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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. 1**

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**COMPACT PARTIES' POST-HEARING OPENING BRIEF**  
**REGARDING MATERIAL INJURY HEARING No. 1 [Sego and Slack]**

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 22, 2025, regarding William Sego and Bill & Irene, LLC (“Sego”) and Grace Slack (“Slack”) (collectively, “Objectors”). As the Compact Parties explain below, Objectors 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.

### **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).

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 Compact*”) (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

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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. 2626.00 (August 13, 2025).

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.”). Finally, the Flathead Indian Irrigation Project (“FIIP”) is operated by the Bureau of Indian Affairs (“BIA”) and complaints concerning the BIA’s operational decisions on FIIP may be appealed under applicable federal regulations as they are not part of the Compact. *Compact Validity Order* at 49.

## **II. OBJECTORS FAILED TO ESTABLISH MATERIAL INJURY**

At their hearing, the evidence offered by Sego and Slack failed to show a concrete, non-speculative injury to a water right or other property interest that stems from the operation of the Compact. Specifically, Sego and Slack testified through pre-filed written direct testimony that they could suffer injury in the future from water administration by the Flathead Reservation Water Management Board (“Board”) and uncertainty as to venues for potential future appeals of Board decisions. This testimony is both speculative and contrary to a resolved legal issue. *See Compact Validity Order* at 63-73. Objectors further claimed in their pre-filed testimony that they suffered injury in 2022 and could suffer injury from a limited irrigation season and channel maintenance or “fish flows.” That testimony did not, however, establish that the cause of the alleged injuries in 2022 was a result of the Compact. Indeed, neither Sego nor Slack pointed to any specific provision of the Compact that supposedly caused their injuries or that might cause injury in the future. The Compact Parties’ witnesses, by contrast, testified unequivocally that no implementation of the Compact instream flows occurred in 2022 or before that could have caused the alleged injuries to the Objectors. As a result, Sego and Slack failed to prove by preponderance of the evidence that their alleged harms were in any way caused by the Compact.

### **A. The Annual Length of the FIIP Irrigation Delivery Season Is Not a Result of the Compact Nor the UAMO**

Using identical language in their written direct testimony, both Sego and Slack claimed that the Board and the Compact Implementation Technical Team (“CITT”) have “begun to exercise authority and make determinations regarding operations of the FIP [sic] that have resulted in reduced irrigation deliveries to my property.” Dkt. No. 2385.00 at 9:13-16; Dkt. No. 2386.00 at 12:2-5. Objectors claim that these determinations arise from unspecified language in

Art. III.C of the Compact<sup>2</sup> that provides the “Tribes have the right to water that is supplied to the [FIIP],” and that in 2022 the FIIP irrigation season began late and ended early causing material injury. Dkt. No. 2385.00 at 9:19 – 10:2; Dkt. No. 2386.00 at 12:8-19. Objectors implied that, despite the plain language of the Compact, Arts. II.32 & III.C.1.a, the Tribes somehow used the FIIP Water Use Right to fulfill instream flows.

Sego and Slack failed to establish material injury by operation of the Compact with these allegations because the operation of FIIP—and the determination of FIIP’s start and stop of the irrigation season—are not governed by the Compact. As the Court has held, “[t]he Compact defines the ‘FIIP Water Use Right’ as the water right dedicated to use by FIIP and FIIP irrigators, primarily for irrigation. Compact, Art. II.32.” *Compact Validity Order* at 48. The cherry-picked suggestion by Sego and Slack, that the Tribes (or the Board or the CITT) might use the FIIP Water Use Right “for purposes other than irrigating” the Sego and Slack property, is incorrect and ignores critical language from the Compact regarding such “purposes.” Dkt. No. 2385.00 at 9:19-20; Dkt. No. 2386.00 at 12:8-9. Compact Article II.32 expressly provides that the FIIP Right is “dedicated to use by the FIIP and FIIP irrigators and includes uses of water for irrigation and Incidental Purposes allowed by FIIP through water service contracts.” Incidental Purposes is a defined Compact term that refers to “purposes incidental to irrigation, including but not limited to Rehabilitation and Betterment, and lawn and garden purposes allowed by the FIIP through water service contracts.” Art. II.42. *See also Compact Validity Order* at 48 n. 40. The Compact further provides that the Tribes’ FIIP water right must be used for FIIP purposes in the volume and flow rate amounts specified in the FIIP abstracts. Art. III.C.1.a. The FIIP Water Use Right is not the source for the Tribes’ instream flow rights which are provided under separate provisions of the Compact. *See e.g.*, Art. III.C.1.d.

The Compact does not proscribe FIIP operations, such as when FIIP should start or stop delivering water to customers. Despite Grace Slack’s testimony to the contrary, Hearing Tr. Vol. 3, 20:18-21, FIIP is operated by the BIA—not the Tribes, the CITT, or the Board. *Compact Validity Order* at 4; Hearing Tr. Vol. 2, 32:9-10 & 41:6-10. The Compact defines the Project Operator as “the entity with the legal authority and responsibility to operate the Flathead Indian Irrigation Project.” Art. II.55. The Compact acknowledges certain responsibilities of the Project

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<sup>2</sup> This reference includes the entire on-Reservation Tribal water right and spans six pages in Preliminary Decree, App. 1 (pp. 9-15).

Operator but does not dictate FIIP's internal operations.<sup>3</sup>

Indeed, Objectors' claims that the Compact is somehow interfering with their FIIP deliveries are expressly rejected by § 3-1-101(1) of the Unitary Administration and Management Ordinance ("UAMO") which provides a clear demarcation between waters used within FIIP and waters that are outside FIIP:

The enforcement powers set forth in this Chapter apply to the resolution of disputes between Appropriators who are not served by the Flathead Indian Irrigation Project, or between any Appropriators who are not served by the FIIP and any water user(s) or holders of Existing Rights, if any, whose use of water is served by the FIIP. Disputes exclusively between or among users whose water is delivered by the FIIP shall remain subject to the oversight of the Project Operator and the Enforcement provisions of this Ordinance shall not apply. *The powers and duties set forth in this Chapter, as they extend to uses of the Tribal Water Right within the FIIP, extend only to the resolution of disputes concerning the delivery of water to FIIP diversion facilities and shall not extend to the administration of that water in FIIP facilities or on lands served by the FIIP, which shall remain subject to the oversight of the Project Operator.*

§§ 85-20-1902, 3-1-101(1), MCA (emphasis added).

The BIA operates FIIP pursuant to the 2008 Operation and Maintenance Guidelines Flathead Indian Irrigation Project ("Operation Manual"). Hearing 1\_Compact Parties Ex02. Under the Operation Manual, the FIIP irrigation season for the Mission Valley where Objectors' property is located is broadly set from April 15 to September 15, but multiple factors influence the actual start and end dates of irrigation deliveries within the overall authorized period of use. These include the overwinter reservoir levels, when reservoirs are expected to fill in the spring, the climate (total snowpack, when the snowpack melts, spring rainfall), channel maintenance flows, irrigation canal transmission losses. Hearing 1\_Compact Parties Ex02\_028-034; 068-075;

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<sup>3</sup> The Project Operator—who is advised by the CITT on implementing operational improvements and adaptive management, Art. II.24—is responsible for practices that improve water storage and allocation, Art. II.52; relinquishes the right to make a call against certain water rights under consensual agreements, Art. III.G.3; should implement flow schedules under App. 3.4 for the tribal instream flows and if not done, they may be enforced, Art. IV.C.3.v; measures Farm Deliveries, Art. IV.D.1.e.i; issues Delivery Entitlement Statement, Art. IV.D.2; diverts streamflow to meet FIIP needs, Art. IV.E.3.a; determines use of carryover storage, Art. IV.E.5.d; decisions of Project Operator may be appealed under federal regulations, Art. IV.G.5.d.ii; receives a portion of net revenues from Mission Valley Power, Art. IV.H.3; and is not under the authority of water commissioners appointed by the Board for water rights administration, Art. IV.I.5.d.ii.

Hearing Tr. Vol. 2, 20:22-23; 22:3-15. Accordingly, Objectors established no material injury due to shortened irrigation seasons because they have no entitlement to any specific length of irrigation season.

FIIP's annual delivery determination in 2022 occurred amidst such factors. Tribal hydrologist Mr. Seth Makepeace testified that a review of publicly available hydrologic data showed that 2022 was a median or middle year of a 32-year period in the Mission Valley, Hearing Tr. Vol. 2, 55:9-19; 56:11 – 57:22; 58:20 – 59:17, and the start of overall irrigation season in 2022 was well within the observed range of variability. *Id.*, 60:7-14. That same data, measured by federal agencies indicated limited spring water availability in the Mission Valley, contributing to a delayed start of canal operations in the Mission A Canal which serves Objectors. *Id.*, 60:15-23. On cross examination, Mr. Makepeace elaborated that “runoff volumes of the natural flow were 55 percent of average” for April and “between 40 and 50 percent in the month of May.” *Id.*, 76:18-23. With the slow release of the snowpack and little spring rain, there was insufficient water to start irrigation deliveries. *Id.* 76:23 – 77:9. Mr. Makepeace further testified that with respect to Sego's Moise property, publicly available hydrologic data demonstrated that 1,150 acre feet of irrigation return flows passed through gauges below Sego's Moise property over the two-month period at the end of the irrigation season. *Id.*, 61:14-18; 63:21 – 64:16. Because available water in storage is a factor used by the BIA to determine irrigation season start dates, Hearing 1\_Compact Parties Ex02\_074 & 088 & Hearing Tr. Vol. 2, 22:3-15, depletion of irrigation water at the end of the prior season (2021) could have contributed to a later start date in the Moise area, along with the delayed snowpack melt and lack of spring rains that affected deliveries more generally.

Moreover, claims of a shortened irrigation season are not a result of the Compact's operation because the Compact does not modify either the irrigation season or the factors that influence FIIP's annual seasonal determinations. To the contrary, the Abstracts contained in Compact Appendix 5 provide for periods of diversion from either April 15 to September 15 or from January 1 to December 31. Preliminary Decree, App. 2, pdf pages 2 – 64. These are the same general seasons of use for irrigation found in the 2008 Operations Manual. Hearing 1\_Compact Parties Ex02\_028-034. Nothing in the Compact limited the determination of the FIIP irrigation seasons.

Similarly, Objectors' allegations of a shortened irrigation delivery period were not a result of the Compact's implementation. Casey Ryan, a long-time employee of the Tribes who worked closely with FIIP and the Compact and was the Tribes' representative to the CITT, testified squarely that no implementation of Compact instream flows under the Compact occurred in 2022. Hearing Tr. Vol. 2, 78:13-21; 85:17 – 86:3; 86:20 – 87:6. Similarly, Seth Makepeace, who served as the Tribes' representative to the CITT from 2015 to 2021, *id.*, 11:19 – 12:12, testified that the CITT took no actions relating to FIIP operations between 2015 and 2021. *Id.*, 32:4-8; 35:19 – 36:14.

Objectors failed to establish by preponderance of the evidence that any reduced FIIP deliveries they experienced in 2022 were caused by the Compact. Rather, the only evidence presented at the hearing was that no Compact implementation activities occurred during that time period and that when FIIP started irrigation was consistent with past practice, the climatic situation, and the Operations Manual. Any assertion by Objectors that the FIIP water delivery period could be limited in the future is speculative and not supported by any provision of the Compact.

**B. Objectors' Complaints Related to Channel Maintenance or "Fish Flows" Are a Result of Unrelated Federal Law and Regulations, Not the Compact**

Sego testified that decisions of the Tribes or implementing Compact instream flows could result in road and structure washouts and damage from high stream flow levels, which "already happened" on his property because "water was used instead for fish or channel flows instead of fulfilling the irrigation water needs of farmers and ranchers." Dkt. No. 2386.00 at 12:21-28. Slack testified that instream flows "could result in the erosion and undercutting of roads, diversion structures, and crossing..." Dkt. No. 2385.00 at 10:5-8. These allegations do not demonstrate any material injury from the operation of the Compact for three reasons. First, the assertion is unspecific and speculative. Beyond Sego's vague assertion, that this damage "already happened" in 2022, both Objectors' claims that high volume flows might at some point in the future cause injury is purely speculative and Objectors cannot use them to demonstrate material injury. *Forest Service Compact*, 2012 WL 9494882, at \*10. And neither Objector identified any specific provision of the Compact that required flows large enough to cause the damage they described, because no such provision exists.

Second, the alleged present or future harm from high flows is not a feature of the Compact, but rather of FIIP's operations. The BIA operates FIIP pursuant to its 2008 Operations

Manual which prescribes channel maintenance flows under certain conditions. Hearing 1\_Compact Parties Ex 02\_049, 074. Additionally, as the operator of FIIP, the BIA must comply with the 2018 Biological Opinion on the Flathead Indian Irrigation Project on Bull Trout and Critical Bull Trout Habitat, Hearing 1\_Compact Parties Ex 03 (“Biological Opinion”). The Biological Opinion requires the BIA to conduct channel maintenance flows. Hearing 1\_Compact Parties Ex 03\_047, 048, 061, 067, 109, 113.

At the hearing, Mr. Ryan testified that the “Biological Opinion requires that the Flathead Indian Irrigation Project implement the bankfull discharge flows or channel maintenance flows. And so as part of my role as tribal hydrologist, the Biological Opinion calls for the FIIP or the BIA to solicit the expertise of the Confederated Salish & Kootenai Tribes where appropriate in implementing their responsibilities under the Biological Opinion.” Hearing Tr. Vol. 2, 87:18 – 88:3. Mr. Ryan further testified that during his tenure with the Tribes (2017-present) the only time the BIA carried out channel maintenance flows under the Biological Opinion was during the 2022 irrigation season. *Id.*, 88:10 – 89:19. This is the only time that Mr. Sego identified any high flow events affecting his ranch.

Third, any harm from FIIP operations is distinct from the Compact and its administration. As the 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 (*citing* 25 C.F.R. Part 171 (BIA regulations governing Indian irrigation projects)). *See also* UAMO, § 3-1-101(1) (administration of water rights under the Compact does not include distribution of waters by FIIP).

In sum, intermittent mandated channel maintenance flows on parts of the FIIP is a regulatory requirement that is outside of and preexists the Compact and therefore cannot constitute a material injury in these proceedings.

**C. The Board’s Authority to Administer Water on the Reservation and How the Board’s Future Decisions May Be Resolved on Appeal Do Not Constitute Material Injury**

Objectors’ identical written testimony expressing a general objection to being subject to the authority of the Board for water rights administration and whether future Board decisions might be subject to appeal in a State court, Dkt. No. 2385.00 at 8:1 – 9:1; Dkt. No. 2386.00 at 10:18 – 11:28, cannot constitute material injury. These are the issues that Objectors raised last



year questioning the legality and authority of the Board, which this Court has rejected. *Compact Validity Order* at 63-73. The objections opposing the Tribes' or the State's exercise of their respective jurisdiction on the Flathead Indian Reservation, which is at bottom an issue of law that is controlled by legal precedent, are entirely outside the Compact.

### **III. CONCLUSION**

For the foregoing reasons, the Compact Parties request that the Court dismiss all objections, including Sego's and Slack's, and approve the CSKT Compact.

Respectfully submitted this 22<sup>nd</sup> day of August, 2025.

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Post-Hearing Opening Brief* for Hearing No. 1 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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