claim of off reservation waters is the right to fish off the reservation. Treaty of Hellgate, 1855, Article III. Yet the grant of water rights pursuant to the Flathead Compact actually endangers the very fisheries upon which the CSKT's off reservation water right is grounded.

As a citizen of the State of Montana, Objector Carter has a right to the opportunity to harvest wild fish in the Flathead River. Montana Constitution, Article IX, Section 7. MCA 87-1-107. This right to the opportunity to harvest wild fish is a "protected interest" which must

not be negatively affected by the Flathead Compact. MCA 85-2-233. If the flow rate of the Flathead River is not sufficient to sustain fisheries, then there would be no opportunity to harvest fish in the Flathead River. In that the required flow rates set by DFWP are not being met by the Flathead Compact, the taking of off reservation water allowed by the Compact results in flow rates that are insufficient to protect fisheries. This could occur at least 15 to 20 % of the time.

Objector Carter's right to harvest wild fish dates back to before the signing of the Treaty of Hellgate, 1855. That treaty acknowledges the preexisting right of citizens of the Territory to harvest wild fish. The Treaty grants to the confederated tribes "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Treaty of Hellgate, 1855, Article 3.[7] The rights of the citizens of the Territory to harvest wild fish, consequently, was in place before July 16, 1855, the date this Court set as the date CSKT's off reservation fishing rights sprung into being. Consequently, the CSKT does not have a superior priority date as to Objector Carter's protected opportunity to harvest wild fish from the Flathead River and so cannot be heard to claim that CSKT's fishing rights nullify Objector Carter's fishing rights.

The Compact fails to adequately protect the fisheries in the Flathead River. First, it does not use as the minimum flow requirements for the Flathead River those flow rates set by DFWP, Montana expert in fisheries management. Second, even though it uses the flow rates set by USFWS, there is no guarantee in the Compact that even those questionably adequate flow rates will be maintained because CSKT will not reduce its taking of the water stored in the Hungry Horse Reservoir to below 45,000 acre feet. Third, the flow rates that were set, were intended as a "starting point for further analysis of what effects new Tribal diversions could have in the Flathead basin." Carter Exhibit 7 page 6. They were not presented as the final solution. Objector Carter has proven that the Compact harms her protectable interest in harvesting wild fish in the Flathead River. The Flathead Compact must be voided.

IV. THE WATER COURT LACKS JURISDICTION

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[7] The priority date the DFWP has for its Murphy Rights on the Flathead River is December 22, 1970. Carter Exhibit 9, page 8 of 10. The Department of Reclamation has senior water rights to the 90,000 acre feet stored in the Hungry Horse Reservoir i.e. 1955 or 1947. See Agreed to Facts 6. However, the DFWP's Murphy Rights are herein relevant only as an indicator as to the flow rates necessary to protect the Flathead River fisheries. The date of Objector Carter's right to the opportunity to harvest wild fish, and thereby the right to have the fisheries protected, dates back to before the Treaty of Hellgate, 1855.

The Water Court has no Jurisdiction to set the priority date of a "new use." The Water Court only has jurisdiction over pre July 1, 1973 uses. The use of off reservation water for other than uses set forth in the Treaty of Hellgate, i.e., protection of off reservation fisheries, United States v. Adair, 723 F.2d 1394, 1413 (9th Cir. 1983), is a "new use." The Water Court simply has no jurisdiction to set the priority date for any "new use" in that the "new use" was not in place prior to July 1, 1973. Furthermore, pursuant to Montana law, the priority date for a "new use" is the date that the CSKT applies to the DNRC for this water right. MCA 85-2-401. It is not the date of the original use. Consequently, this Court did not follow Montana law when it set the priority date of this new use, i.e., when it set the priority date as the date of signing of the Treaty of Hellgate, 1855, i.e., July 16, 1855. The Court must void the Flathead Compact.

The Water Court only has jurisdiction to set the priority date for the use of the 229,383 acre-feet including the 90,000 acre-feet stored in the Hungry Horse Reservoir for uses that are specified in the Treaty of Hellgate, 1855, i.e., related to off reservation fishing. It has no jurisdiction whatsoever to set a priority date for a post July 1, 1973, new use including on the reservation irrigation. Having no jurisdiction to set the priority date of the new, on reservation, use of the off reservation water, the Water Court must void the Flathead Compact.

IV. CONCLUSION

For the above stated reasons, Objector Carter has met her burden to prove material harm to her water rights. She has also proven that she has priority dates that are superior to those held by the CSKT for the 229,383 acre-feet including the 90,000 acre-feet stored in the Hungry Horse Reservoir. She has also met her burden to prove that the Compact violates her protected interest of having the opportunity to harvest wild fish in the Flathead River. The Flathead Compact must be voided.

Furthermore, this Court lacks jurisdiction to set the priority date for the 229,383 acre-feet including the 90,000 acre-feet store in the Hungry Horse Reservoir as the date the Treaty of Hellgate, 1855 was originally signed, i.e., July 16, 1855, in that the use allowed in the Flathead Compact is a new use, i.e., it is not for the preservation of off reservation fisheries. This lack of jurisdiction, as well as the Court's failure to follow Montana law for setting the priority date for a new use, each alone, requires that the Flathead Compact be voided.

Dated this 30th day of August, 2025.

OBJECTOR MICKALE CARTER

/s/ Mickale Carter
MICKALE CARTER
Bar Number 2594
pro se

CERTIFICATE OF SERVICE

I declare under penalty of perjury, that I emailed a true and accurate copy of the foregoing document on August 30, 2025 to the following email addresses:

Montana Water Court: watercourt@mt.gov

Daniel J Decker
Confederated Salish & Kootenai Tribes: objections@cskt.org

David W. Harder
U.S. Department of Justice
Indian Resources Section
Environment & Natural Resources Division: efile_denver.enrd@usdoj.gov

Molly M. Kelly
Montana Department of
Natural Resources and Conservation: Jean.Saye@mt.gov

Chad Vanisko
Montana Attorney General Agency
Legal Counsel Agency Legal Services Bureau: chad.vanisko@mt.gov

/s/ Mickale Carter August 30, 2025.