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

\* \* \* \* \*

**CASE NO. WC-0001-C-2021**  
**EVIDENTIARY HEARING No. 3**  
**(Mission and Jocko Irrigation Districts)**

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**COMPACT PARTIES' POST-HEARING OPENING BRIEF**  
**REGARDING MATERIAL INJURY HEARING No. 3 [Mission/Jocko]**

Pursuant to the governing orders,<sup>1</sup> the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States (collectively, “Compact Parties”), submit this opening post-hearing brief in connection with the material injury hearing held on April 23, 2025 regarding the Mission Irrigation District and Jocko Irrigation District (collectively, “Mission/Jocko” or “the Districts”). As the Compact Parties explain below, Mission/Jocko have not carried their 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 (“Motion”), and approve the CSKT Compact, §§ 85-20-1901, -1902, MCA.

The evidence demonstrates that Mission/Jocko’s primary allegation of material injury—curtailment of the Flathead Indian Irrigation Project’s (“FIIP” or “Project”) annual irrigation season by the Bureau of Indian Affairs (“BIA”)—is not a result of the Compact, but rather the application of unrelated federal laws and regulations. Mission/Jocko’s speculation of potential loss of production or cumbersome appeals of future implementation errors by the BIA do not demonstrate material injury by operation of the Compact.

## **I. MATERIAL INJURY LEGAL STANDARD**

As this Court and the Montana Supreme Court have held, to demonstrate material injury from the Compact, an objector here must establish, through admissible evidence, a concrete injury to water rights or other real property interests caused by operation of the Compact. *See 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, ¶¶ 34-35, 382 Mont. 46, 364 P.3d 584 (rejecting argument that Objectors had “property interest in future appropriations or changes in use” harmed by a Compact’s basin closure provision); *United States Fish and Wildlife Service, Bowdoin National Wildlife Refuge - Montana Compact*, No. WC2013-04, 2015 WL 9699486, at \*10 (Mont. Water Ct., Oct. 07, 2015) (determining material injury “requires injury to water rights or real property interests” rather than difference of opinion over correct government policy).

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<sup>1</sup> *Case Management Order No. 9*, Dkt. No. 2602.00 (May 16, 2025); *Court Minutes and Order Setting Deadlines*, Dkt. No. 2608.00 (July 11, 2025); and *Order Modifying Briefing Schedule*, Dkt. No. 2628.00 (August 13, 2025).

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) (“*Forest Service Order*”) (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.”). Additionally, injury stemming from the consequences of the prior appropriation system cannot establish material injury. *Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00, at 75-76 (April 1, 2025) (“*Compact Validity Order*”) (“[N]either the Water Court nor the Montana Supreme Court ever has held that confirmation of tribal reserved rights with senior priority dates alone is sufficient material injury to disapprove a compact.”). Indeed, even if the Districts had demonstrated material injury, such perceived injury is negated by the Compact’s provisions that give FIIP irrigation uses a higher priority than or shared priority with pertinent Tribal instream flow water rights, which provide the Districts’ irrigators with protections that could not be achieved in an adjudication. Section 85-20-1901, MCA, Arts. IV.C.1(irrigation use ahead of target instream flows in priority scheme governing FIIP); IV.E (shared shortages provisions among instream flow and FIIP uses).

## **II. THE DISTRICTS FAILED TO ESTABLISH MATERIAL INJURY**

At their hearing, the Districts’ evidence failed to show a concrete, non-speculative injury to a water right or other property interest that stems from the operation of the Compact. Indeed, the Districts offered no evidence that they own any water rights or other real property rights, let alone that such were materially injured by operation of the Compact.

Instead, the Districts relied on the nine-page pre-filed written direct testimony of Ray Swenson, Chairman of the Mission Irrigation District, Dkt. No. 2378.00, along with three reference exhibits depicting the geography of the Project and the respective Districts it serves. Following cross-examination of Mr. Swenson, Mission/Jocko offered no re-direct examination. Thus, the entirety of the Districts’ evidence pertaining to material injury by operation of the Compact is contained within the four corners of the written direct testimony of Swenson.

**A. The Districts' Complaints of Curtailment Due to "Flushing Flows" Are a Result of Unrelated Federal Law and Regulations, Not the Compact**

Swenson testified that in 2021, Project irrigation deliveries were not available in mid-May and that he understood this to be the result of "flushing flows." Dkt. No. 2378.00, at 6-7, Resp. to Qs. 28-32. He did not, however, testify that either such curtailment or "flushing flows" were related to any particular provision of the Compact. On cross-examination, Swenson admitted that 2021 was an extremely dry year. Hearing Tr. 12:21-23, April 23, 2025 ("Tr."). He further admitted that while the irrigation season is broadly set to begin on April 15, the actual start date is influenced by several factors such as snowpack, runoff, spring reservoir levels, rain, canal capacity, and conditions of the Project's diversion works. Tr. 13:18-14:17. Swenson further acknowledged that the BIA operates the Project under the 2008 Operation and Maintenance Guidelines Flathead Indian Irrigation Project "Operation Manual" which considers these same factors for the distribution of available water. Tr. 16:2-17:21; Hearing 3\_Compact Parties Ex 02\_074.

Swenson also acknowledged that the BIA operates the Project under the 2018 Biological Opinion on the Flathead Indian Irrigation Project on Bull Trout and Critical Bull Trout Habitat, Hearing 3\_Compact Parties Ex 03 ("Biological Opinion"). Tr. 18:14-19:4. The Biological Opinion requires the BIA, as the operator of the Project, to conduct channel maintenance flows. Tr. 19:11-14; Hearing 3\_Compact Parties Ex 03\_067. The Operation Manual expressly contemplates providing channel maintenance flows, subject to the availability of necessary water in the early season. Tr. 17:3-7; Hearing 3\_Compact Parties Ex 02\_049, 074. Finally, Swenson admitted that there is no provision in the Compact requiring "flushing flows" and that any such requirements stem from the Biological Opinion. Tr. 19:15-19. As this Court has held, "to the extent any Objector has a dispute with the way FIIP is administering water to persons within its service area, those disputes may be addressed through the FIIP dispute resolution process, which the Compact does not modify." *Compact Validity Order*, at 49, *referencing* 25 C.F.R. Part 171 (BIA regulations governing Indian irrigation projects); *see also* Hearing 3\_Compact Parties Ex 02\_170 (171.23). In sum, intermittent mandated channel maintenance flows on parts of the Project that preexist the Compact are not a material injury.

**B. The Districts Are Not Materially Injured Because Their Alleged Injury Relies on Speculation of Future Compact Implementation or Incorrect Legal Conclusions**

Mission/Jocko's remaining complaints are based on legal issues that the Court has

addressed or that otherwise rely purely upon speculation. For example, Swenson speculated that shortened irrigation seasons might result in lost production, Dkt. No. 2378.00, at 7, Resp. to Q. 34, but offered no testimony identifying any Compact provision that might somehow shorten irrigation seasons beyond what is already contemplated by applicable federal regulations.

Similarly, Swenson also ventured that “the change in efficiency won’t be calculated correctly” but acknowledged that the Districts would have a right to appeal those decisions, thus negating any claim of material injury. Dkt. No. 2378.00, at 8-9, Resp. to Q. 36 (apparently referencing the calculation of Reallocated Water, § 85-20-1901, MCA, Arts. II.56, II.58; IV.C.3.b.iii, IV.D.1.b; App. 3.5(8-9)). The Districts did not overcome their reliance on speculation with Swenson’s suggestion that it might be expensive to pay consultants and lawyers in the event of some possible future appeal of BIA’s mismanagement of FIIP. Dkt. No. 2378.00, at 9, Resp. to Q. 37; *Forest Service Order*, 2012 WL 9494882, at \*10 (fear of potential future litigation as necessary to protect objectors’ rights is a cost of living in this country). And any appeals of BIA’s decisions about FIIP exceed the scope of this proceeding. *See Compact Validity Order* at 49. Nor did the Districts overcome their reliance on speculation with testimony about the uncertainty over the venue of a possible future appeal, Dkt. No. 2378.00, at 9, Resp. to Q. 37, as this legal issue has been resolved by the Court, *Compact Validity Order* at 71-73.

Finally, while Swenson speculated that hydrological impacts of changes in irrigation methods might result in lost irrigation water, he failed to testify how those changes have any connection to the Compact. Dkt. No. 2378.00, at 9, Resp. to Q. 36.

The Districts have not met their burden to demonstrate how the Compact harms their water rights or causes them any other material injury.

### **III. CONCLUSION**

For the foregoing reasons, the Compact Parties request that the Court dismiss all objections, including the Districts’, and approve the CSKT Compact.

Respectfully submitted this 22nd day of August, 2025.

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/s/ Melissa Schlichting  
Attorney for the Confederated Salish & Kootenai Tribes

/s/ Molly Kelly  
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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Post-Hearing Opening Brief* for Hearing No. 3 was served by email to counsel for the Objectors and email to counsel for the Compact Parties as set forth below this 22<sup>nd</sup> day of August, 2025.

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