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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**  
**Evidentiary Hearing Nos. 15 and 16**  
**(Mickale Carter and Vivian Allen)**

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**HEARINGS 15 AND 16 – FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**INTRODUCTION**

The Court enters these Findings of Fact and Conclusions of Law to address evidence offered and admitted in the evidentiary hearing involving objectors Mickale Carter (“Carter”) and Vivian Allen (“Allen”). Carter and Allen both objected to the Water Rights Compact (“Compact”) entered into by and among the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (“Tribes”), the State of Montana (the “State”), and the United States of America on behalf of the Tribes (“United States”) (collectively, the “Compact Parties”).

On April 1, 2025, the Water Court issued its Order on Pending Motions Regarding Compact Approval (“Order on Motions”). (Doc. 2336.00). The Order on Motions concluded the Compact is fundamentally fair, adequate, and reasonable, and the Compact conforms to applicable law. The Order on Motions shifted the burden to parties who filed objections to the Compact (“Objectors”), including Carter and Allen, to prove their interests are materially injured by operation of the Compact. Order on Motions, at 73.

Although the Order on Motions concluded the Compact Parties met their threshold burden as a matter of law, the Order on Motions provided the opportunity for any Objector to request an evidentiary hearing as to their burden to prove material injury. Most Objectors did not request a hearing, but several did, including Carter and Allen.

This Order addresses evidence of alleged material injury specific to Carter and Allen. The Court's findings of fact and conclusions of law as to their proof of alleged material injury is consolidated into one order because much of their evidence overlaps. Additionally, Carter and Allen are the only two Objectors owning property and water rights upstream from the Flathead Reservation and Flathead Lake who requested hearings.

### **PROCEDURAL BACKGROUND**

1. On June 9, 2022, the Water Court issued a Preliminary Decree based on a motion by the Compact Parties to incorporate the water rights described in the Compact into decrees for nine hydrologic basins in western Montana.<sup>1</sup> (Doc. 19.00). Issuance of the Preliminary Decree commenced a statutory period for potentially interested parties to file objections to the Compact.

2. Carter filed an objection to the Compact on November 28, 2022. (Doc. 146.00 and Doc. 147.00 (duplicate)). Carter later amended the objection with leave of the Court.<sup>2</sup> (Doc. 1440.00).

3. Allen filed an objection to the Compact on November 28, 2022. (Doc. 126.00). Allen amended and refiled the objection on December 5, 2022. (Doc. 385.00). Allen later amended the objection with leave of the Court.<sup>3</sup> (Doc. 1496.00).

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<sup>1</sup> The Preliminary Decree contains three appendices. Appendix 1 is the full text of the Compact as ratified by the Montana Legislature, codified in § 85-20-1901, MCA, and approved by the Secretary of Interior. Appendix 2 contains the abstracts that document the elements of the Tribal Water Right. Appendix 3 contains lists and abstracts of the Tribe's water rights co-owned with FWP. These three appendices are referenced as "Decree Appendix" or "Decree Appx." Decree Appendix 2 also includes several numbered appendices from the Compact. These are referred to as "Compact Appendix" or "Compact Appx."

<sup>2</sup> Twelfth Order on Motions to Amend Objections. (Feb. 1, 2024, Doc. 1631.00).

<sup>3</sup> Order No. 29 on Motions to Amend Objections. (Feb. 22, 2024, Doc. 1715.00).

4. On June 19, 2024, Carter filed a Motion for Summary Judgment. (Doc. 1786.00). The Court denied the motion as part of the Order on Motions.

5. On July 9, 2024, Allen filed a Motion for Summary Judgment. (Doc. 1809.00). The Court denied the motion as part of the Order on Motions.

6. After the Court issued its Order on Motions, Carter filed a Request for Evidentiary Hearing. (Doc. 2111.00). The Court consolidated the issues in Carter's hearing request as Evidentiary Hearing No. 15.

7. Allen also filed a Request for Evidentiary Hearing. (Doc. 2112.00). The Court consolidated the issues in Allen's hearing request as Evidentiary Hearing No. 16.

8. On May 5, 2025, the Court issued an order in limine barring Carter from re-arguing issues raised during the legal issues phase of the case, or from raising new legal issues that could have been raised during that phase. (Doc. 2590.00). The order also barred Carter from arguing that the Compact Parties failed as a matter of law to conduct groundwater studies necessary to support a fair and reasonable compact. The Court also barred Carter from introducing evidence as to how the Compact quantifies off-reservation instream flows for fisheries use.

9. The Court conducted the hearings for Carter and Allen sequentially but separately on May 7, 2025, in the Flathead County District Court courthouse in Kalispell, Montana. The testimony and exhibits admitted for hearings are summarized in the Hearing 15 – Court Minutes. (Doc. 2599.00) and Hearing 16 – Court Minutes. (Doc. 2601.00). Following the hearing the court reporter prepared a written transcript.

10. Carter filed an opening post-hearing brief on July 30, 2025. (Doc. 2611.00). The Compact Parties filed their opening brief on August 22, 2025. (Doc. 2642.00). Carter filed a response on September 5, 2025. (Doc. 2659.00). The Compact Parties filed a response on September 19, 2025. (Doc. 2676.00).

11. Allen filed an opening post-hearing brief on August 22, 2025. (Doc. 2655.00). The Compact Parties filed their opening brief the same day. (Doc. 2647.00). The Compact Parties (Doc. 2677.00) and Allen (Doc. 2678.00) filed responses on September 19, 2025.

12. The Court makes the following findings of fact and conclusions of law based on the admitted evidence and testimony in Evidentiary Hearing Nos. 15 and 16:

### **FINDINGS OF FACT**

#### ***Facts Applicable to Both Carter and Allen***

1. Carter and Allen each own property at separate locations in Flathead County. Their respective properties are north and hydrologically upstream from Flathead Lake and the Flathead Reservation.

2. The Flathead River supplies water to Flathead Lake. The mainstem of the river is formed by the confluence of the North Fork and the Middle Fork of the Flathead River along the southern border of Glacier National Park. The South Fork joins the Flathead River mainstem several miles downstream, adjacent to the town of Hungry Horse.

3. Hungry Horse Dam is located on the South Fork, several miles above its confluence with the Flathead River. Hungry Horse Dam impounds Hungry Horse Reservoir (collectively, the “Hungry Horse Project” or (“Project”)). The United States Bureau of Reclamation (“Reclamation”) operates the Hungry Horse Project. The Project is part of the Federal Columbia River Power System, an interconnected system of federal hydroelectric power projects in the Columbia River Basin region of the Pacific Northwest.<sup>4</sup> Hungry Horse Reservoir has a total storage capacity of 3.47 million acre-feet.

4. Reclamation holds eleven Montana state-based water rights to store and use water in connection with the Hungry Horse Project. The Water Court adjudicated and confirmed the elements of Reclamation’s Hungry Horse Project water right claims in Water Court case no. 76J-0009-R-2022.<sup>5</sup> As part of that case, the Water Court confirmed

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<sup>4</sup> See generally, <https://www.usbr.gov/pn/fcrps/index.html>. (Reclamation’s website describing the Federal Columbia River Power System).

<sup>5</sup> Basin 76J is the basin designation for the South Fork of the Flathead River Basin. Although Reclamation’s water right claims associated with the Hungry Horse Project have been adjudicated by the Water Court, the Water Court has not yet issued a final decree for Basin 76J.

Reclamation's state-based water rights for the Project with priority dates of either June 16, 1947 or December 31, 1955.

5. Neither Carter nor Allen provided evidence or testimony that they objected to Reclamation's Hungry Horse Project water right claims or otherwise participated in the Water Court proceedings in case no. 76J-0009-R-2022.

6. As a general matter Reclamation operates the Project according to guidelines so Hungry Horse Reservoir is drafted during the winter and early spring to reach its minimum pool in April. The reservoir then stores spring runoff from snowmelt. The reservoir typically fills and reaches its full pool in July. The filling and drafting of the reservoir is subject to ramping rates that control the rate at which Reclamation releases from the reservoir over set periods of time. The Project guidelines also set minimum streamflows, which are monitored downstream of the reservoir in both the South Fork and the Flathead River mainstem at Columbia Falls.

7. The Hungry Horse Project is located upstream from Flathead Lake. The top ten feet of Flathead Lake also is a reservoir, controlled by the Séliš Ksanka Qlispé Dam near its outlet.

8. The Tribal Water Right quantified in the Compact includes a right to "Flathead System Compact Water." The scope of this portion of the Tribal Water Right is described in the abstract for water right no. 76LJ 30063812.<sup>6</sup> This portion of the Tribal Water Right quantifies 229,383 acre feet that may be diverted from the Flathead River below Flathead Lake or from Flathead Lake with a priority date of July 16, 1855. Of that amount, the water right confirms up to 128,158 acre feet of diverted water may be consumed or depleted each year.<sup>7</sup>

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<sup>6</sup> The Preliminary Decree contains three appendices. Appendix 1 is the full text of the Compact as ratified by the Montana Legislature, codified in § 85-20-1901, MCA, and approved by the Secretary of Interior. Appendix 2 contains the abstracts that document the elements of the Tribal Water Right. Appendix 3 contains lists and abstracts of the Tribe's water rights co-owned with FWP. These three appendices are referenced as "Decree Appendix" or "Decree Appx." Decree Appendix 2 also includes several numbered appendices from the Compact. These are referred to as "Compact Appendix" or "Compact Appx."

<sup>7</sup> The Compact defines "Flathead System Compact Water" as "that portion of the Tribal Water Right consisting of 229,383 Acre-feet per year that the Tribes may withdraw from the Flathead River or Flathead Lake, which includes up to 90,000 Acre-feet per year stored in Hungry Horse Reservoir, with a

9. The Flathead System Compact Water diversions are limited to surface water. The Tribal Water Right includes several off-reservation instream flow rights, but none of these instream flow rights apply to the mainstem of the Flathead River above Flathead Lake, or to any of the major forks of the Flathead River, including the South Fork.<sup>8</sup> Compact, Art. III.D.

10. The Flathead System Compact Water includes an entitlement to up to 90,000 acre feet of water stored in Hungry Horse Reservoir. This entitlement is not a new storage right in the Reservoir, but rather represents an allocation of part of Reclamation's state-based Hungry Horse water rights previously confirmed by the Water Court. Compact, Art. II.35. Congress confirmed this allocation when it passed the Montana Water Rights Protection Act ("MWRPA") in 2020. Div. DD, Pub. L. No. 116-260, Sec. 6, 134 Stat. 1182, 3014.

11. Prior to the approval of the Compact, two studies were prepared to analyze the effects of the proposed 90,000 acre-feet allocation. They include a report called the "Flathead Basin Depletions Study" ("Depletions Study") (H-15 Carter Ex. 7, at 3, 10<sup>9</sup>), and a second report called "Hungry Horse Reservoir, Montana: Biological Impact Evaluation and Operational Constraints for a proposed 90,000-acre-foot withdrawal." ("Biological Evaluation") (H-15 Carter Ex. 8).

12. Reclamation prepared the Depletions Study in September 2012 to model and analyze the effect of using up to 90,000 acre-feet of storage water from Hungry Horse to augment water supplies. The Depletions Study is included as Appendix 7 to the Compact,<sup>10</sup> and also is referenced in an information remark on the abstract for the

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maximum total volume consumed of 128,158 Acre-feet per year." Compact Art. II.35.

<sup>8</sup> In connection with MWRPA, the Tribes waived co-ownership with the Montana Department of Fish, Wildlife and Parks, of 14 water rights for the Middle Fork and the South Fork. Decree Appx. 3, Compact, Appx. 28.

<sup>9</sup> Unless otherwise defined, exhibits cited in this Order follow the format of identifying the hearing (e.g. "H15"), followed by the party and the exhibit number for that party. Exhibit page references are to the Bates numbered page without any leading zeros.

<sup>10</sup> Appendix 7 and other Compact appendices not included in the Preliminary Decree are available at: <https://dnrc.mt.gov/Water-Resources/Compacts/Flathead-Compact>.

Flathead System Compact Water portion of the Tribal Water Right (76LJ 30063812). The Depletions Study was offered and admitted as Carter or Allen Exhibits 7 in both hearings.

13. As described in Depletions Study and the Biological Evaluation, the operation of the Hungry Horse Project is subject to a complex and integrated set of federal and state laws, regulations, guidelines, and decisions, including biological opinions prepared by the United States Fish and Wildlife Service (“USFWS”) and the NOAA Fisheries Service under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

14. The terms of the Compact also provide that if the Tribes seek to exercise the right to use any portion of the Flathead System Compact Water portion of the Tribal Water Right (including the 90,000 acre feet of stored water) somewhere off the reservation, including in the Flathead Valley, the Tribes must first obtain approval from DNRC through the Montana Water Use Act change process. Compact, Art. IV.B.5.c.

15. The Compact also includes certain limitations on the Tribe’s right to call for the curtailment of junior water rights in Basins 76L, 76J, and 76LJ. These limitations preclude calls against groundwater uses other than groundwater connected to surface water used for the purpose of irrigation with a flow rate greater than 100 gallons per minute (“gpm”). Compact Art. III.G.4.

16. The water right no. 76LJ 30063812 abstract for the Flathead System Compact Water portion of the Tribal Water Right includes numerous information remarks<sup>11</sup> that reflect various conditions for the exercise of this right. The information remark on the 76L 30063812 abstract pertaining to the Depletions Study states:

THIS WATER RIGHT SHALL BE USED IN A MANNER THAT ENSURES IMPACTS ASSOCIATED WITH THE EXERCISE OF THIS WATER RIGHT ARE SUCH THAT THOSE IMPACTS ARE NO GREATER THAN THOSE IDENTIFIED IN MODEL RUN: NATURAL Q + 90K OF THE UNITED STATES BUREAU OF RECLAMATION’S FINAL FLATHEAD BASIN DEPLETIONS STUDY (USBR, OCTOBER 2012) APPENDED TO THIS WATER RIGHT. IN THE EVENT THAT

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<sup>11</sup> The Water Use Act vests authority with the Water Court to include in a final decree of a reserved water right “any other information necessary to fully define the nature and extent of the right, including the terms of any compacts negotiated and ratified under 85-2-701.” Section 85-2-234(7)(h), MCA. The information remarks on the abstract for water right no. 76LJ 30063812 provide such information.

THE IMPACTS EXCEED THOSE IDENTIFIED IN MODEL RUN: NATURAL Q + 90K OF THE UNITED STATES BUREAU OF RECLAMATION'S FINAL FLATHEAD BASIN DEPLETIONS STUDY, THE USE OF THE WATER RIGHT SHALL BE REDUCED IN SUCH AMOUNTS AS ARE NECESSARY TO IMMEDIATELY ACHIEVE IMPACTS THAT ARE NO GREATER THAN THOSE IDENTIFIED IN MODEL RUN: NATURAL Q + 90K OF THE UNITED STATES BUREAU OF RECLAMATION'S FINAL FLATHEAD BASIN DEPLETIONS STUDY.

17. The Depletions Study modeled a “base case” of natural flow using hydrologic data over a 50-year period. The Depletions Study also modeled two scenarios of the tribal use of the Flathead System Compact Water. One tribal use scenario was based on natural flow and the other evaluated direct flow in the Flathead River as augmented by releases from Hungry Horse Reservoir of up to 90,000 acre feet per year. The second scenario is what is referred to in the Depletions Study and is referenced in the information remark as the “Natural Q plus 90K scenario.”

18. The Depletions Study Natural Q plus 90K scenario identifies several potential impacts to Hungry Horse Reservoir levels during dry years. However, the Depletions Study also concludes minimum streamflows for the Flathead River identified in a 2000 Biological Opinion prepared by the USFWS would be maintained under all scenarios, including the Natural Q plus 90K scenario. Depletions Study, at 25.<sup>12</sup>

19. According to the Depletions Study, all of the modeled scenarios provide minimum flows in the Flathead River below Columbia Falls between 3,200 cfs and 3,500 cfs, depending on the forecasted amount of water available in the reservoir. Depletions Study, at 15, Table 3.

20. The 90,000 acre feet Hungry Horse allocation reflects about 2.6 percent of the volume of Hungry Horse Reservoir. (H-15 Tr. 150:20-22).<sup>13</sup> According to the

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<sup>12</sup> The full reference to the 2000 Biological Opinion is set out in the literature references at the end of the Depletions Study. Depletions Study, at 43.

<sup>13</sup> All transcript (“H-15 Tr.” or “H-16 Tr.”) citations are to the page and line numbers in the transcript for the corresponding hearing.

testimony of the Compact Parties' witness Seth Makepeace, drawdown of the full 90,000 acre-feet would reduce the surface elevation of the reservoir by about four feet. (H-15 Tr. 128:12-19). This testimony is consistent with the conclusions in the Depletions Study. Depletions Study, at 19.

21. The State of Montana prepared the Biological Evaluation, as revised, in September 2011 to provide an overview, biological impact evaluation, and operational constraint recommendations in connection with the then-proposed allocation of 90,000 acre feet from Hungry Horse Reservoir as supplemental water for the Compact. The Biological Evaluation includes recommended operational controls for filling and releasing water from the Reservoir. These controls include adjustments to Reservoir water depletions from 90,000 acre-feet per year linearly downward to 45,000 acre-feet per year "when the water supply approaches the lowest inflow volume on record." Biological Evaluation, at 10.

22. The information remark on the abstract for 76L 30063812 pertaining to the Biological Evaluation states:

THE RELEASE OF UP TO 90,000 ACRE-FEET PER YEAR, AS MEASURED AT THE DAM, OF STORAGE WATER IN HUNGRY HORSE RESERVOIR SHALL BE LIMITED IN ACCORDANCE WITH THE "BIOLOGICAL IMPACT EVALUATION AND OPERATIONAL CONSTRAINTS FOR A PROPOSED 90,000 ACRE-FOOT WITHDRAWAL" (STATE OF MONTANA, SEPTEMBER 14, 2011) APPENDED TO THIS WATER RIGHT. THE CONFEDERATED SALISH AND KOOTENAI TRIBES, THE STATE OF MONTANA, AND THE UNITED STATES OF AMERICA UPON MUTUAL WRITTEN AGREEMENT, AND IN CONFORMANCE WITH OTHER APPLICABLE PROVISIONS OF LAW INCLUDING BUT NOT LIMITED TO THE ENDANGERED SPECIES ACT OF 1973, 16 U.S.C. 1531, ET SEQ., MAY AMEND THE BIOLOGICAL IMPACT EVALUATION CONSTRAINTS IDENTIFIED IN THE SEPTEMBER 14, 2011 REPORT. SUCH AMENDMENTS SHALL BE CHRONICLED AND APPENDED TO THIS WATER RIGHT.

23. These constraints include minimum flow requirements to exercise the right. (H-15 Tr. 153:20-154:7). The minimum flow constraints for the Flathead River

incorporate by reference provisions of the Biological Evaluation for purposes of ensuring protection of various fish species. The Biological Evaluation contains the same table as the Depletions Study, which describes the minimum flows in the Flathead River below Columbia Falls as between 3,200 cfs and 3,500 cfs, depending on the forecasted amount of water available in the reservoir. Biological Evaluation, at 5.

24. If the minimum flows are not maintained, then conditions memorialized in the abstract for water right no. 76LJ 30063812 may apply. The constraints also provide for reduction in the amount of the 90,000 acre feet allocation during drought scenarios, and adjustments to releases to accommodate reservoir refill scenarios, as described in the Biological Evaluation. (H-15 Tr. 151:15-152:2).

***Facts Specific to Carter***

25. Carter is not a party to the Compact.

26. Carter owns property in Flathead County, east of the Flathead River. Carter's property is hydrologically upstream from Flathead Lake and downstream from Hungry Horse Reservoir. The general location of Carter's property and water wells in relation to various Flathead Valley geographic features is depicted on Compact Parties' Exhibit 2 for Hearing No. 16.

27. Carter is the record owner of state-based water right nos. 76LJ 30010558, 76LJ 30124300, 76LJ 30124301, 76LJ 30124302, and 76LJ 30165436.<sup>14</sup> Three of these water rights (76LJ 30010558, 76LJ 30124300, and 76LJ 30165436) are for relatively deep wells in the range of 170 feet deep. Carter's other two (claims 76LJ 30124301 and 76LJ 30124302) are for shallow wells, approximately 20 feet deep. Carter's shallow wells have more senior priority dates than her deep wells. The two shallow wells also have priority dates senior to Reclamation's water right claims associated with the Hungry

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<sup>14</sup> The facts as to Carter's water rights are included for the sole purpose of determining whether Carter or Allen have proved material injury. For that purpose, the Court assumes the prima facie validity of these water rights; provided, however, that this presumption is not a determination of the validity or accuracy of the water rights as they are not at issue in this case.

Horse Project. The following table summarizes Carter’s water rights, as currently claimed and adjudicated or authorized:

<b>Water right no.</b>	<b>Priority Date</b>	<b>Use</b>	<b>Flow</b>	<b>Volume (ac-ft)</b>
76LJ 30010558	June 21, 2004	Domestic	N/A	4.78
76LJ 30124300	May 6, 2019	Domestic	30 gpm	2.78
76LJ 30124301	January 1, 1920	Domestic	10 gpm	7.75
76LJ 30124302	January 1, 1916	Stock	10 gpm	N/A <sup>15</sup>
76LJ 30165436	March 3, 2025	Domestic	17 gpm	0.29

28. All of Carter’s water rights have priority dates junior to July 16, 1855. Two of Carter’s water rights (claims 76LJ 30124301 and 76LJ 30124302) have priority dates senior to Reclamation’s Hungry Horse Project water rights.

29. In 2004, the Montana Bureau of Mines and Geology prepared an extensive report called “Groundwater Resources of the Flathead Lake Area: Flathead, Lake, Missoula, and Sanders Counties, Montana.” (the “MBMG Report”). The MBMG Report was offered and admitted into evidence as Compact Parties Ex. 7 in both Hearing 15 and Hearing 16.<sup>16</sup>

30. The groundwater supply for Carter’s wells is an aquifer on the east side of the Flathead River and the Flathead Valley. The MBMG Report describes this area as including a number of shallow aquifers referred to as the “east-side aquifers.”

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<sup>15</sup> This stockwater right includes a narrative flow rate remark that states:

THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

<sup>16</sup> Both Carter and Allen introduced the first ten pages of the MBMG Report as their Exhibit 1. The Compact Parties introduced the Exhibit as their Exhibit 7. None of these exhibits include page 145 of the MBMG Report. Page references to the MBMG Report are to the Bates-numbered pages.

Groundwater in this area generally flows westerly from the west slope of the Swan Range toward the Flathead River. MBMG Report, at 38.

31. Carter testified that her property is approximately 1.3 miles east of the Flathead River and approximately two miles west of the base of the Swan Range. The elevation of Carter's property and wellheads are 64 feet above the level of the Flathead River. (H-15 Tr. 121:7-8).

32. Carter testified that implementation of the Hungry Horse allocation provisions of the Compact will cause her injury by lowering the level of the groundwater supply in her two shallow wells. Carter explains her understanding that groundwater flows from east to west across her property until it reaches the Flathead River west of her property where it surfaces. Carter testified that she believes use of the 90,000 acre feet will decrease Flathead River flows as a result of the need to refill the reservoir, especially during dry years. (H-15 Tr. 26:7-27:2). Carter testified as to her belief that the Compact allows the Tribes to divert so much water that the level of the Flathead River will drop, which, at least 15 percent of the time, will lower the level of the groundwater that supplies her two shallow wells. (H-15 Tr. 61:13-62:2). Carter also interprets the Compact as adjusting the minimum flows at Columbia Falls from their current levels, which she believes will impact water availability. Carter contends these actions will negatively impact the intake to her shallow wells.

33. Carter bases her contention on the relatively simple and uncontroversial theory that groundwater and surface water are connected. This hydrologic assumption already is recognized in Montana, both as a matter of basic hydrology and as a matter of law. *See, e.g. Mont. Trout Unlimited v. Mont. Dep't of Nat. Res. & Conservation*, 2006 MT 72, 331 Mont. 483, 133 P.3d 224. However, Carter expands on this assumption by arguing depletions resulting from the Tribes' exercise of diversion rights will cause the water level in the Flathead River upstream from Flathead Lake to drop, which will in turn lower the water level of the east-side aquifers that contribute water to the river, resulting in loss of use of her shallow wells.

34. Carter is a lay witness with no education, experience, or training in hydrology. Carter did not call an expert witness to model or analyze the effect of the Compact provisions on the groundwater that forms the source of supply to her wells, or to her ability to exercise her water rights generally. None of the reports Carter introduced identify a connection between the 90,000 acre feet allocation and groundwater levels in east side aquifers that provide the source water for Carter's shallow wells.

35. The Compact Parties called Seth Makepeace and Casey Ryan as witnesses. Both Makepeace and Ryan have extensive hydrology experience. Makepeace has a master's degree in hydrogeology and has worked as a hydrologist for the Tribes for 35 years. Ryan has a master's degree in hydrology and currently is the manager for the Tribe's Division of Engineering and Water Resources.

36. Makepeace testified that even if Flathead River elevation levels were reduced during drought conditions, lower river levels could not harm Carter's ability to use her wells given their location and topography. (H-15 Tr. 123:22-126:21). As part of his testimony, Makepeace referred to a potentiometric map and described how the water table elevation dips westerly from the Swan Range to the Flathead River. Makepeace concluded that any impact to Carter's wells would result from stresses to the aquifer east of her property, which is away from the Flathead River. (H-15 Tr. 122:24-123:4).

37. Ryan testified about the relationship between the Compact 90,000 acre-feet allocation and Reservoir filling and release conditions. Ryan confirmed that the conditions already in place for the Hungry Horse Project are embedded in the abstract for the Flathead System Compact Water portion of the Tribal Water Right.

***Facts Specific to Allen***

38. Allen is not a party to the Compact.

39. Allen owns property in Flathead County, in the town of Hungry Horse. Hungry Horse is adjacent to the confluence of the South Fork and the mainstem of the Flathead River. Carter's property is hydrologically upstream from Flathead Lake and downstream from Hungry Horse Reservoir. The general location of Carter's property and

water wells in relation to various Flathead Valley geographic features is depicted on Compact Parties' Exhibit 1 for Hearing 16.

40. Allen does not have rights to water stored in Hungry Horse Reservoir, or to water released from storage from the Reservoir.

41. Allen is the record owner of state-based water right no. 76LJ 30122779.<sup>17</sup> The water right is to use groundwater up to 16.00 gallons per minute and 2.15 acre feet for domestic use with a May 22, 1967 priority date.

42. Allen's well has a static water level of 70 feet below grade, with a pumping level of 73 feet. (H-16 Tr. 36:4-8; H-16 Allen Ex. 10).<sup>18</sup> According to Allen's interpretation of elevations taken from Google Earth Pro, the surface elevation of her wellhead is 3103 feet above sea level, with a static water level of 3031 feet, and a pumping level at 3030 feet. Allen testified that these levels are below the surface elevation of the mainstem Flathead River at Hungry Horse (3039 feet) and the South Fork (3040 feet). (H-16 Tr. 37:20-24).

43. Allen's well is within the Coram subarea of the Flathead region, which includes the Flathead River valley east of Bad Rock Canyon and south of the Apgar Mountains and Glacier National Park. MBMG Report, at 85. The MBMG Report describes productive deep and shallow alluvial aquifers in the Coram subarea. MGMG Report, at 87.

44. Allen theorizes that drought conditions put her well at risk because she believes the South Fork contributes water to the aquifer that provides the source water for her well. Allen did not provide any modeling data or reports to support her theory. Instead, Allen relies on generalized statements in the government documents she offered as exhibits.

45. Allen did not identify any time periods when she was unable to use her well as a result of declining water levels in the aquifer. Allen also did not identify any instance where her well has been subject to a call from a senior water right owner, or that she has

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<sup>17</sup> The Prehearing Order incorrectly identifies the water right number as 76LJ 30122279.

<sup>18</sup> Allen's Exhibit 10 is her well log, which actually identifies the static water level as 72 feet.

been forced to make a call on a junior water right to maintain water availability in her well. Allen also did not identify any period of time where operations of the Hungry Horse Project have depleted the local aquifer or otherwise affected her well.

46. Allen contends a relationship exists between low water levels in Hungry Horse Reservoir and the water level at the intake to her well. Yet Allen testified that low water levels in the Reservoir occurred in the late 1980s and early 1990s, but did not have any effect on her water supply during those years. (H-16 Tr. 43:14-20).

47. Allen did not offer an expert report or opinion to explain how reduced flows in the South Fork could negatively affect the availability of groundwater in her well when the well's static water level is below the elevation of the river.

48. The Compact Parties' witness Seth Makepeace testified in Hearing 16. Makepeace testified that the hydrogeology in the area is such that annual releases of up to 90,000 acre-feet from the Hungry Horse Project would augment natural flows and result in an increase in aquifer levels. (H-16 Tr. 82:4-14). Allen did not credibly rebut this testimony.

## **CONCLUSIONS OF LAW**

### ***Standard***

1. The standard followed by the Court when reviewing a compact requires an objector to prove the objector's interests are "materially injured" by "operation of the Compact." *In re Crow Water Compact*, 2015 MT 353, ¶ 18, 382 Mont. 46, 364 P.3d 584. To meet this standard, an objector must (1) identify a legally protected interest, (2) prove material injury to that interest, and (3) establish a link between the proven injury and an operative provision of the Compact. This standard requires the objector to meet a "heavy burden" to prove the Compact is unreasonable as applied to the objector. *Id.*

### ***Conclusions of Law as to Carter and Allen***

2. Carter and Allen misinterpret the legal relationship between water stored and released from the Hungry Horse Project, and the operation of the Compact. The Compact does not establish a new water right to 90,000 acre-feet of water stored and released from Hungry Horse Reservoir. Rather, the Compact allocates to the Tribes up to

90,000 acre-feet of stored water already adjudicated by the Water Court in case 76J-0009-R-2022. By entering into the Compact, the United States agreed to this allocation. Congress confirmed the federal allocation by passing MWRPA. But neither the Compact nor MWRPA represents a new water right nor a change to any water right that the Water Court already adjudicated.

3. Neither Carter nor Allen provided any evidence that they objected or otherwise participated in Water Court case 76J-0009-R-2022. To the extent they are collaterally attacking the elements of Reclamation's Hungry Horse water rights, Carter and Allen waived those objections by not timely filing them before the Court in the state-based proceeding. *See generally, In re Red Dog Ranch LLC*, Case DCERT-0003-WC-2024, 2025 LX 217248, 2025 WL 435886 ("Water Court objection deadlines matter and they cannot be circumvented through an alternative procedural mechanism").

4. Carter and Allen both contend they are materially injured by perceived discrepancies between the Flathead River minimum flows under the Compact and the Flathead River flows referenced in the Depletions Study and the Biological Evaluation. These contentions fail to recognize that instream flow rate levels already exist pursuant to provisions of Endangered Species Act biological opinions. The Compact did not establish these flow levels. Neither Carter nor Allen presented evidence that those existing flow rate levels have caused injury to their water use.

5. Carter and Allen both reference so-called "Murphy rights," which are instream flow rights held by the Montana Department of Fish, Wildlife and Parks ("FWP"). These contentions fail to prove material injury for several reasons. First, while Carter and Allen express some disagreement that the Flathead River instream flow rate levels identified in the Depletions Study and the Biological Evaluation are less than FWP's claimed Murphy rights, these differences are not attributable to the Compact. Second, neither Carter nor Allen explain the relationship, if any, between FWP's Murphy rights and their ability to use their respective wells. As Carter acknowledges, Murphy rights have relatively junior priority dates. Third, to the extent Carter and Allen allege a public interest in the Murphy right instream flows, those interests already are represented

by FWP. Under the Montana Water Use Act, FWP “exclusively represent[s] the public” with respect to existing water rights for public recreational uses. Section 85-2-223, MCA. Neither Carter nor Allen questioned the applicability of this statute and FWP did not object to the Compact.

6. Carter and Allen both cite the case *Flathead Lakers Inc. v. Montana Dep’t of Natural Res. and Conservation*, 2023 MT 85, 412 Mont. 225, 530 P.3d 769, for the proposition that the Compact Parties have an obligation to analyze the impact of the Compact’s Hungry Horse allocation on groundwater, and the failure to do so constitutes material injury. In *Flathead Lakers*, the Montana Supreme Court held the Montana Department of Natural Resources and Conservation (“DNRC”) failed to conduct a proper legal availability analysis before approving a new groundwater permit application. The case has no relevance to this proceeding because it involved the criteria for issuing a new permit under Montana’s Water Use Act. In that situation, the permit applicant bears the burden of proving both the physical and legal availability of water, applying a complex series of regulations.<sup>19</sup> The case does not discuss the burden of an objector to prove material injury, which is the standard Carter and Allen must meet in this case.

### ***Conclusions of Law as to Carter***

7. Carter maintains that implementation of the Compact will result in the lowering of groundwater levels during times of drought, which Carter projects will occur 15 to 20 percent of the time. Carter theorizes that by curtailing releases of water from the Hungry Horse Project as needed to refill the reservoir following periods of drought, the surface elevation of the Flathead River will drop, which in turn will lower the water level of groundwater that supplies Carter’s wells.

8. Carter’s theory has numerous flaws. Carter has no training or experience in groundwater modeling or any other aspect of groundwater hydrology. Groundwater

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<sup>19</sup> The Act requires an applicant to prove the new appropriation meets several statutory criteria, including that water is both physically available and legally available. Water is physically available if it exists “at the proposed point of diversion in the amount that the applicant seeks to appropriate.” Section 85-2-311(1)(a)(i), MCA. The Act considers water legally available “if the amount of physically available water exceeds the existing legal claims to that water.” Mont. Code Ann. § 85-2-311(1)(a)(i) & (ii).

hydrology is recognized as “one of the most complex of the sciences” because it “deals with the occurrence and movement of water in an almost infinitely complex subsurface environment.”<sup>20</sup> The hydrologic theory Carter posited is one that requires expert testimony because of the novel scientific attempt Carter seeks to make between reduced Flathead River flows to refill Hungry Horse Reservoir (pursuant to Reclamation’s water rights that Carter did not object to) and groundwater levels at her property many miles downstream. *See McClue v. Safeco Ins. Co. of Illinois*, 2015 MT 222, ¶ 21, 380 Mont. 204, 354 P.3d 604 (expert testimony required for novel scientific evidence); Rule 702, Mont. R. Evid.; *see generally, Kiskadden v. Pennsylvania Dep’t of Env’t Prot.*, 149 A.3d 380, 388 (Pa. Commw. Ct. 2016) (“[w]here the issues require scientific or specialized knowledge or experience to understand, such as the intricacies of drilling and the science of hydrogeology, expert testimony is required”); *People v. Kinder Morgan Energy Partners, L.P.*, 159 F. Supp. 3d 1182, 1199 (S.D. Cal. 2016) (hydrological and hydrogeological issues ... require qualified technical expertise). Carter’s theory about groundwater effects also fails to meet the standard for lay witness expert opinions because Carter presented no evidence that the groundwater impacts she asserts are based on anything she perceived or otherwise observed. Rule 701, Mont. R. Evid.

9. Even assuming a basic knowledge of groundwater hydrogeology, Carter’s theory relies more on speculation than fact. Carter did not provide a credible water balance to prove a reduction in Flathead River flows or water level necessary to refill Hungry Horse Reservoir following drought conditions. Carter did not provide an analysis that correlates reduced streamflows to aquifer recharge or aquifer depletion. Carter also did not explain how reduced streamflows in the Flathead River west and down gradient from her property would deplete the shallow aquifer that is recharged from groundwater originating upgradient in the Swan Range to the east. Simply arguing groundwater and surface water are interrelated is not enough. The Court concludes that Carter’s hydrologic theory is too speculative to meet her burden of proof. *See In re U.S.D.A. Forest Service –*

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<sup>20</sup> Heath, R., 1983, Basic ground-water hydrology: U.S. Geological Survey Water Supply Paper 2220 (2004 rev.), at 1. Available at: <https://doi.org/10.3133/wsp2220>.

*Montana Compact Decision*, Case WC-2007-03, 2012 WL 9494882, at \*10 (Oct. 31, 2012) (rejecting compact objector testimony that was based speculation about future events). The Court concludes Carter's theories about groundwater impacts lack credibility.

10. Carter also misread the various reports she referenced. The Depletions Study does not identify reductions in shallow groundwater level in aquifers that feed the Flathead River as an effect of allocating 90,000 acre feet from Hungry Horse Reservoir. Like the Depletions Study, the Biological Evaluation also does not identify reductions in shallow groundwater level in aquifers that feed the Flathead River as an effect. Similarly, the MBMG Report does not identify flow levels (either flow rate or river surface elevation) as affecting water availability in the Flathead east-side aquifers. MBMG Report, 38-39.

11. Carter maintains the Compact materially harms her by reducing the Flathead River minimum streamflows as measured at Columbia Falls. In her testimony, Carter implied that the Compact sets a minimum flow in the Flathead River at Columbia Falls, which she believes is less than the current minimum flow. (H-15 Tr. 29:20-31:4). Again, Carter's argument misreads the Compact. The Compact does not set or reduce minimum streamflows for the Flathead River at Columbia Falls. The 3,200 to 3,500 cfs flows Carter referenced are taken from a Biological Opinion prepared under the Endangered Species Act. Those flows are part of the baseline operational conditions that were in place prior to the Compact. The Compact incorporated these existing conditions, but it did not set or alter them. Furthermore, the tables she referenced show that these existing flow guidelines can continue to be met even with the 90,000 acre feet entitlement under the Compact.

12. Carter also lacks the expertise to support the opinions she offered about how reductions in Flathead River flows may be caused by the need for additional volume to refill Hungry Horse Reservoir and then affect her groundwater supply. Carter assumed a direct relationship between (1) the volume necessary to add up to four feet of water elevation to Hungry Horse storage and (2) groundwater available at her property miles

downstream. In her post-hearing brief, Carter hypothesized that by reducing flows at Columbia Falls from 5,000 cfs to 3,500 to 3,200 cfs, the amount of available groundwater flow will be reduced from between 30 to 36%. (Doc. 2611.00, at 7). Carter's theory fails to recognize that the Compact does not alter minimum flows at Columbia Falls or anywhere else. Additionally, Carter provides no water balance or other analysis to correlate reduced streamflows to additional reservoir refill volume.

13. To the extent Carter has a general interest in instream flows for fisheries, the Court already ruled that such evidence is not relevant as to Carter. The Court made this ruling in part based on Carter's representation to the Court that she did not dispute the Compact Parties' motion to exclude evidence of quantification of water necessary to protect instream flows for fisheries. (Doc. 2590.00, at 3). Even if Carter believes the Court's ruling was not clear, Carter failed to explain why FWP does not adequately represent her interests. Moreover, even if her interest were legally cognizable, her contention does not raise an issue related to operation of the Compact. The 3,200 to 3,500 cfs minimum flows she referenced pertain to guidelines for releases of stored water from Hungry Horse Reservoir. In contrast, the Murphy rights she referenced presumably relate to instream water rights in the Flathead River, which the Compact does not alter.

14. Even if Carter had not waived her rights by not objecting in the state proceedings, her concerns about injury from Hungry Horse operations are at odds with the prior appropriation doctrine, which governs water distribution in Montana. Section 85-2-401(1), MCA. Like any reservoir, Reclamation adds stored water to Hungry Horse Reservoir when inflows exceed outflows. Reclamation's right to add stored water to Hungry Horse is subject to the prior appropriation doctrine. If during times when water is added to storage a senior water right owner is affected, the senior water right may call for water. Carter has water rights senior to Reclamation, but failed to explain why her senior water rights do not protect her, especially when the Compact does not alter Reclamation's water rights. Carter contends that the drought conditions may cause injury by reducing Flathead River flows to refill the reservoir. Even assuming a hydrologic impact – which

is a highly speculative assumption at best – Carter has the right to assert her senior water rights, which the Compact Parties do not dispute.<sup>21</sup>

15. All of Carter’s water rights are for domestic use, including lawn and garden use. The Compact precludes the Tribes from making a call on any of these categories of rights. Carter contends these provisions are illusory because a senior irrigator who could be called by the Tribes then could mitigate the impact by calling her water rights. In its in limine order, the Court precluded this argument.

16. Even if Carter had identified a senior water right owner with the ability to make a call – which she did not, Carter’s argument is largely nonsensical. If the hypothetical user was called, that user would be curtailed. Calling Carter or any other junior user does not automatically lift the curtailment as to the senior user. Additionally, as Carter’s water rights are only for a minor percentage of a large senior user, the benefit of a hypothetical call is questionable. As the party bearing the burden of proof, Carter failed to provide any study or analysis showing either proximity or benefit.

17. Carter raised several other arguments in her post-hearing briefing. The Court already rejected issues of law Carter raised regarding Compact validity. These arguments are beyond the scope of the issues for the evidentiary hearing phase and the Court declines to address them.

18. Carter failed to prove that implementation of the Compact will cause material injury to her and her water rights.

### ***Conclusions of Law as to Allen***

19. Like Carter, Allen contends that releases of up to 90,000 acre feet of water stored in Hungry Horse Reservoir will cause reductions in surface water levels in the South Fork and the mainstem Flathead River. Allen cites no report that reaches this conclusion and she lacks the technical training or experience to reach it as an expert

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<sup>21</sup> Perhaps recognizing her deep wells have water rights junior to Reclamation’s Hungry Horse Project rights, Carter does not contend the Compact’s Hungry Horse allocation provisions will injure rights to her deep wells.

opinion. Allen also failed to identify any instance where her well has been affected either positively or negatively by releases of water stored in Hungry Horse Reservoir.

20. Also like Carter, Allen raised several arguments that go to the validity of the Compact, which the Court already addressed in the Order on Motions.

21. For reasons that largely mirror those of Carter, Allen failed to prove that implementation of the Compact will cause material injury to her and her water rights.

***Conclusion***

22. The evidence and testimony offered by Carter and Allen fail to prove material injury by operation of the Compact.

**ORDER**

Therefore, it is ORDERED that these Findings of Fact and Conclusions of Law shall be incorporated by reference into the Court's Final Order Approving the Compact.

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Stephen R. Brown  
Chief Water Judge

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