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Montana Water Court

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

* * * * *

CASE NO. WC-0001-C-2021
EVIDENTIARY HEARING No. 15

COMPACT PARTIES' POST-HEARING OPENING BRIEF
REGARDING MATERIAL INJURY HEARING No. 15 [Carter]

Under the governing orders,¹ the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States (collectively, “Compact Parties”), submit this opening post-hearing brief in connection with Mickale Carter’s (“Carter”) material injury hearing held on May 7, 2025. As the Compact Parties explain below, Carter has not carried her burden of proof to show material injury by operation of the Compact. Therefore, the Court should grant the Compact Parties’ *Motion for Approval of the Flathead Reservation-State of Montana-United States Compact and for Summary Judgment Dismissing All Remaining Objections*, Dkt. No. 1823.00 at 71-72 (“Motion”), and approve the CSKT Compact, §§ 85-20-1901, -1902, MCA.

At her hearing, Objector Carter offered evidence but failed to show a concrete, non-speculative injury to her water rights or other property interest that stems from the operation of the Compact. Carter offered only lay opinion evidence of a general hydrologic interaction between surface and groundwater—something the Compact Parties do not dispute. She provided nothing definite about how exercise of any aspect of the Tribal water right under the Compact would injure her domestic water rights, some of which are senior to the applicable Tribal Water Right. Carter acknowledged that her injury was that she is simply “uncertain” about whether her water rights would ever be impacted by the Compact water rights. She based that uncertainty on an unsupported disregard of legal mechanisms meant to protect her interests and only the most general connection between her groundwater rights and the Compact surface water rights, without any site-specific analysis by an expert.

I. MATERIAL INJURY LEGAL STANDARD

As this Court and the Montana Supreme Court have held, to demonstrate material injury from the Compact, an objector must establish, through admissible evidence, a concrete injury to water rights or other real property interests caused by operation of the Compact. *See In re Crow Water Compact Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Crow Tribe of Indians and the State of Montana*, 2015 MT 353, ¶¶ 34-35, 382 Mont. 46, 364 P.3d 584 (rejecting argument that Objectors had “property interest in future appropriations or changes in use” harmed by a Compact’s basin closure provision); *United States Fish and Wildlife Service, Bowdoin National Wildlife Refuge - Montana Compact*, No.

¹ *Case Management Order No. 9*, Dkt. No. 2602.00 (May 16, 2025); *Court Minutes and Order Setting Deadlines*, Dkt. No. 2608.00 (July 11, 2025); and *Order Modifying Briefing Schedule*, Dkt. No. 2628.00 (August 13, 2025).

WC2013-04, 2015 WL 9699486, at *10 (Mont. Water Ct., Oct. 07, 2015) (determining material injury “requires injury to water rights or real property interests” rather than difference of opinion over correct government policy).

Evidence of injury that relies on speculation about future Compact implementation cannot demonstrate material injury. *In re Adjudication of the Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the United States Department of Agriculture Forest Service within the State of Montana*, No. WC-2007-03, 2012 WL 9494882, at *10 (Mont. Water Ct., Oct. 31, 2012) (court cannot “rely on any fears, concerns, and conjectures expressed by the Objectors about the future application of the Compact provisions or other future Forest Service actions. The expressed uncertainty of feared future events is too speculative upon which the Court can base a decision.”). Additionally, injury stemming from the consequences of the prior appropriation system cannot establish material injury. *Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00, at 75-76 (April 1, 2025) (“*Compact Validity Order*”) (“[N]either the Water Court nor the Montana Supreme Court ever has held that confirmation of tribal reserved rights with senior priority dates alone is sufficient material injury to disapprove a compact.”).

II. CARTER FAILED TO ESTABLISH MATERIAL INJURY

Carter’s injury allegations are unsuccessful because of where she claimed her injury occurred and how she tried to prove that injury. Her injury allegation is infirm because it relies on her generic lay testimony about the interaction of surface and groundwater and was not supported by any site-specific expert testimony. Carter’s injury assertion is in the wrong location given the geological setting on the east side of the Flathead River near Columbia Falls. Finally, Carter’s wells have multiple layers of legal protections under state law preventing the harm she alleges. In sum, her injury claim is unsupported and ill-conceived.

A. Carter’s Injury Claim Is Based on Lay Testimony About How the Future Use of 90,000 Acre-Feet from the Hungry Horse Reservoir Will Cause Her Domestic Wells to Possibly Go Dry

Carter’s theory of harm focused entirely on the portion of the Tribal Water Right known as “Flathead System Compact Water,” and the component of that right that allows the Tribes to use water from a United States Bureau of Reclamation (“BOR”) reservoir. Hearing Tr. 13:3-9; 14:7-13; 16:7-17:5; 75:4-76:16, May 7, 2025 (“Tr.”). The Compact provides the Tribes with a right to divert up to 229,383 acre-feet per year (“AFY”) from the Flathead River or Flathead

Lake, allow those uses to consume no more than 128,158 AFY, and that the right includes up to 90,000 AFY from BOR's Hungry Horse Reservoir ("Hungry Horse Allocation"). Section 85-20-1901, MCA, Arts. II.35 & III.C.1.c; *Compact Validity Order* at 39, n.35; 45. Under the federal legislation approving the Compact, the Tribes' allocation from that Reservoir has a priority date of the water rights held by BOR for Hungry Horse Reservoir. *See Findings of Fact, Conclusions of Law, and Order for the Commencement of Special Proceedings for Consideration of the Confederated Salish and Kootenai Tribes—State of Montana—United States Compact*, Dkt. No. 18.00, at 6-9 (June 9, 2022). The priority date for those rights in basin 76J was recently decreed by the Water Court and are either 1947 or 1955. Tr. 3:2-4:4; 69:12-70:10; *Hearing 15 Prehearing Order*, Dkt. No. 2589.00, at 2, May 5, 2025 (Agreed Fact No. 4).

Carter lives downstream of Hungry Horse Reservoir and a couple miles to the east of the Flathead River. Tr. 17:23-18:4; *Hearing 15_Compact Parties Ex02_001* (green dot). Carter has five non-irrigation water rights: two are wells she asserts are 10-20 feet deep, in the shallow aquifer, with priority dates of 1916 and 1920; the other three wells are around 175 feet deep and have priority dates from 2004 to 2025. Tr. 17:6-22; *Hearing 15 Prehearing Order*, Dkt. No. 2589.00, at 2-3 (Agreed Facts Nos. 6 & 7). Carter's allegation of harm is that in the driest 15% of future water years, if the Tribes use all of the 90,000 AFY Hungry Horse Allocation somewhere below her, the level of the Flathead River near her home will be lower than it otherwise should be in a drought, making it more likely that one or more of her domestic wells will produce less water or go dry. Tr. 16:7-17:5; 22:6-31:13.

Three witnesses testified at the hearing. Carter testified as a lay witness in support of her objection. Carter does not have any training or education in hydrology, geology, or engineering. She had not reviewed scientific papers related to the hydrology or geology of the Flathead River basin until she prepared for the material injury hearing. Tr. 71:12-73:15. Her testimony consisted of describing pertinent parts of several state and federal scientific papers that described either the hydrology/geology of the Flathead River basin or the concept that groundwater and surface water typically have some linkage. Tr. 31-68.

The Compact Parties had two witnesses. Seth Makepeace is a hydrologist who has worked for the Tribes for 35 years. He has a bachelor's degree in geological sciences and a master's degree in hydrogeology. His thesis was to create a groundwater flow model that included surface and groundwater interactions. Mr. Makepeace was familiar with all the

regional scientific papers that Carter introduced as exhibits because he read them as they were published, since they were pertinent to his work and the Tribes had gathered data used in several of the reports. Tr. 86:13-88:16. The Compact Parties' other witness was Casey Ryan, a hydrologist for the Tribes, who is currently the manager of the Division of Engineering and Water Resources. He has a bachelor's degree in geography sciences and a master's degree in hydrology. Tr. 143-44.

B. Carter Did Not Demonstrate That the Tribes' Future Use of the Hungry Horse Allocation Would Materially Injure Her Wells

Carter's allegation of future injury is unsupported and misguided. First, Carter's claimed injury is in the wrong location given the topography and the location of her wells. Carter asserts that the offending cause of her possible future injury is lower water levels to her west, when the groundwater her wells rely on come from the wetter and higher ground to the east in the Swan Mountain Range. Second, the injury asserted is unsupported, and the Court has ruled that the type of evidence that Carter presented would not establish an injury claim.

Carter's wells are between the Flathead River (1.3 miles to the west of her wells) and the Swan Mountain Range (two miles to the east of her wells). Tr. 18:13-23; Hearing 15_Carter Ex01_003; Hearing 15_Compact Parties Ex02_001. The elevation where Carter lives is about 3,060 feet. Tr. 40:3-5. "The Swan Range, with peaks higher than 7,000 feet above sea level, rises abruptly from the east side of the [Flathead] valley floor" where Carter lives. Hearing 15_Carter Ex01_005. It is undisputed from the relevant reports and all testimony that the flow of groundwater in this area is from east to west, from the Swan Mountains to the Flathead River, from the higher point to the lower point. *Id.* 007; Tr. 40:18-41:1; 42:2-9; 42:23-43:2; 44:8-24; 55:2-11; 121:4-8; 132:11-21. The shallow aquifer, where some of Carter's wells are located, relies on the groundwater flow for recharge. Hearing 15_Carter Ex01_007; Tr. 74:1-22; Tr. 121:22-122:22 (Makepeace referring to Hearing 15_Compact Parties Ex07_145 [potentiometric map]).

To harm Carter's wells, the Tribes' use of the Hungry Horse Allocation would need to intercept those groundwater flows between the Swan Mountains and those wells. Tr. 122:23-123:9 (Makepeace). But Carter's allegation of future harm by the Hungry Horse Allocation is not in that steep mountainous terrain to her east. Rather it is alleged to occur at the Flathead River to her west. This is on the wrong side of her wells to show injury from the Compact. That alleged locus of harm is downgradient from her wells, over a mile to the west, at the Flathead

River. Carter's specification of harm is contrary to the relevant topography and the direction of groundwater movement and therefore must be rejected.

Carter's allegation that Flathead River levels near her house will be lower in a future drought because of the Tribes' use of the Hungry Horse allocation farther downstream is speculative at best and cannot form the basis of a material injury claim. Carter's primary harm contention is that she has "uncertainty" about whether her wells close to the River will have reduced capacity in the driest 15% of future years. Tr. 61:13-19. Carter's potential harm allegation is based on the generalized concept that groundwater and surface water are connected. From there, she contends that if the Flathead River nearest her house is lower in a dry year than in an average or wet year, the groundwater table her wells use must be lowered to support the diminished Flathead River flow, leading to her wells being more likely to go dry. Tr. 31-61. This allegation is clearly speculative for several reasons.

First, the allegation is based on only generalized lay testimony that the Court ruled cannot support a valid injury. Carter has no specialized training in the relevant subjects. She has not conducted the necessary analysis or modeling to demonstrate that her wells would be impacted by the minimum level of the Flathead River the Compact requires during droughts when the Tribes are fully using the Hungry Horse Allocation. Tr. 71:12-73:15; 83:25-84:11. She did not hire an expert to conduct such a study. Tr. 84:22-85:13. The Court has previously ruled that Carter must do more than show "a general hydrologic connection exists between surface water and groundwater." *Hearing 15 Order on Prehearing Motions*, Dkt. No. 2590.00, at 3 (May 5, 2025). Second, rather than providing competent testimony that modeled the precise scenario she alleged caused her "uncertainty," Carter blamed the State of Montana for not having done a groundwater study that would support her allegation. Tr. 84:5-85-9. Yet again this Court ruled before the hearing that Carter could not argue that the Compact Parties' failure to conduct a groundwater study was an injury. *Hearing 15 Order on Prehearing Motions*, Dkt. No. 2590.00, at 3.

Third, Mr. Makepeace testified that even the lower River levels during a drought could not harm Carter's wells given their location and the topography. Tr. 123:23-126:15. Fourth, Carter made no showing that absent the Compact, in a future drought, the water levels in the Flathead River would be higher than what the Compact requires. Fifth, the Compact protects minimum Flathead River levels in times of drought and limits the use of the Hungry Horse

Allocation down to 50% of the full allocation (45,000 AFY). Tr. 138:21-139:24; 147:21-148:17; 150:23-152:2; 153:18-154:7; § 85-20-1901, Apps. 7 & 8; Preliminary Decree, App. 2, Decree Report pages 64-66 (Remarks on Flathead System Compact Water right, 76LJ 30063812). In sum, there was no competent evidence that use of the Hungry Horse Allocation would harm Carter.

C. Existing Legal Standards Protect Carter's Wells from Exercise of the Tribal Water Right

Carter's wells are protected from injury by the Tribes' water rights recognized in the Compact in a variety of ways. First, the Tribes cannot drill a well where it would harm Carter's wells without participating in a state statutory process that requires no adverse effects to existing water uses. Given the topography and flow of groundwater to Carter's wells, the location for a tribal water right to potentially harm them is in a location that intercepts their recharge from the prevailing groundwater flow that comes off the Swan Mountains. *See supra* Section II.B. Still, the Compact protects Carter from the Tribes doing that unilaterally.

The Tribes have no authority under the Compact to drill a well off-Reservation where Carter lives. The Tribes' only right off Reservation is the Flathead System Compact Water. The sources for that right are exclusively surface water and not groundwater. Section 85-20-1901, MCA, Art. III.C.1.c (Flathead River and Flathead Lake are only listed sources). So, if the Tribes sought to drill a well in the Swan Mountain Range above Carter's house, they would have to apply to the Montana Department of Natural Resources and Conservation ("DNRC") and comply with state law—like any other water user wishing to do the same. Thus, her alleged concerns are not specific to the Tribes, nor the Compact. State law prevents a permit from being issued without an adverse effects analysis that shows the water quantity of existing water uses will not be adversely impacted, § 85-2-311(1)(b), MCA, and if a valid objection is filed, that the water quality of that existing water user will not be adversely impacted, §§ 85-2-311(1)(f); (2), MCA. Thus, Carter has extensive protection if the Tribes—or any other water user—sought a proposed groundwater development in the forested area above her property in the Swan Mountain Range.

Second, if the Tribes sought to develop a use of the Flathead System Compact Water in the Flathead River close to Carter's wells, the Tribes also cannot do this without complying with state law, being subject to an objection by Carter or others, and winning the approval of the DNRC—just like any other state user. The Compact provides that any direct use by the Tribes, or lease by the Tribes of the Flathead System Compact Water, is only allowed if such proposal is

reviewed by DNRC and the agency determines that the proposed use does not adversely impact existing state water uses. Section 85-20-1901, Art. IV.B.5.c & Art. IV.B.6.c.vi (requiring compliance with the change of use state law requirements under §§ 85-2-302; 85-2-307 to -310; 85-2-314; and 85-2-402, MCA). A change of use application is only valid if the proponent demonstrates that the “change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued” Section 85-2-402(2)(a), MCA. Again, Carter’s wells have existing legal protections from new uses of Flathead System Compact Water.

Third, the Tribes and United States cannot use their water rights to make a call on any of Carter’s water rights. *Hearing 15 Prehearing Order*, Dkt. No. 2589.00, at 3 (Agreed Facts Nos. 7 & 8). So, Carter’s water rights will not be limited by actions of the Tribes and United States. Fourth, the two water rights that Carter thinks are at greatest risk from the Tribes’ use of the Hungry Horse Allocation are her two “shallow” wells. Tr. 17:6-19; 40-42; 130:17-132:21. But those two wells have priority dates that are senior to the priority dates of the BOR water rights that support the Hungry Horse Allocation. Tr. 17:6-17; *Hearing 15 Prehearing Order*, Dkt. No. 2589.00, at 2 (Agreed Facts Nos. 5 & 6). Thus, if hypothetically those two rights are being harmed by the Hungry Horse Allocation, they have seniority over that water use thereby allowing Carter to call and ensure she will have the full supply for those two wells.

III. CONCLUSION

For these reasons, the Compact Parties request that the Court find that Carter has not carried her burden of proof to demonstrate material injury to her water rights from operation of the Compact. The Court should dismiss all objections, including Carter’s, and approve the CSKT Compact.

Respectfully submitted this 22nd day of August, 2025.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Post-Hearing Opening Brief* for Hearing No. 15 was served by email to the Objector and email to counsel for the Compact Parties as set forth below this 22nd day of August, 2025.

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