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Montana Water Court

**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 16**

Comes now, Objector Vivian Allen, *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 Allen did not carry her burden to prove material injury resulting from the operation of the Flathead Compact. All 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 Allen's water right is materially harmed by the Flathead Compact in that it allows the level of the groundwater in the Coram Subarea Hungry Horse Aquifer, where her water right is 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 90,000AF, 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 Allen's Post Hearing Brief, the failure to release water in the spring would result in the lowering of the Flathead River at Hungry Horse/Columbia Falls. As Allen's groundwater well is fed by the Flathead and South Fork Rivers in a losing stream scenario, her groundwater levels would also be lowered. That is the material harm to her water right that Objector Allen claims.

Further, the Compact Parties fail entirely to address Objector Allen's "other protectable interests," i.e., her right to harvest wild fish from the Flathead River, her right to jury trial of peers vs. bench trial conducted by one of the adverse parties, etc., etc.

Objector Allen adopts herein the arguments and analysis contained in her Post Hearing Brief, in their entirety. Allen Further relies on Objector Carter's hearing matters and admissions by the Compact Parties.

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 Allen's proof of material injury. On page 2, in the Parties' Brief in response to Hearing 15, they admit the general hydrologic interaction between ground and surface water. The same can be found in several locations in their Post Hearing 16 Brief. This is significant in that the crux of Objector Allen's argument is that her groundwater levels rise and fall with the rise and fall of the surface water level of the Flathead River and the South Fork on the perimeters of Hungry Horse. 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 90,000AF the previous summer, the water level of the Flathead River remains low and as a consequence lowers the groundwater level, which is the material harm to Objector Allen's water rights.

The Compact Parties also tacitly admit, in their appendix of the Flathead Lake water right, which includes all named and unnamed tributaries,¹ that Objector Allen's water right, is 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 right is superior or equal to those of the entity seeking the water right. With this admission, Objector Allen, as a matter of law, has proven superior water rights. See Footnote 1, re Section II.

The Compact Parties tacitly admit on page 6 of their Post Hearing 15 Brief, by reference to CSKT employee Makepeace's testimony, Tr. 123:23 -126:15, that the groundwater level in the Hungry Horse Aquifer, where Objector Allen's water right is located, corresponds directly with the surface water level of the Rivers abutting Hungry Horse: in his analysis, CSKT employee Makepeace discusses what happens to the water level of the Flathead River in the summer when the 90,000AF is released from the Hungry Horse Reservoir. He notes that when the river levels rise, the

¹ The moment the water leaves the reservoir through Hungry Horse Dam, and resumes its course as the South Fork of the Flathead River, it no longer belongs to the Reservoir water right Abstract and priority date, but instead becomes part of the Flathead Lake Abstract, which as to the on-reservation use of this off-reservation water right "granted" to the Tribes in the Compact **has no priority date and is inferior to Allen's water right.** See Allen's Post Hearing 16 Brief, Section II, pp. 10-11.

ground water levels rise.² 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 Objector Carter's cross examination, did acknowledge that the movement of water from one system to another, eg., from surface water to groundwater, 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 in the Hungry Horse aquifer being "recharged" by the higher river levels (Makepeace, Hearing 15), the groundwater level in the underground river in which Allen's well is located will necessarily decrease as the river levels feeding into it decrease, causing material harm to Objector Allen's water rights. See Sect I, pp. 2-10, Allen's Post-Hearing Brief. The Compact Parties cannot have it both ways. Makepeace's scientific admission per studies cited at Hearing 15 are in direct conflict with his speculative testimony at Hearing 16.

Finally, the Compact Parties admit, on pages 6 and 7, Post Hearing 15 Brief, 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 90,000AF stored in the Hungry Horse Reservoir by 50%, no matter how low the Flathead River gets at Hungry Horse/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 Allen'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.

Makepeace, Compact Parties' witness, introduced no information from any actual scientific study of Allen's aquifer, as such expert study as has been done, Exhibit 1, and upon which Allen relied. In fact, this study, which Makepeace was involved in but not in the Hungry Horse Aquifer of the Coram Subarea per his testimony, was *barely touched upon by Makepeace*. All of his testimony

² The opposite will also be true in a losing system scenario, as affects Allen's groundwater.

which allegedly contradicted Allen's testimony *was mere private speculation as someone who has only driven through the area on US Highway 2 passing through Hungry Horse from time to time. He admitted not having ever been on the river through or in the Hungry Horse area. He showed distinct unawareness of the River system at Hungry Horse, and impeached himself in disagreeing at Allen's hearing with information he agreed to at Carter's hearing.* Whatever else Makepeace would be an expert on, it was for practically all purposes irrelevant to Allen's hearing and her testimony.

Further, the Parties' in their arguments against Allen on p. 5 of their Brief, contradict the facts of their own party opponent study done in the area, which Allen presented. The Bad Rock area of the canyon does not restrict or constrict or raise groundwater levels, in fact, Makepeace tacitly admitted that Allen's static water level in the well is lower than the surrounding rivers, providing no evidence otherwise, thus he also impeached himself by insisting (purely speculative, per his admissions on cross-exam) that the groundwater levels in the Hungry Horse aquifer is raised by Bad Rock Canyon.

Again, Makepeace's claims about VarQ somehow protecting Reservoir and River levels in dry years under the Compact parameters, was shown in some detail to be abjectly false in Allen's and Carter's Post Hearing Briefs. Makepeace instead offered knowingly incomplete, selective presentation of facts, which amounted to evasion of necessary fact. Cf. final paragraph in 1.a. below.

II. OBJECTOR ALLEN PROVED MATERIAL INJURY TO WATER RIGHT

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

The Compact Parties aver that Objector Allen's claim that her water right is materially injured because during times of drought the groundwater table of her wells would be lowered in response to the diminished Flathead River flow, leading to her well being more likely to go dry, is mere speculation. Each of their bases is without support in either the law or the facts.

1. The claim of speculation, that Objector Allen's claim of material harm is based solely upon "disproven/generalized lay testimony" fails.

The Compact Parties aver that Objector Allen merely relies on "disproven" and "generalized lay testimony" to support her assertions concerning both the interconnection between the ground and surface water in the Hungry Horse Aquifer where her water right is located, as well as to the specific nature of the movement of the ground and surface waters in the Hungry Horse Aquifer. Nothing

could be further from the truth. Objector Allen relied on Expert Reports to prove the interaction between ground and surface water in the Hungry Horse Aquifer where her water right is located. The Expert Reports she relied upon were prepared by agencies of the Compact Parties. See 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, 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 a losing system such as where Objector Allen's water right is located, including the general movements of the ground water from the surrounding mountains toward the Flathead Rivers and thence into Allen's aquifer in between the rivers, as well as the propensity of the groundwater and surface water to seek/maintain an equilibrium.

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 90,000AF from the Hungry Horse Reservoir the previous summer. See, e.g., Appendix 7 to the Flathead Compact, 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, 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 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. Allen 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 to-do about the fact that Objector Allen (a co-joinder to Carter's motion for the same), 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.³

³ It should also be noted that the Court denied Objector Allen'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 16 was scheduled for May 7, 2025, only one

It is also significant that the concepts involved in the understanding of the interrelated nature of surface water and groundwater are not complex science. 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 and gravel being the most permeable; and 4. water seeks to maintain an equilibrium, i.e., the surface water stage reflects the local water table, are all concepts readily understandable by the average person. Furthermore, in this case a judge is the trier of fact. The Court 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 Allen. This is abject conflict of interest and should have disqualified the witnesses as “expert” on its face, having put an unconscionable burden on Makepeace to testify in favour of his employer in this billion-dollar venture. Could they locate no one else who would?

2. That the failure of the DNRC to conduct a groundwater study cannot be an injury, 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. However, Objector Allen 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 complaint 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

month later. Objector Allen informed the Court in her co-joiner motion with Carter 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, Allen 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, instead, rushing everything heard to unripened “completion” by a Compact required deadline, 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, over three months from the date of the hearing.

Hungry Horse Aquifer where Objector Allen's water right is located. The Compact Parties admit that no groundwater analysis whatsoever was conducted by any entity, including the DNRC. Agreed Fact

2. In line with Flathead Lakers, the Court must void the Flathead Compact.

3. That the reliance upon the testimony of CSKT employee Makepeace, Hearing 15 Tr. 123:23-126:15, with regard to direction of flow of the groundwater, is misplaced.

In the Carter transcript cited by the Compact Parties in Post Hearing 15 Brief, CSKT employee Makepeace, Tr. 123:23-126:15, discusses the flow of the waters in the summer when the 90,000AF 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.

As discussed in Allen's Post Hearing Brief, Objector Allen's water right can be harmed by the lowering of the Flathead Rivers 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 Rivers which replenish Allen's groundwater would then cause the groundwater of Objector Allen's water right to diminish.

4. That Objector Allen 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, Exhibits 7 and 8, and 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, Allen 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 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. This ties in with the Makepeace's disingenuous statements regarding alleged VarQ prevention of drought issues. Under the unheard of and contradictory allowable Compact paradigm, Var Q can be gutted, see also 5. below.

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. 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 Allen's groundwater levels. See Allen's Post Hearing Brief. Furthermore, as also therein discussed, 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. All of this belies the VarQ non-contextual alleged protections asserted by Makepeace.*

6. The Compat Parties' claim that alleged speculation based on fear is not basis for harm.

The whole Compact process has been demonstratively shown in the filings and testimony presented in this court to be based on intimidation, fear, fraud, overreach, collusion, favours traded, non-arm's length negotiations, and to be both unfair and decidedly inadequate. What has been will continue to be, and is thus not speculative by any definition but historical record through to this very moment and thus simple fact to any rational thinking person. Too assert that more harm is naught but speculation is either willful fraud and deceit, or faith in the impossible.

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

The Compact Parties allege that Objector Allen's wells are protected from injury by the Flathead Compact by existing legal standards. They base this allegation on a few arguments: 1. The

CSKT must comply with state law to develop a use close to Objector Allen's water rights. 2. Objector Allen's water right is not subject to call. Neither one of these arguments provides protection to Objector Allen from material injury.

The fact that Objector Allen's water right is allegedly not subject to call provides no protection. See numerous documents in the docket ever since her first objection wherein Allen has delineated this. See also, Exhibit 14, wherein the DNRC defines Allen in ***bolded italics*** as an ***irrigator***, which puts her under Compact call parameters. Allen is not protected from call.

As to the other argument, the outcome of Flathead Lakers belies the erroneous nature of that. 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 ALLEN PROVED MATERIAL INJURY TO FISHING RIGHTS

This Court, has held that Allen may prove material injury, based on what the Compact actually says "or other protectable interest and evidence of injury to those rights and interests." One of the "protectable interests" that Objector Allen proved to be 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. Post Hearing Brief pp.11-13.

The Compact Parties aver that the only material injury that ought be considered by the Court is injury to Objector Allen's water rights. This is contrary to the specific language of the Court's May 5, 2025 order which specifically incudes "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 Post Hearing 15 Brief, 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 Allen'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

As has happened all through this process, the Compact Parties have conflated and transmogrified issues out of reality and out of context rather than simply admit the facts. There has been a superabundance of egregious malfeasance, fraud, overreach, conflict of interest (including a non-jury court of one of the Compacting Parties hearing and ruling on the matter), and collusion.

The Compact Party's employee expert witness did not have more than cursory awareness, and was shown to even have inaccurate awareness (ignorance), of the hydrology of Allen's groundwater well's aquifer and surroundings, and impeached himself twice. When he wasn't simply evading accurate expert answers, his opinions were of necessity admitted lay speculation.

For all the above stated reasons and many more previously elucidated, the Court should find material harm and void the Flathead Compact.

DATED this 19th day of September, 2025,

/s/ Vivian Allen
Vivian Allen
Objector
Pro Se

CERTIFICATE OF SERVICE

I, Vivian Allen, do hereby certify by signature above that on the 19th day of September, 2025, I served a true and correct copy of the foregoing document upon the persons named below, at the addresses set out below, by emailing, a true and correct copy of said document.

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