

WC-0001-C-2021

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Montana Water Court

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

CASE NO. WC-0001-C-2021

**RESPONSE BRIEF
HEARING 15**

Comes now, Mickale Carter, Pro Se, and submits her Response Brief, countering the Compact Parties' Post-Hearing Opening Brief, filed on August 22, 2025. The Compact Parties erroneously aver therein that Objector Carter did not carry her burden to prove material injury resulting from the operation of the Flathead Compact. All five of their arguments supporting this erroneous assertion are unsupported by the facts.

The facts of the case, in conjunction with the Expert Reports, reveal unequivocally that Objector Carter's water rights are materially harmed by the Flathead Compact in that it allows the level of the groundwater in the East Side Aquifer, where her water rights are located, to be lowered 15 to 20 percent of the time, i.e., in times of drought. The groundwater levels are lowered whenever water is not released from the Hungry Horse Dam in the spring, in order to protect the fisheries in the Reservoir. The fisheries of the Reservoir are in danger due to the release of the 90,000 acre feet, as allowed by the Compact, the previous summer, which results in the lowering of the Hungry Horse Reservoir by 4 feet. As discussed in Objector Carter's Post Hearing Brief, Doc. No. 2611 at 4-7, the failure to release water in the spring would result in the lowering of the Flathead River at Columbia Falls. This lowering of the river would result in the rushing of the groundwater of Objector Carter's water rights toward the river until the groundwater level is equal to the surface water level of the Flathead River. As a

consequence, her groundwater levels would be lowered. That is the material harm to her water rights that Objector Carter claims.

Also, the Compact Parties fail entirely to address Objector Carter's "other protectable interests," i.e., her right to harvest wild fish from the Flathead River.

Objector Carter adopts herein the arguments and analysis contained in her Post Hearing Brief, Doc. No. 2611, in their entirety.

I. ADMISSIONS WHICH SUPPORT PROOF OF MATERIAL INJURY

Before analyzing the inadequacy of the Compact Parties' arguments, it is instructive to point out that the Compact parties admit in their Opening Brief factual allegations that support Objector Carter's proof of material injury. On page 2, they admit the general hydrologic interaction between ground and surface water. This is significant in that the crux of Objector Carter's argument is that her groundwater levels rise and fall with the rise and fall of the surface water level of the Flathead River near Columbia Falls. In times of drought, 15-20% of the time, when water is not released from the Hungry Horse Dam in the spring in order to maintain the fisheries in the Reservoir after the taking of the 90,000 acre feet the previous summer, the water level of the Flathead River remains low and as a consequence of the low river level, the ground water rushes to fill the river to obtain equilibrium. This lowers the groundwater level which is the material harm to Objector Carter's water rights. See Doc. No. 2611 at 4-11.

The Compact Parties also admit, on page 2, that some of Objector Carter's water rights, i.e., the 1920 and 1916 water rights in the shallow aquifer, are senior to the applicable Tribal Water Rights. In order to prevail in a claim of material harm in Montana, which is a "first in time, first in right" state, the objector must prove that his/her water rights are superior or equal to those of the entity seeking the water right. With this admission, Objector Carter, as a matter of law, has proven superior water rights. See Doc. No. 2611 at 11-13.

The Compact Parties admit on page 6, by reference to CSKT employee Makepeace's testimony, Tr. 123:23 -126:15, that the groundwater level in the East Side Aquifer, where Objector Carter's water rights are located, corresponds directly with the surface water level of the Flathead River at Columbia Falls. In his analysis, CSKT employee Makepeace discusses what happens to the water level of the Flathead River

in the summer when the 90,000 acre feet is released from the Hungry Horse Reservoir. He notes that when the river levels rise, the ground water levels rise. Tr. 124:14 - 125:8. Employee Makepeace neither made mention of in his testimony, nor was he asked questions by the Compact Parties' counsel, as to what would happen the following spring, in times of drought, i.e., 15-20% of the time, when water is not released from the Hungry Horse Reservoir in order to preserve the fisheries in the Reservoir. CSKT employee Makepeace, however, in response to cross examination, did acknowledge that the movement of water from one system to another, i.e., from groundwater to surface water, is controlled by the difference between surface and groundwater levels. Tr. 134: 22-135:7. In other words, the water flows toward whichever system is lower. Consequently, in the springs when water is not released from the Hungry Horse Reservoir, which results in the Flathead River being lower than in years the water is released, instead of the groundwater being recharged by the higher river levels, the groundwater would rather flow toward the lower Flathead River and would do so until equilibrium is reached. Equilibrium is reached when the surface level of the Flathead River is the same as the groundwater level. Doc. No. 2611 at 6-7. This flow of the groundwater to raise the level of the Flathead River would necessarily lower the level of the groundwater causing material harm to Objector Carter's water rights. See discussion Doc. No. 2611 at 7-11.

Finally, the Compact Parties admit, on pages 6 and 7, that even in times of drought, which occurs 15 to 20 percent of the time, Doc. No. 2611 at pp. 4-5, the Compact only requires reduction of the allocation of the 90,000 acre feet stored in the Hungry Horse Reservoir by 50%, no matter how low the Flathead River gets at Columbia Falls. In other words, the Compact Parties admit that the Flathead Compact does not actually obligate the CSKT to maintain the 3200 to 3500 cfs at Columbia Falls which is required by the standards set by the United States Fish and Wildlife Service (USFWS) in order to maintain Flathead River fisheries. This failure of the Flathead Compact to ensure water levels sufficient to maintain fisheries is also a material harm to Objector Carter's "protectable interest" in taking wild fish from the Flathead River. Montana Constitution, Article IX, Section 7. MCA 87-1-107. See also, Treaty of Hellgate, 1855, Article 3.

II. OBJECTOR CARTER PROVED MATERIAL INJURY TO WATER RIGHTS

A. The Assertions that Carter's Claimed Injury is Speculative, Fails

The Compact Parties list five reasons why they aver that Objector Carter's claim that her water rights are materially injured because during times of drought the groundwater table of her wells would be lowered to support the diminished Flathead River flow, leading to her wells being more likely to go dry, is mere speculation. Pages 6-7. Each of their bases is without support in either the law or the facts.

1. The first basis for their claim of speculation, that Objector Carter's claim of material harm is based solely upon "generalized lay testimony," fails.

The Compact Parties aver that Objector Carter merely relies on "generic lay testimony" to support her assertions concerning both the interconnection between the ground and surface water in the East Side Aquifer where her water rights are located, as well as to the specific nature of the movement of the ground and surface waters in the East Side Aquifer. Page 6. Nothing could be further from the truth. Objector Carter relied on Expert Reports to prove the interaction between ground and surface water in the East Side Aquifer where her water rights are located. The Expert Reports she relied upon were prepared by agencies of the Compact Parties. See Carter Exhibits 1-9 and Compact Parties Exhibit 7. See generally Doc. No. 2611. Having been prepared by the agencies of the compact parties, these Expert Reports are admissions of a party opponent. Rule 801(2)(d).

As noted in Doc. No. 2611 at 4-8, Carter Exhibits 1-9 and Compact Parties Exhibit 7 describe the interrelationship between ground and the surface water. More particularly, they describe the specifics of the ground water movements in the East Side Aquifer where Objector Carter's water rights are located, including the general movement of the ground water in the East Side Aquifer from the 7000 feet Swan Range toward the Flathead River, as well as the propensity of the groundwater and surface water to rush toward whichever is lower in order to maintain an equilibrium. Carter Exhibit 4 at 10. See also, Carter Exhibit 10 at 4. CSKT employee Makepeace admitted that the Objector Carter's groundwater flows toward the Flathead River and indeed would do so until the ground water and the surface water are at the same level. Tr. 138:10-20; 140:14-18; 140:19-141:6.

Furthermore, the Flathead Compact itself informs the Court of what would happen 15-20% of the time during times of drought, i.e., the Reservoir would be 4 feet lower in the spring following the release of the 90,000 acre feet from the Hungry Horse Reservoir the previous summer. See, e.g., Appendix 7 to the Flathead Compact, Carter Exhibit 7 at 5. In order to maintain the fisheries in the Reservoir, the normal spring release of waters has to be greatly limited. Appendix 8 to the Flathead Compact, Carter Exhibit 8 at 19. The Flathead Compact, for the most part, requires that the flow at Columbia Falls to be maintained at between 3200 and 3500 cfs. See Carter Exhibit 8 at 5. This level is considerably below the normal spring flow required by the Murphy Rights of the DFWP which is between 6650 and 8125 cfs. Carter Exhibit 9 at 8. It is also below the normal 5000 cfs contributed to the river flow at Columbia Falls by groundwater. Carter Exhibit 6 at 2. The lower the surface water level, the lower the groundwater level. Carter Exhibit 10 at p. 4: "The surface water stage reflects the local water table."

a. The Compact Parties make great todo about the fact that Objector Carter did not hire an expert witness. However, Rule 702 does not require expert testimony. It rather states that if specialized knowledge will assist the trier of fact, a witness qualified as an expert may testify thereto. There is no requirement that an expert witness be utilized.

It is also significant that the concepts involved in the understanding of the interrelated nature of surface water and groundwater are not rocket science. Rather, they are at a Middle School science level. The concepts that: 1. water runs downhill; 2. the steeper the incline the faster the water flow; 3. the more permeable the soil, the quicker the movement of the water through the soil, with sand being the most permeable; and 4. and water seeks to maintain an equilibrium, i.e., the surface water stage reflects the local water table, are all concepts readily understandable by a sixth grader. Furthermore, in this case a Judge is the trier of fact. Judge Brown certainly will have no problem understanding these concepts.

It should also be noted that the Compact Parties did not hire an independent expert. They rather relied on employees of the CSKT to give testimony in an attempt to counter the Expert Reports relied upon by Objector Carter. ¹

2. The second basis for their claim of speculation, that the failure of the DNRC to conduct a groundwater study cannot be an injury, also fails.

The Compact Parties argue that the Court has held that the failure of the DNRC to do a groundwater study cannot itself be deemed to be an injury. Page 6. However, Objector Carter is not claiming, nor has she ever claimed, that the failure to do a groundwater study is an injury. Indeed, it is the lowering of the groundwater level in the spring that results in the complained of injury. She rather points out to the Court that in Flathead Lakers Inc. v. Montana Artesian Water Company, 2023 MT 85, the Montana Supreme Court put the onus on the DNRC to make all necessary ground water studies required to determine the extent to which the requested water right would negatively affect ground water levels. When the Supreme Court determined that the DNRC had failed to meet its obligation, the Montana Supreme Court voided the requested water right. Applying Flathead Lakers to the case at bar, the Court should hold, as a matter of law, that it was the obligation of the DNRC to quantify the extent of the lowering of the groundwater levels caused by the Flathead Compact in the East Side Aquifer where Objector Carter's water rights are located. The Compact Parties admit that no groundwater analysis whatsoever was conducted by any entity, including the DNRC. Agreed Fact 3. In line with Flathead Lakers, the Court must void the Flathead Compact.

3. The third basis for the claim of speculation, the reliance upon the testimony of CSKT employee Makepeace, Tr. 123:23-126:15, with regard to direction of flow of the groundwater, is misplaced.

¹ It should also be noted that the Court denied Objector Carter's request for an extension of time for her hearing in order to have time to obtain an expert witness. The Order denying the Motions for Summary Judgment was filed by the Court on April 1, 2025. Hearing 15 was scheduled for May 7, 2025. One month apart. Objector Carter informed the Court in her motion that she was told by the experts she had contacted that they were booked up and were not available during the next month. Consequently, in order to hire an expert, she would need to have the trial scheduled at a later date. It is ironic that although the Court would not give even a month extension for the hearing, the Court has allowed the dates for filing post hearing briefs to be pushed back several times, at the request of the Compact Parties, with the final due date of August 22, 2025. That's over three months from the date of the hearing!

In the transcript cited by the Compact Parties, CSKT employee Makepeace, Tr. 123:23-126:15, discusses the flow of the waters in the summer when the 90,000 acre feet is released from the Hungry Horse Reservoir. He notes, Tr. 124:14-125:9, that this release of the water during the summer will raise the level of the Flathead River and as a result, will raise the level of the groundwater. In other words, when the water is released from the Reservoir in the summer it causes the groundwater levels to raise to correspond to the surface level of Flathead River. This is precisely the opposite of what happens the following spring, in years of drought, when the water level in the Reservoir is 4 feet low and water is not released in order to preserve the fisheries in the Reservoir. CSKT employee Makepeace's testimony references what happens during the summer. It does not address or otherwise support the erroneous claim by the Compact Parties that the failure to release water in the spring, which results in the lowering of the Flathead River, would not impact the groundwater levels.

The Compact Parties further aver that the only way that Objector Carter's water rights can be harmed by the Flathead Compact is if it could "intercept those groundwaters flows between the Swan Mountains and those wells." Page 5. This assertion is not supported by logic or the nature of the interaction between ground and surface water in the East Side Aquifer where Objector Carter's water rights are located. As discussed in Doc. No. 2611 at 2-4, Objector Carter's water rights can be harmed by the lowering of the Flathead River caused by the failure, in the spring, to release water from the Hungry Horse Reservoir in order to preserve the fisheries in Reservoir. This would happen between 15 and 20 percent of the time, i.e., during times of drought. This lowering of the surface level of the Flathead River would then cause the groundwater of Objector Carter's water rights to flow rapidly toward the Flathead River until the level of the River is the same as that of the groundwater. Carter Exhibit 10 at 4. The flux rate of the flow is dependent upon the gradient, i.e., the difference in the surface and ground water levels. The greater the difference, the higher the flux rate, i.e., speed of travel of the water. Id.

In order for the Compact Parties' assertion that the only way to harm Objector Carter's water rights is to intercept the replenishing of the water from the Swan Range, it must necessarily be true that the groundwater of Objector Carter's water rights does not

flow toward the Flathead River, i.e., it is not interconnected with the Flathead River. However, the groundwater in the East Side Aquifer does continue to flow to the west, i.e., toward the Flathead River. This fact is acknowledged by CSKT employee Makepeace. Tr. 132:14-21, i.e., "The shallow aquifer would move from your property towards the river." This direction of flow is also admitted by the Compact Parties in their Opening Brief: "It is undisputed from the relevant reports and all testimony that the flow of groundwater in this area is from east to west, from the Swan Mountains to the Flathead River." Page 5. The groundwater does not magically stop flowing toward the west when it reaches Objector Carter's water rights. The Compact Parties' assertion that all the groundwater in the East Side Aquifer does not flow toward the Flathead River is not supported by reality and must consequently be disregarded by the Court.

4. The fourth basis for their allegation of speculation, that Objector Carter has made no showing that absent the Compact, in years of drought, the water levels would be higher than the Compact requires, fails.

Appendices 7 and 8 to the Compact, Carter Exhibits 7 and 8, and Carter Exhibit 9 reveal that without the takings of water allowed by the Compact, the water level of the Flathead River would be higher than the minimum 3200-3500 cfs required by the Compact. For example, Figure 1, Carter Exhibit 8, page 7, reveals a comparison of the elevation of Hungry Horse Reservoir without the Compact water taking, and with the Compact water taking. Without the the taking of water allowed by the Compact, it would never be necessary to withhold the release of water in the spring in order to preserve the fisheries in the Reservoir. Appendices 7 and 8 to the Compact.

Carter Exhibit 9 at page 8 sets forth the DFWP's Murphy Rights. Without the existence of the Compact, the minimum flow at Columbia Falls in April would be at least 6650 cfs in May; 8125 cfs in June; and 5412 cfs in July. This is substantially higher than the 3200-3500 cfs required by the Compact.

Furthermore, the baseflow, i.e., the flow of the Flathead River provided by the groundwater is 5000 cfs. Carter Exhibit 6 at 2. Consequently, the contribution of groundwater to the flow of the Flathead River is more than the minimum flow levels set by the Flathead Compact.

5. The fifth basis for their allegation of speculation, that the Compact provides minimum levels of protection for Flathead River levels during times of drought, fails.

The Compact does provide for a minimum flow of between 3200 cfs and 3500 cfs at Columbia Falls. However, these minimum flow rates do not protect Objector Carter's groundwater levels. See, Doc. No. 2611 at 2-11. Furthermore, as discussed in Doc. No. 2611 at 5-7, this flow rate is considerably below the normal flow rate and is in fact less than the 5000 cfs which is normally contributed by groundwater.

B. Existing Standards Do Not Protect Objector Carter's Water Rights

The Compact Parties allege that Objector Carter's wells are protected from injury by the Flathead Compact by existing legal standards. Page 7. They base this allegation on four arguments: 1. The Compact does not give the CSKT authority to drill a well off the reservation. 2. The CSKT must comply with state law to develop a use close to Objector Carter's water rights. 3. Objector Carter's water rights are not subject to call. 4. The 90,000 acre feet withdrawal is subject to call by Objector Carter's 1916 and 1920 water rights. Not one of these arguments provides protection to Objector Carter from Material Injury.

The first two arguments are not relevant in that they are beyond the scope of the Flathead Compact in that they deal with future appropriations or change of use. See, In Re: The Crow Water Compact, 2015 MT 353 ¶ 35. The fact that Objector Carter's water rights are not subject to call provides no protection. See discussion in Doc. No. 2611 at 11. The fourth argument, lacks credulity. If the argument that the claimed water right, i.e., 90,000 acre feet is subject to call, were a basis for denial of a claim of material harm, then no claim of material harm would ever be upheld. Furthermore, the outcome of Flathead Lakers belies the erroneous nature of this argument. If this argument were sufficient to deny a material harm claim, then rather than denying the water right as did the Montana Supreme Court in Flathead Lakers, 2023 MT 85, because of the possibility that the groundwater levels would be affected by the requested water right, the Montana Supreme Court would have held that the Objectors should just call the bottling plant's water right when their wells went dry. The Supreme Court, rather, voided the requested water right, as should the Court in the case at bar.

III. OBJECTOR CARTER PROVED MATERIAL INJURY TO FISHING RIGHTS

This Court, in its May 5, 2025 order, Hearing 15 Order on Prehearing Motions, on page 3 held, "Carter remains free to attempt to prove material injury, but must do so based on what the Compact actually says in the context of her specific water rights or other protectable interest and evidence of injury to those rights and interests." The "protectable interest" that Objector Carter proved was materially harmed by the Flathead Compact is her right as a citizen of the State of Montana to harvest wild fish from the Flathead River. See Doc No. 2611 at 13-16.

The Compact Parties aver in their discussion of "Material Injury Legal Standard" on pages 2 and 3, that the only material injury that will be considered by the Court is injury to Objector Carter's water rights. This is contrary to the specific language of the Court's May 5, 2025 order which specifically includes "protectable interest."

As noted infra, the Compact Parties admit that the Flathead Compact does not guarantee the Flathead River levels determined by the USFWS to be required to maintain fisheries. See pages 6 and 7. Because the Flathead Compact does not even guarantee the water levels set by the USFWS, let alone those set by the Montana Department of Fish, Wildlife and Parks (DFWP), it puts in jeopardy the fisheries in the Flathead River and as a consequence materially harms Objector Carter's right to harvest wild fish. Montana Constitution, Article IX, Section 7. MCA 87-1-107. See also, Treaty of Hellgate, 1855, Article 3.

III. CONCLUSION

For the above stated reasons, the Court should find material harm and void the Flathead Compact.

Dated this 5th day of September, 2025.

OBJECTOR MICKALE CARTER

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

CERTIFICATE OF SERVICE

I declare under penalty of perjury, that I emailed a true and accurate copy of the foregoing document on September 5, 2025, to the following email addresses:

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/s/ Mickale Carter September 5, 2025.