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

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

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

Under the governing order,[1] the Confederated Salish and Kootenai Tribes ("CSKT"), the State of Montana, and the United States (collectively, "Compact Parties"), submit this post-hearing response brief rebutting Mickale Carter's ("Carter") assertions of material injury in her *Post Hearing Brief Hearing 15*, Dkt. No. 2611.00 (July 30, 2025) ("Carter's Opening"). As the Compact Parties explained in their *Post-Hearing Opening Brief Regarding Material Injury Hearing No. 15*, Dkt. No. 2642.00 (Aug. 22, 2025) ("Compact Parties' Opening") and below, Carter has not carried her burden of proof to show material injury by operation of the Compact. Therefore, the Court should grant the Compact Parties' *Motion for Approval of the Flathead Reservation-State of Montana-United States Compact and for Summary Judgment Dismissing All Remaining Objections*, Dkt. No. 1823.00 at 71-72 (July 10, 2024) ("Motion"), and approve the CSKT Compact, §§ 85-20-1901, -1902, MCA.

Objector Carter showed no material injury at her hearing. Carter presented only general conclusions about the interaction between groundwater and surface water, leading only to her admitted "uncertainty" over the viability of her two shallow groundwater wells during a drought. Carter refused to acknowledge that her two wells she alleges are at risk are senior to the relevant Tribal water allocation; are protected from interference by a future state law adverse effects determination the Compact and the Unitary Administration and Management Ordinance guarantee; and are in a location unlikely to result in impacts given the direction of the groundwater flow. Carter then advanced three new legal arguments that are all too late to be considered by the Court. But as set forth below, even if the Court considers such untimely arguments, it should reject them on the merits.

I. MATERIAL INJURY LEGAL STANDARD

The Compact Parties' Opening explained that this Court and the Montana Supreme Court have held that to demonstrate material injury from a Compact, an objector must establish, through admissible evidence, a concrete injury to water rights or other real property interests caused by operation of the Compact. Compact Parties' Opening at 2-3. Carter's Opening has no discussion of the relevant case law defining when a water rights compact causes material injury. The Compact Parties' description of the governing law regarding her material injury assertion is thus uncontested.[2]

[1] *Order Modifying Briefing Schedule*, Dkt. No. 2626.00 (August 13, 2025).
[2] Carter's use of the term "harm," throughout her Opening, instead of the correct term of

II. CARTER FAILED TO ESTABLISH MATERIAL INJURY TO HER WATER RIGHTS

In section 1 of Carter's Opening, she attempts to establish material injury, but such effort fails. There, Carter alleges that her two shallower groundwater wells (around 20 feet deep) might be impacted by CSKT's future use of their Flathead System Compact Water right ("FSCWR"), including the potential use of an allocation of 90,000 acre-feet from the Bureau of Reclamation's Hungry Horse Reservoir, which in drought years could lead to lower flows in the Flathead River.[3] Carter's Opening at 2-9. Carter claims that because of the acknowledged interaction of ground and surface water, the possibility of lower Flathead River flows creates an "uncertainty" about ground water levels in the future and diminishes the value of her property. *Id*. at 10-11. These allegations of material injury fail for many reasons.

First, Carter's complaint that her shallow groundwater rights are unprotected from the exercise of CSKT's rights is incorrect. *Id*. For one, her shallow groundwater rights at issue here are senior to CSKT's Hungry Horse allocation and therefore she could use the priority system to block that hypothetical interference with her rights. *See* Compact Parties' Opening at 8. For another, any development by CSKT of water resources near Carter's wells would (i) be governed by Montana law, not by the Flathead Reservation Water Management Board, and (ii) require that there not be any adverse effect on existing water users (like Carter) before allowing CSKT a right. *Id*.at 7-8. Further, Carter's protest that the Compact Parties conducted no groundwater study before completing the Compact, Carter's Opening at 10-11, has been rejected by this Court. *Hearing 15 Order on Prehearing Motions*, Dkt. No. 2590.00 at 3 (May 5, 2025).[4]

"material injury," to describe her burden is unsupported by any citation or explanation and does not lessen her obligation as an Objector to the CSKT Compact under the applicable law.

[3] Carter has three other groundwater rights that are much deeper (around 170 feet deep) and are in a different aquifer, termed the "intermediate" aquifer. Carter's Opening at 3-4; Hearing Transcript ("Tr.") at 121:9-21; 129:13–131:17. Carter's alleged injury does not include these three wells.

[4] Carter's reliance on *Flathead Lakers Inc. v. Montana Artesian Water Co*., 2023 MT 85, *see* Carter's Opening at 11, is inapt. That case concerned whether the Montana Department of Natural Resources and Conservation properly issued a groundwater permit under state law, *see Flathead Lakers*, ¶¶ 36–57, while this case concerns the Court's review of a federal reserved water rights compact under §§ 85-2-234 & -702, MCA, under the common law consent decree standard, *Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00 at 18-20 (Apr. 1, 2025) ("*Compact Validity Order*"). If anything, the *Flathead Lakers Inc.* case illustrates the powerful state law protections provided to Carter by the application of state law to any future use of water by the CSKT in her area. *See* Compact Parties' Opening at 7-8.

Second, Carter's "uncertainty" over her groundwater supply in the driest 15-20% of future years cannot support an objection and void the CSKT Compact. Evidence of injury that relies on speculation about future Compact implementation cannot demonstrate material injury. *In re Adjudication of the Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the United States Department of Agriculture Forest Service within the State of Montana*, No. WC-2007-03, 2012 WL 9494882, at *10 (Mont. Water Ct., Oct. 31, 2012) (court cannot "rely on any fears, concerns, and conjectures expressed by the Objectors about the future application of the Compact provisions or other future Forest Service actions. The expressed uncertainty of feared future events is too speculative upon which the Court can base a decision."). That is all Carter has offered in this case, which fails to satisfy her burden.

Third, the evidence Carter submitted does not evidence any injury. Carter is a lay witness with no education, experience, or training in hydrology. Carter did not hire an expert witness to model or analyze her situation. Compact Parties' Opening at 4. All Carter provided was generalized information that shows a connection between groundwater and surface water, and that when the surface water level of the Flathead River is lower, then the surrounding groundwater table likely would go lower to some unknown extent. She has not provided anything probative to her specific situation, such as: (i) how much shallower the Flathead River would become with CSKT's use of their FSCWR,[5] (ii) how much will a shallower River level decrease the groundwater level where her wells are located over a mile from the River, or (iii) whether that decrease in the groundwater level would be enough to impact the yield of her groundwater wells. Carter's assertion of material injury is premised on any change in the level of the aquifer being an injury to her shallow groundwater wells. But such a definition would preclude there being any withdrawal from the Flathead River or the aquifer in her area. Instead, state law allows new development if the existing right can still be satisfied. Section 85-2-311(1)(b), MCA (water rights of an existing user "will be satisfied" even with the new use); *see* 85-2-401(1), MCA (allowing post-1973 uses that change the water table so long as "the prior appropriator can reasonably exercise the water right under the changed conditions"). The Court

[5] While Carter has described a possible lowering of the flow in cubic feet per second in the Flathead River, Carter's Opening at 6-7, she has not provided the operative metric, which is the change in the relative height of the River at different flows. The depth of the river is what would affect hydraulic head between the groundwater and surface water. *Hearing No. 15*, Compact Parties Ex02-01.

has ruled that Carter must do more than show "a general hydrologic connection exists between surface water and groundwater." *Hearing 15 Order on Prehearing Motions*, Dkt. No. 2590.00 at 3. But Carter failed to meet this directive.

Fourth, Carter's lay witness analysis of her situation focuses on the wrong location when trying to show material injury. Carter asserts that the offending cause of her possible future injury is lower water levels to her west at the Flathead River, when the groundwater recharge that her wells rely on comes from the wetter and higher ground to the east in the Swan Mountain Range. Compact Parties' Opening at 5-6. Her locus of injury is thus misplaced and cannot serve as the basis of a material injury from operation of the Compact.

Fifth, Carter's lay opinions in her Opening on hydrologic matters that go beyond her hearing testimony must be rejected. In support of her geographically misplaced analysis at the Flathead River, Carter makes expert witness-like conclusions in her brief on the speed at which groundwater near her wells moves and the impact certain Flathead River flows would have on the groundwater-dominated baseflow supporting the Flathead River. Carter's Opening at 4, n. 1, 5-7, 8, n. 5, 12, n. 6. These are all matters that are outside the capacity of the lay witness to testify about and require application of advanced analysis beyond the cited exhibits. These assertions from Carter during briefing also amount to improper post-hearing testimony, seeking to prevent the Compact Parties from having the opportunity to object to such testimony or to refute such contentions through rebuttal witnesses. The record closed for Hearing No. 15 on May 7, 2025, and Carter has offered no basis to reopen the record. Her unsubstantiated opinions are not "new" evidence—something she could not have offered at the hearing to justify such an extraordinary step. *See*, *e.g.*, *Stavenford v. Mont. State Fund*, 2003 MT 67, ¶ 21, 314 Mont. 466, 67 P.3d 229 (rejecting motion to reopen because "new" evidence could have been offered before the close of the proceeding and because the movant failed to show materiality).

Moreover, the analysis of the baseflow is flawed in many ways. Initially, Carter assumes that the Flathead River will fall to the minimum allowable flow levels or below in all the drier years. Carter's Opening at 5-7 (citing 3,200 or 3,500 cfs flow levels in Compact App. 7). Yet those levels are the minimum flows in drought years, and the actual future flows could be higher depending on hydrologic conditions (*i.e.*, the Compact provides a floor, not a ceiling).[6] As well,

[6] Carter incorrectly posits that CSKT can or will breach the minimum Flathead River flow levels or otherwise not adhere to the prescriptive terms of the applicable Compact provision or water

Carter's baseflow calculations use a starting point of 5,000 cfs that is considerably less reliable than Carter describes. *See* Carter's Opening at 5, relying on Tr. 46:10 - 48:24 (describing contents of Carter's Ex. 6). The text of Carter's exhibit 6 states that "the baseflow for the Flathead River at Columbia Falls (Figure 1.5) might be estimated to be approximately 5,000 [cfs]." Carter's Ex. 6-4 (emphasis added). The general interest publication Carter cites for this proposition does not define what period of record is used to compute this estimate, whether that period includes years before Hungry Horse Reservoir was created or after when the hydrology is different, and what statistical metric 5,000 cfs represents (mean, median, or certain percentile). Without further background information, it is hard to know the worth of that baseflow value that Carter relies on.

In sum, Carter has not demonstrated that any of her shallow groundwater wells will suffer material injury from the operation of the Compact. They have significant legal protections under the existing priority system and the Compact, and they are located where the Compact use identified is downgradient from her wells, after they have been recharged from the Swan Mountain Range, suggesting Carter will suffer no injury at all.

III. CARTER'S LEGAL ATTACKS ON CSKT'S FLATHEAD SYSTEM COMPACT WATER RIGHT MUST BE REJECTED

The remainder of Carter's Opening attacks the FSCWR with various legal allegations that all must be rejected. Carter first alleges that the 1855 priority date of the FSCWR is invalid, and therefore all her water rights are senior to it. Carter's Opening at 11-13 (section II). She then argues that she is materially injured by the Compact not conditioning use of the FSCWR with high enough instream flow requirements to support Carter's claimed constitutional right to harvest wild fish. *Id*. at 13-15 (section III). Finally, Carter maintains that the Water Court lacks jurisdiction to approve the Compact with water rights for any "new" use like the FSCWR (a right to be initiated in the future). *Id*. at 15-16 (section IV). These charges are meritless for the

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rights abstract. Carter's Opening at 5, n. 2, 6, n.3, 7, n. 4. Such charge is baseless. The Compact and the relevant abstract require that "[t]he exercise of this water right shall conform with the minimum instream flow schedules [contained in certain tables in Compact Appendix 7]. . . . In the event that the minimum instream flow schedules or ramping rates are not met, the use of this water right shall be suspended until such time as those minimum instream flow schedules and ramping rates are achieved." Section 85-20-1901, MCA, Art. III.C.1.d.iv; Preliminary Decree, App. 2, Decree Report page 65 (pdf page 68) (emphasis added). A material injury claim based on CSKT taking actions expressly forbidden by the relevant Compact term and abstract is meritless speculation and must be rejected.

procedural and substantive reasons detailed below.

A. Carter's Legal Challenges Are Raised Too Late to be Considered by the Court

Carter raised many legal issues in her opening motion of law. *Motion and Memorandum in Support of Motion for Summary Judgment,* Dkt. No. 1786 (June 19, 2024). In her post-hearing material injury brief, Carter raises three more legal challenges. The timing of these latest legal arguments fails various procedural requirements that govern this case and therefore preclude the need for any substantive analysis of their dubious merits.

For example, the current phase of the case concerns factual allegations about material injury. At the start of 2025, the Court outlined that it would hear factual challenges related to material injury from the operation of the Compact and required the Objectors to summarize those factual allegations that would be the subject of each Objector's hearing.[7] Carter timely filed a *Request for Hearing*, Dkt. No. 2111.00 (Feb. 13, 2025) and properly did not raise any of the legal arguments she has now added to her post-hearing opening brief. Next, all these legal issues should have been raised in 2024 during the period set aside for briefing on legal issues. *Case Management Order No. 3* ("*CMO 3*"), Dkt. No. 1395 at 2-3 (Oct. 18, 2023). This Court has explicitly stated that the 2025 factual hearing process was not the time to reargue legal issues. *Hearing 15 Order on Prehearing Motions*, Dkt. No. 2590.00 at 3 (May 5, 2025); *Clarification Order and Case Management Order No. 7*, Dkt. No. 2147.00 at 1 (Mar. 5, 2025).

Finally, two of the three legal issues asserted now were not even raised in Carter's Amended Objection[8] that is her governing pleading.[9] While Carter included a challenge to the 1855 priority date for future uses like the FSCWR in her Amended Objection, Dkt. No. 1440 at pdf pages 12-15, the other two allegations she makes now were not included in the Amended Objection. The time to revise her Amended Objection and include more legal argument was December 8, 2023. *CMO 3* at 2. That date has long since passed and she cannot seek to effectively amend her Amended Objection through this briefing. Thus, for many procedural

[7] *Case Management Order No. 5*, Dkt. No. 2109.00 at 2 (January 31, 2025) & *Order Setting Dates for Evidentiary Hearings and Case Management Conference*, Dkt. No. 2099.00 at 1 (January 2, 2025).

[8] *Amended Notice of Objection and Request for Hearing*, Dkt. No. 1440 at pdf pages 12-20 (Nov. 28, 2023) (attached to *Motion and Memorandum in Support of Motion to Amend Existing Objections*).

[9] The Court allowed the amendment. *Twelfth Order on Motions to Amend Objections (Consolidated)*, Dkt. No. 1631 (February 1, 2024).

reasons, the Court should not entertain any of the legal contentions lodged by Carter in her Opening.

B. Carter's Legal Challenges to the Priority Date for the FSCWR Are Invalid

In both sections II and IV of Carter's Opening, Carter alleges that the Compact's 1855 priority date for the FSCWR is wrong or so outside established law that the Court could not consider it. These attacks on the FSCWR are belied by the Court's ruling on legal issues. The Court has approved the FSCWR. *Compact Validity Order* at 45, 73. If the Court were to consider Carter's challenge to the priority date for the FSCWR, such opposition should be rejected because it disregards a fundamental aspect of Indian reserved water rights, that they must provide for the future needs of the CSKT's reservation. *Arizona v. California*, 373 U.S. 546, 599-600 (1963); *Montana ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 219 Mont. 76, 93-94, 712 P.2d 754, 764-65 (1985) ("*Greely*"). Tribal water rights are not governed by and are different than state-law appropriative water rights; they do not require establishment through actual use. *Greely*, 219 Mont. at 89-90, 712 P.2d at 762-63. Thus, Carter is mistaken for imposing state law historical use rules to quantify and determine the priority date for the FSCWR. Carter's Opening at 12-13, 16. And Carter's challenge of the Court's jurisdiction to even adjudicate CSKT's future rights fails for the same reason. The Court has correctly ruled that it is empowered to review the Compact based on sections 85-2-701, -702, and must be guided by applicable federal law, *Compact Validity Order* at 17, 20-21, which explicitly allows such uses.

Additionally, Carter's attack on the 90,000 acre-feet Hungry Horse reservoir allocation, which is a part of the FSCWR, is infirm for another reason.[10] This source of water comes from a United States reservoir, and Congress has exclusive control over such resources. Congress can adjust the status of the water stored in federal facilities subject to limitations not applicable here. *In re Crow Water Compact Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Crow Tribe of Indians and the State of Montana*, 2015 MT 353, ¶ 25, 382 Mont. 46, 52, 364 P.3d 584, 588.[11] Carter's challenges to the FSCWR's 1855

[10] The Hungry Horse allocation can satisfy the larger FSCWR in part. *See* Compact Parties' Opening at 3-4 (explaining the more junior reservoir allocation component of the FSCWR).
[11] Carter is correct that her two shallow groundwater wells are senior to the priority date for CSKT's Hungry Horse allocation, Carter's Opening at 12, but that means those wells are protected from exercise of the Hungry Horse allocation of the FSCWR. Thus, she cannot be

priority date must be rejected.

C. Carter's Fisheries' Water Rights Contention Fails

Carter also alleges that she will be harmed in a future scenario when there might be a drought, CSKT uses their Hungry Horse allocation, and the Flathead River flows decrease to the minimum required flows under the Compact as a result. Carter's Opening at 13-15. Carter asserts such scenario would interfere with her claimed right, under the Montana Constitution, of the "opportunity to harvest wild fish," thus causing her injury. *Id*. at 13. Carter then argues that this opportunity to harvest fish requires that higher minimum flows must be maintained as compared to those specified by the Compact. *Id*. at 13-14. This argument is contrary to state law and the priority system that governs water rights.

First, the constitutional provision Carter relies on does not create a right to a certain flow in the Flathead River. The text of the provision focuses on the "opportunity to harvest" fish, a concept that is different from the conditions that provide fish to harvest. This construction is reinforced by § 87-1-107, MCA, that expresses the Montana Legislature's understanding that the constitutional "opportunity . . . to harvest" fish is carried out through the enactment of "the laws of this title pertaining to the lawful means of hunting, fishing, and trapping, as defined in 87-2-101 and 87-6-101. . ." These laws alone provide the "adequate remedies for the preservation of the harvest heritage of the individual citizens of this state," Section 87-1-107, MCA. They include no provision for the instream flows that Carter desires. Carter is mistaken that she has an enforceable instream flow right in the Flathead River under the Montana Constitution. Outside of the United States and the Tribes, only the State of Montana can have such broad-based rights to protect fisheries, not individual citizens.[12]

Second, Carter is incorrect that the "Murphy rights" flows she relies on are "required flow rates set by [the Department of Fish, Wildlife and Parks]" that the Compact must meet. Carter's Opening at 14 (emphasis added). Rather, the "Murphy rights" fishery flows in the

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materially injured from CSKT's exercise of such junior allocation. *See supra*, at 3.

[12] Section 85-2-223, MCA (providing that only the Department of Fish, Wildlife and Parks has exclusive representation of the public to hold pre-Montana Water Use Act rights for recreation purposes like fisheries); § 85-2-316(1) (allowing only the State to reserve water to maintain streamflow); § 85-2-436(1) (allowing only the Department of Fish, Wildlife and Parks to hold leases for instream flows for fisheries or hold instream water rights resulting from a change of use from another purpose). *See* § 89-901(2), RCM (Murphy rights held by the Department of Fish, Wildlife and Parks).

Flathead River are for the available unappropriated flow with an effective priority date of 1970. S. Brown, M. Bryan & R. McElyea, *Montana Water Law*, 202-03 (2021). Those "Murphy rights" flows are in no way a mandatory restraint on any more senior uses, like the 1855 priority date FSCWR,[13] or the 1947/1952 priority date for the Hungry Horse allocation.[14] Carter acknowledged the junior nature of these "Murphy rights" at the hearing, Tr. 81:5-13, but omits such acknowledgment from her Opening. Her assertion that state law provides a senior, enforceable water right protecting instream flows for fish that the Compact ignored is incorrect. Thus, even if not procedurally barred by failing to make this argument in her Amended Objection or in 2024 during the legal motions phase, her contentions have no support under the state law she relies on.

IV. CONCLUSION

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

Respectfully submitted this 19th day of September, 2025.

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[13] Section 85-20-1901, MCA, Art. III.C.1.d.viii.
[14] Tr. 3:2-4:4; 69:12-70:10; *Hearing 15 Prehearing Order*, Dkt. No. 2589.00, at 2 (May 5, 2025) (Agreed Fact No. 4).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Post-Hearing Response Brief* for Hearing No. 15 was served by email to the Objector and email to counsel for the Compact Parties as set forth below this 19th day of September, 2025.

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