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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 16[1]

Comes now, Objector Vivian Allen, *Pro Se*, and presents her Post Hearing Brief for Hearing 16, which was held on May 7, 2025. The factual issue to be determined by the hearing is whether Objector Allen's water right or other protectable interests are negatively affected, i.e., materially harmed, by the Flathead Compact. The determination of this factual issue with regard to her water right requires an analysis of the interactivity between the surface and ground water in the Flathead Drainage System, including the Coram Subarea of the Flathead Lake Watershed, and in specific the Hungry Horse Aquifer where Objector Allen's water right is located. It also requires an analysis of the priority dates of Objector Allen's water right as compared with those held by the Compact Parties.

Allen Exhibits 1-9 and 12-14, 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 Allen's groundwater right is lowered by the taking of the off-reservation water, including the 90,000 AF stored in the Hungry Horse Reservoir. This lowering of the groundwater is a material harm. Furthermore, Objector Allen's water right is superior to those held by the CSKT. The Court is compelled to void the Flathead Compact.

[1] Reference in this brief to particular pages in the transcript are representative and the full transcript is attached and incorporated by reference here as completely relevant and integral whether quoted or not.

Allen 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 Allen 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 Allen'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. ALLEN PROVED MATERIAL HARM TO HER WATER RIGHT

Objector Allen allegedly[2] has the burden of proving that the Flathead Compact will materially harm her water right. MCA 85-2-233. The Flathead Compact gives the CSKT a right to off-reservation surface water. Objector Allen's water right is a ground water right. Consequently, Objector Allen's water right can 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 Hungry Horse Aquifer of the Coram Subarea where Objector Allen's water right is located.

The question becomes: Will the taking of the 229,383 AF, including the 90,000 AF stored in the Hungry Horse Reservoir, as allowed by the Flathead Compact, cause the ground water levels in the Hungry Horse Aquifer to be lowered? Testimony at the hearing, and Allen Exhibits 1 through 14 and Compact Parties Exhibits 2, 3 and 7 reveal that the answer to this question is a resounding "yes."

A. Objector Allen's Water Right

Objector Allen's water right is a groundwater right located in Basin 76LJ. Agreed Facts 4. Her water right is situated on a narrow peninsula in the shallow aquifer below the town of

[2] Objector Allen at hearing asserted the legal processes she has been swept up in as an Objector to this Compact have been carried out in a highly irregular and untrustworthy manner, so she does not believe the burden of proof has ever lawfully shifted to her, supported in her filings and reliance on filings of others of similar stance. However, since this is the irregular stance of the Court, Allen demonstrates material and/or irreparable harm herein at the Court's request.

Hungry Horse in the Coram Subarea between the Flathead River and the South Fork of the Flathead River, a few miles below the Hungry Horse Reservoir Dam. TR pp. 25, 26, 38. The soil is alluvial sand, coarse gravel, and cobbly gravel. Allen Exhibit 1-6* and Exhibit 10-1* and related testimony TR pp. 27, 32, 33.

The elevation where Objector Allen's water right is located is 3,103 ft above sea level. Allen, TR p. 36. Allen Exhibit 11. Doing the math, Objector Allen's static water level (Exhibit 10-1 and Exhibit 11) is 8-9 ft below the surface elevation of both rivers, demonstrating both rivers are losing streams discharging into the groundwater beneath Hungry Horse. It comes as no surprise that in the Hungry Horse Aquifer, groundwater flow is downward from the three slopes of the three confining mountain ranges (Swan, Flathead, and Whitefish Ranges) into the two rivers and via losing streamflow into the underground water basin between them, that aquifer flowing thence generally northwestward toward Bad Rock Canyon. Allen Exhibit 1-3, 1-7 and Exhibit 11. Allen, TR pp. 25, 26, 28, 31, 32, 35, 36.

"Ground water flows from higher topographic positions over short distances (generally < 2 mi) to nearby streams [these two rivers] and lakes." Ground Water Resources of the Flathead Lake Area, Carter[3] Exhibit 1 p. 4 of 10. Makepeace Testimony, Carter TR p. 134 line 32 - p. 135 line 7. Groundwater that is close to the discharge area takes only days to reach the discharge area. Carter Exhibit 4, Figure 3 p. 7 of 14.[4] "Hillslopes store water for months or years, and then release it to streams in minutes or hours." Allen Exhibit 6-3. Allen's well is so situated to be rapidly affected by drought conditions, especially given the losing streamflow hydrology.

"Ground water flows from high altitude to low altitude." Compact Parties Exhibit 10 p. 146. Objector Allen has a shallow water right located in sandy gravel at the immediate foot of altitudes of Columbia (7235 feet, Swan Range), Teakettle (5935 feet, Whitefish Range), and Lion Hill (4830 feet, Flathead Range). Allen, TR p. 25. The groundwater of this water right is directly related to what does or doesn't flow down into the Flathead River and the South Fork of the Flathead on either side of Hungry Horse, and thence into the aquifer below it.

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* Exh. X-X denotes Allen's exhibit number then Allen's page number in that exhibit.

[3] Allen stated her reliance upon Carter's relevant exhibits and testimony as well as that of others, Allen TR pp. 23, 24, 28, 29.

[4] 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.

B. Impact of the Taking of the 90,000 AF on Flathead River Water Levels.

The Flathead Compact allows the CSKT to take 229,383 AF of off-reservation surface water including 90,000 AF 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 Allen Exhibits 7 and 8 respectively. The studies revealed that the taking of the 90,000 AF 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 Horse Reservoir to fill the following spring during dry years." Allen Exhibit 7, p. 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. P. 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., p. 6, and/or 15 percentile of water years. Allen Exhibit 8, p. 2. These shortages occur in the March through June period and in October. Allen Exhibit 7 p. 6. Allen, TR p. 23 line 10 - p. 31 line 4.

"Minimum flow requirements below Hungry Horse Dam and below Columbia Falls[5] were established by the USFWS (United States Fish and Wildlife Services) BiOp" for wildlife preservation including fisheries. Allen Exhibit 8 p. 5. The minimum flow requirement below Columbia Falls was set to be between 3,500 and 3,200 cfs (cubic feet per second). Id. Allen Exhibit 7 p. 15. There are provisions in the Flathead Compact to maintain the minimum water flow requirements of the USFWS BiOp.[6] Preliminary Decree, Part III.C.1.c.ii., iv., vi. Carter TR p. 30 line 11 - p. 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 AF. Of this average annual discharge, about 3.6 million AF are

[5] Compact Party's large potentiometric map on display in the courtroom shows Allen's water right to be approximately 6 miles upstream from this gauging station, thus the flow at this station is relevant to Allen's hydrology.

[6] 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 AF, Ryan Testimony, Carter TR page 157 lines 8-21, i.e., will continue to take up to 45,000 AF no matter how low the Flathead River becomes.

attributed to ground water. Flathead Watershed Sourcebook, Carter Exhibit 6 p. 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 cfs. Id. See Carter TR p. 46 line 10 - p. 48 line 24.

Allen 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 AF 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),[7] 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 ground water levels in the aquifer where Objector Allen's water right is 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 p. 4. "The surface-water stage reflects the local water table." Id. See also, Makepeace Testimony, TR p. 138 lines 10-20 and p. 141 line 4-7. See also, Compact Parties Exhibit 3 figure 4. Consequently, the lower the surface level of the Flathead River and/or the South Fork at Hungry Horse, the lower the water table where Allen's water right is located, *and especially so* in Allen's hydrology where there is a losing streamflow, supra, i.e, the water table in the aquifer is even *lower* than the surface of the feeding river bodies. Allen Exhibit 1-7.[8]

[7] See footnote 6.
[8](Read "Exhibit 1-7" as "Exhibit 1, page 7", etc. throughout.)

As the river level lowers, the flux rate of the groundwater, i.e., the force of the groundwater flow from the river, gets weaker. See Carter Exhibit 10 p. 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, Carter TR p. 138 lines 14-20: "If the water level of an effluent system is lowered, the groundwater gradient 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." This will by implication and science be the opposite in Allen's losing streamflow system, necessarily lowering her groundwater. The gradient will become more level, losing less river water into the groundwater, and the groundwater aquifer will be diminishing.

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.[9] 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 Allen's Water Right Resulting from the Taking of 90,000 AF.

1. The lower the surface water of the Flathead River and/or South Fork of the Flathead River, the lower the groundwater level of Objector Allen's water right. The reports of the federal and state agencies, Carter Exhibits 1 through 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 Coram Subarea where Objector Allen's water right is located. Makepeace specifically admitted to this: "I would characterize surface and ground water as very

[9] See footnote 6. Because the CSKT will only reduce their taking by 45,000 AF, in times of drought, the actual flow levels may be lower than either 3,500 cfs or 3,200 cfs.

interconnected in the Hungry Horse area." Allen TR p.81, lines 22-24. 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 pp. 6-7, discusses the interaction of groundwater and surface waters in different landscapes. Figure 4 of Carter Exhibit 4 p. 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 flows from higher elevations to lower elevations. Note again, this will be the opposite in Allen's losing streamflow hydrology—the diminished flow in the Flathead Rivers during drought will rapidly diminish the supply of groundwater adjacent to and at Allen's water right.

Objector Allen's water right is just a short stroll from both the Flathead River and the South Fork of the Flathead River. Her soil is sand, gravel and cobbly gravel. The altitude of her static groundwater level is only 8 feet below the surface level of the rivers. Consequently, the ground water in which Objector Allen's water right is located, which is recharged from these rivers, will lose its recharge in drought conditions. Allen Exhibit 1-7, Fig. G4.

"The water table commonly intersects land surface at the shoreline." Carter Exhibit 4 p. 10 of 14. In other words, the water table is even with the shoreline. The lower the shoreline, the lower the groundwater level becomes, after the taking of the 90,000 (or 45,000) AF, because the groundwater of Objector Allen's water right is replenished from the rivers. The lower the flow rate of the Flathead River, the lower the shoreline. The lower the shoreline, the less the discharge into the groundwater aquifer.

2. <u>CSKT Hydrologist Makepeace tacitly admits that the groundwater levels reflect the surface water levels of the Flathead River</u>. 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. Carter TR p. 122 line 1-22. Objector Carter's water right is due east of the Flathead River, so Makepeace essentially stated that her groundwater flows toward the Flathead River.

Makepeace then testified that the surface water level of the Flathead River would increase when the 90,000 AF is released from the Hungry Horse Dam. He testified further that this elevated surface water level would recharge groundwater levels. Carter TR p. 124 line 14 - p. 125 line 9. This is a tacit admission that in the 15 to 20% draught years, when water is <u>not</u> 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. Carter TR p. 122 lines 7-9. See also, Makepeace Testimony indicating that the source of recharge of this groundwater is the Swan Range. TR p. 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.

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 AF stored in the Hungry Horse Reservoir, are interconnected to ground water. Also as tacitly admitted by the Compact Parties, see discussion supra, the lower this surface water, the lower the ground water levels. This lowering of the groundwater levels in Allen's well's aquifer negatively impacts, i.e., materially harms, Objector Allen's water right. The Court must void the Flathead Compact.

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

Pursuant to the terms of the Flathead Compact, 15 to 20% of the time Objector Allen has no certainty that she will have access to her groundwater right. 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 Allen's water right. Due to the interconnectivity of the surface and ground water, the lowering of the surface water level will necessarily lower the ground water level. Allen Exhibit 1-6 and Exhibit 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 Allen has no certainty as to the availability of groundwater. This puts a cloud on her water right. 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. 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 AF per year, including the 90,000 AF stored in the Hungry Horse Reservoir, would have on the groundwater levels in the Coram Subarea of the Flathead Basin where Objector Allen's water right is located. Agreed Facts 2. 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 Hungry Horse Aquifer where Objector Allen's water right is located. See supra.

This failure to provide safeguards to protect groundwater levels in the Flathead Compact puts a cloud on Objector Allen's water right. 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 Coram 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 to-do about the fact that Objector Allen's water right is not subject to call by

CSKT. See, e.g., Agreed Facts 1. However, because Montana has a prior appropriation doctrine, i.e., first in time first in right, her water right is 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 or someone whose well produces over 100gpm in the Flathead Drainage System, that irrigator or 100+ gpm well owner could then call all water right possessors with inferior priority dates. In other words, there would be a trickle-down effect. Objector Allen's water right could be called whenever CSKT calls a water right. See Allen original objection incorporated at hearing.

Furthermore, not being subject to call does not protect Objector Allen's water right 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 Allen not being able to use her water right without it having to be called.

II. OBJECTOR ALLEN HAS A SUPERIOR WATER RIGHT

Objector Allen has a water right that is superior to the CSKT's off-reservation Flathead System Compact Water rights. She has a water right that has an earlier priority date than CSKT has to the 229,393 AF including the 90,000 AF stored in the Hungry Horse Reservoir.

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 AF of water allowed by the Compact, is to maintain fisheries off the reservation. Any use other than to 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 AF 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, Objector Allen's 1967 water right is superior to the CSKT's right to the 229,383 AF per year of off-reservation water.

III. THE COMPACT DAMAGES ALLEN'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 87-1-147.

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 Right is 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 p. 8 of 10. Carter, TR p. 52 line 6 - p. 54 line 9. See Ryan Testimony, Carter TR p. 157 line 22 - p. 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 AF stored in the Hungry Horse Dam would be down to 45,000 AF. Ryan Testimony, Carter TR p. 156 line 22 - p. 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, Allen Exhibit 7, reveals that the flow rates set at 3200 cfs and 3500 cfs, in fact may provide insufficient protection for the fisheries. Allen Exhibit 7 p. 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, Carter TR p. 157 line 22 - p. 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 Allen has a right to the opportunity to harvest wild fish in the Flathead River. Montana Constitution, Article IX, Section 7. MCA 87-1-147. 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 Allen'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.[10] 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 Allen'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 Allen'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 AF. 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." Allen Exhibit 7 p. 6. They were not presented as the final solution. Objector Allen 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

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.

[10] The priority date the DFWP has for its Murphy Rights on the Flathead River is December 22, 1970. Allen Exhibit 9, page 8 of 10. The Department of Reclamation has senior water rights to the 90,000 AF stored in the Hungry Horse Reservoir i.e. 1955 or 1947. See Agreed Facts 4. However, the DFWP's Murphy Right is herein relevant only as an indicator as to the flow rates necessary to protect the Flathead River fisheries. The date of Objector Allen'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 only has jurisdiction to set the priority date for the use of the 229,383 AF including the 90,000 AF 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.

V. FURTHER EVIDENCE OF MATERIAL HARM AND MYRIAD OF BASES OF MATERIAL HARM

(Transcript page and lines annotated as page/line-line.)

(Exh. X-X denotes Exhibit number and page number.)

Allen's well is located in an underground river, a shallow aquifer and shallow alluvium. Groundwater in these aquifers occurs in unconfined condition. It is formed from losing streamflow discharging to groundwater. 24/23-25, 26/15-21, 27/1-4, 38/8-9, Exh. 1-7. Groundwater moves rapidly through highly porous material close to the surface. 32/6-7, Exh. 6-4. Allen's well log and Makepeace testimony agree her well is in a highly porous aquifer. 32/18 – 33/20, 80/5-6, 81/17-18. The aquifer is a local system within the larger Coram subarea, "Local flow systems consist of shallow groundwater flow between adjacent recharge and discharge areas superimposed on or within a regional flow system." Exh. 1-8. Recharge comes from the South Fork bounding Hungry Horse on the south and east and the mainstem of the Flathead River bounding Hungry Horse on the north "where the water levels are higher than those in the neighboring (Allen's) aquifers." 28/9-15, Exh. 1, Fig G4. Hungry Horse is located between three hillslopes supplying the South Fork and the mainstem of the Flathead River, which in turn lose water into Allen's well's aquifer. Groundwater and surface water are intimately connected. Near stream channels there are complex groundwater and surface water flow patterns. The rivers support the aquifer: drier periods = drier, lower rivers = drier, lower aquifer. Exh. 6 pp. 4 & 5, 34/16-17, 22-24, 6-10, (opposite in a losing streamflow system). Very dry periods with not enough water for proper streamflow occur 15-20% of the time, supra. Allen's aquifer is basically a large hyporheic exchange. 35/7-8, 38/13-17. Makepeace's testimony admitted this specifically. 81/22-24. Depleting her aquifer levels further at very dry times will naturally cause harm, given her well depth/pumping level associated with the surface elevation of the rivers. 36/4-18, 37/19-24, 64/17-18.

The Compact rests not at all, and contains zero data in it on the importance and significant concern of interconnectivity between ground and surface waters, supra,—in spite of tacit allusion to it—and in fact completely ignores—except in tacit allusion to it—this absolutely essential and crucial component of the whole paradigm in the Compact's sweeping assertions and claims to excesses of water. 28/18-23, 35/12-14. The interconnectivity of ground and surface water are intrinsically related to water supply, of concern to Allen as to material harm, as is the open-ended, vague, undefined water quality issue foundational in the Compact. 29/8-23, 40/10-20. The three forks of the Flathead River, of which Hungry Horse Reservoir is part, contribute ~80% of the water entering Flathead Lake, a huge chunk of what supplies Flathead Lake and points south, as to the supply governed by the Compact. 30/4-10, Exh. 6-1. The Flathead Lake abstract includes all tributaries named and unnamed including the South Fork and the mainstem of the Flathead, thus its relevance to Allen's well water right. Exh. 7.

Water quality problem-issues with the Compact have been addressed by other objectors upon whose testimony, etc., Allen relies. The Compact is completely undefined and open-ended upon what could be entailed in water quality. Water quality for fish includes but is not limited to temperature, turbidity, and contamination. The mitigation of any of these, whether occurring upstream or downstream from Allen, can affect her well water right, imposing substantive material harm. 39/4 – 40/9. Water rights of "irrigators" and 100+gpm groundwater well owners can be called by the Tribes to mitigate these issues through increased water withdrawals and flows. In this mitigation process, other water rights owners can and will become enforcers for the Tribes in calling Allen's so-called "no call" water right in order to protect their own water sources. This effectively renders the "no call" assurances of the Compact null. 40/10 – 41/11. The whole Montana historic-usage rights and the whole water rights call paradigm are completely changed in this basin by this Compact, without Constitutional amendment process by citizen participation to do so — massive material harm of Allen's "protectable interest."— both because of the massive new water right and priority dates it assigns to the Tribes and because it is so sweeping, open-ended and vague in crucial definitions and areas of control. 40/10 - 42/1. The abstracted purposes of the 90,000AF in HH Reservoir are limited to fisheries and flood control. 38/22 – 39/3-9. However, the Compact allows new uses not permitted under treaty, which will impinge on Allen's water right through the above sweeping call paradigm changes.

In serious water shortage years, under the new Compact paradigm, Allen will be placed in the position of either Compact-imposed material harm (no water) or the reprehensible and immoral position of putting a call on her town's workhorse well's junior water right less than a block away. 42/2-13.

The Compact Parties have alleged throughout the objection process that the Reservoir has not suffered low levels. Allen provided eyewitness testimony in detail and USGS documentation to the contrary. 44/2 – 43/10, Exh. 12. Allen has protectable interest not to be so defrauded (materially harmed).

Makepeace testified that the Reservoir cannot under the VarQ be drained low anymore as in the years for which Allen provided some examples. However, that does not account for Carter's testimony regarding inadequate streamflow per the Montana Department of Fish, Wildlife and Parks studies, as measured below Hungry Horse and Columbia Falls, **nor** the Tribes' rebuttal witnesses' tacit agreement at Carter's hearing[11] that the Tribes **are** permitted to do what Makepeace alleged in his testimony at Allen's hearing they are not permitted to do—participate in using too much water from the Reservoir. Makepeace has therefore impeached himself and the Compact. The Compact, by its alleged treaty nature, trumps everything else, and it ***has and will*** be used in this fashion, creating the material harms to Allen and others to which they and Allen have documented and testified. Allen perceived that this already happened two summers ago when Flathead Lakeshore homeowners and businesses were left high and dry by the (already being implemented) Compact—to which the Tribes' "solution" was to attempt to use the Reservoir to refill the deficient Lake—a huge amount of water. 48/6-16. The Reservoir itself can naturally become depleted and with the addition of the 45,000AF Compact drawdown during such periods, the Compact has initiated no study whatsoever on this and its effect upon groundwater/surface water interactions in Hungry Horse and beyond—or even on downstream fisheries elsewhere in the basin. The lack of study poses significant material harm to Allen. Makepeace admitted that under VarQ there is "an increased **probability** of reservoir refill" (emphasis added), tacitly admitting **there will still be low years** in the natural course of things, and he further admitted to climatic, water supply, and operational variabilities, all of which can recreate these scenarios. 51/1-11, 84/3-14. This, with Carter's testimony on snowball effect of low reservoir years and the Tribes' ability to pull water below DFWP Murphy rights set to

[11] See Footnote 6.

protect fish, completely supports Allen's testimony of material harm from the Compact in very dry times.

During Carter's hearing, Makepeace referred to a large map in the courtroom showing potentiometric data in the Flathead Valley. The potentiometric map was also present during Allen's hearing, however, Makepeace did not refer to any scientific data on it because although Hungry Horse and Bad Rock were included as locations on the map, Hungry Horse and Bad Rock were not included in the scientific hydrogeological studies done in the Flathead, in which Makepeace participated. Therefore, instead of using scientific data such as this during Allen's hearing, Makepeace proposed hydrogeological guesses and surmises made, per his testimony, without any actual onsite study, but solely on his personal sightseeing while visiting Glacier National Park, some ten miles distant from Allen's well. 79/4ff, 85/25ff. He alleged the Bad Rock to be a funnel, but had he better knowledge of the area, he would have known, as all river floaters do, that the funnel is approximately 2 miles upstream of Bad Rock at the outer east end of Hungry Horse and the water does indeed back up and then drop with a Class II rapids as it goes through the tall, very narrow bedrock gorge there. Bad Rock does not function as a funnel at all; the river flows freely and broadly, at full width along typically exposed wide gravel banks, with no visually identifiable slope through it—as Makepeace admitted. 81/3-7, 86/14-21, 91/19-24. If Makepeace has travelled through Bad Rock "dozens and dozens and dozens" of times, as he testified, the road literally edges along the river bank, he would know Bad Rock has nothing of the nature of a funnel, whether it lies between the bedrock toes of two mountains or not. 86/12&13.

Makepeace's assertion that the water tables in Hungry Horse are "elevated" due to the alleged funnel was shown false by Allen's testimony and the evidence she introduced concerning her water table in the well compared to surface elevations of the rivers, again revealing that crucial portions of Makepeace's testimony were no more than non-factual (uninformed) guesses. The rivers are in a tightly confined area (between two mountains, essentially), which Makepeace admitted, and they would not flow for miles on large broad perches as he surmised, especially given the broad gravel banks and water flowing out of the river into Allen's aquifer, if there were anything lower to flow upon in the "very coarse and permeable gravel" alluvium, to which he admitted the whole confined area, including Hungry Horse, is filled. 80/2-3, 5-6, 9-12, 86/24-25, 88/16-19. When asked if Allen's shallow groundwater aquifer meets the river surfaces at the

shoreline (as was established by government publications and his own testimony, supra, in Carter's hearing, and especially with the permeable gravel alluvium he stated existed), Makepeace oddly appeared to deny this, except at Bad Rock over a mile distant. Nor, as a hydrologist, could he seem to concede or admit that level water is at equilibrium, no matter what is underneath, and is level because it naturally seeks equilibrium and that slope is a relative indicator of equilibrium. 86/24 – 90/25. When asked how the Compact would harm Allen's water right Makepeace had nothing to offer as to how it would not or could not, providing instead an incredibly sweeping assertion with no foundation for it provided at any point.

Allen has zero confidence in the DNRC and appeal process for people harmfully affected by new/change of uses of the Compact water allocations to the Tribes which will prove harmful for her, based on how the Montana Artesian Water case was handled. The case was funded by special interest money most people don't possess and the DNRC thought it did due diligence and was told at the appeal level that it didn't—leading to its all-fours use herein. Processes are violated all the time by those in authority, including this current CSKT Compact objection process. Given the importance and nature of the Compact issues raised by Allen and so many others upon whom she relies in the process, that, too, is demonstrative material harm to Allen's protectable interest and water right. 23/21 – 24/12, 71/17 – 75/21.

The definition of irrigation is to artificially wet the ground. Every well-owner, domestic use or not, is considered an irrigator by the Montana DNRC, if they water their lawn or garden. Exh. 14-1&2. The Compact contains no language differentiating or defining "irrigator" as anything else. This is a massive and obviously purposeful loophole which will inevitably cause material harm to Allen since it gives the Tribes the **power** to take her water at any point. Given the dishonest nature of the whole process thus far, no reasonable thinking man would trust any assurance otherwise. 41/8-9, 52/22 – 53/21.

Allen cannot comprehend the 229,383AF allocation for 7000 people for their fishing activities under the Compact compared to its allocation of only 11,000AF for everyone else's' future needs, including industrial and municipal. 51/24 – 52/21. This fraud, overreach and collusive-natured allocation has created material harm to Allen's water right and everyone else's.

Allen will be harmed because there has not been completion of the types of studies that show due diligence and careful meditation upon all important human and environmental facts (and serious issues of law, which have been raised by herself and numerous objectors—

protectable interests), before such a Frankensteinish monstrosity of unknowns, with the potential to forever damage and negatively harm so much wildlife, environment and human life, is so negligently implemented. 55/2-13.

If this court can knowingly approve a compact which was demonstratively not properly ratified by all those involved, ***anything else is possible***, and ***that is a matter of fact*** and of gross material harm to Allen's protectable interests and water right and to everyone else affected. 54/1-6.

Allen has not at any point in the process waived her Montana Constitutional right to jury trial, nor has she been offered the same, this protectable interest violation in itself creating material harm to her water right and other protectable rights.

In the interest of preserving her rights, including redress of grievance, she entered into the record of these proceedings, attaching and incorporating by reference, all data, arguments and references to and reliance upon her own and all other objecting parties' arguments, exhibits, witnesses, et al., such as may have even a penumbra of applicability to her own case and situation before the court, since the beginnings of her involvement, and that of other objectors in these proceedings. Allen also entered into the record any arguments or exhibits which this court may overrule in this hearing. 23/21 - 24/12

VI. CONCLUSION

For the above stated reasons, Objector Allen has met her alleged burden to prove material harm to her water right. She has also proven that she has a priority date that is superior to those held by the CSKT for the 229,383 AF including the 90,000 AF stored in the Hungry Horse Reservoir. She has also met her alleged 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 AF including the 90,000 AF 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.

The Compact Party's expert witness did not have more than cursory and even inaccurate awareness of the hydrology of Allen's groundwater well's aquifer and surroundings, and also impeached himself.

DATED this 15th day of August 2025.

/s/ Vivian Allen
Vivian Allen
Objector
Pro Se

Transcript Errata Sheet follows as an aid to accurate testimony and brief. It is not part of the brief but for judicial note.

CERTIFICATE OF SERVICE

I, Vivian Allen, do hereby certify by signature above that on the 15th day of August, 2025, I served a true and correct copy of the foregoing document upon the persons named below, at the addresses set out below, by emailing, a true and correct copy of said document.

Montana Water Court: watercourt@mt.gov

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Transcript Errata Sheet follows as an aid to accurate testimony and brief. It is not part of the brief but for judicial note.

Transcript Errata Sheet, Hearing 16

Entered as Page/Line, corrected language in bold, including punctuation where that makes a difference in clarity and interpretation.

4/19 did add, **let's see**, a couple exhibits,

8/20 **"Email."**

10/9 **G**roundwater **R**esources

15/3 **Off-**Reservation Technical documents, and it

24/1-2 I **herewith** enter into the record

24/8 have even **a penumbra** of applicability

24/21 **etcetera, agreeable** to me, upon which I

27/22-23 northern boundary of Hungry Horse, **abutting** the **mainstem**

28/22 **claims** to excesses of **water, is** further

29/18-22 [This is a quote:] **"The** interaction…**groundwater."**

30/9 what's suppling the lake **and** all points south

32/2 the slope of the **—** of Teakettle **Mountain**

33/18 like, **100,000** gallons a month or more
[The transcript is accurate but I meant to say 100,000 gallons a month, not 100.]

34/6 **earlier** hearing, …

34/22 And **then, "Near** stream channels, **there** are

36/9 **Per** Google Earth Pro

36/14 Per Google Earth Pro, the **at-grade**

36/16 making my static water level a**t 3.033-**feet
[The transcript is accurate but I should have said 3,033 vs. 3,031 feet.]

36/18-19 3,030-feet **elevation, Exhibit 11. So,** on this exhibit is the

37/2 then I would point out, so you can **see** on this

38/6 hydrologically, as well as **per** the

38/14-15 for drought years, with **their** consequent low **in-stream** flows

40/14-15 loopholes, in the name of **fish, and** what could be demanded

40/24 **territory, per** treaty language

41/10-11 making that assurance of **"no call"** in the Compact terms **null**. This is the

41/15 rights usage paradigm, **in** the watersheds of

41/25 water rights under the Compact **change** the

42/9-10 could end up having to put a call **on, unconscionably** creating a moral dilemma

43/18 that in my mind I **thought** it was so low

44/14 back, I did a color copy, and **that** kind of

44/25 feet. So that gives you more or a **true-scale**

45/5 that much at the top of the reservoir, **it's—**

46/13-14 the time the dam was implemented to **current, month** by month levels

46/25 – 47/1 And **no,** all the **assurances and** alleged limitations **in** usage of water from the reservoir

47/10 water under the **Preliminary—**

50/8 At 243 average **depth,** we have

51/17 plus whatever the missing **south** reservoir
[The transcript is accurate, but I should have said south vs. north.]

52/16 **This in** itself points to a world of

53/8 page 2 of that, under **the** groundwater **box, 3,**

53/16 domestic users, are **irrigators, some**

55/12-13 environment, and human life is so **negligently** implemented.

60/23-24 Mr. Ryan testified **to, when** sometimes it's **limited. So** apparently it is

62/23 advocated in the **Compact, during** certain

65/12 Correct. But **the "If"** is the big thing.

75/4 You **know, what** – what is due

76/6-8 they probably allow **many** well-meaning **things – that** could be properly regulated, were they properly laid out in proper **detail – to** become nightmares.