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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

**Post Evidentiary Brief of Mission/Jocko Irrigation Districts
Evidentiary Hearing No. 3**

Comes now the Mission and Jocko Irrigation Districts (“Districts”), by and through their attorneys, and respectfully submit their Opening Post-Evidentiary Hearing Brief.

A.) The Compact Materially Injures the Members of the Mission and Jocko Irrigation Districts by Depriving Them of Water Earmarked for Their Use by the United States

There are approximately 15,000 acres of land within the boundaries of the Mission Irrigation District. Direct Prefiled Testimony of Ray Swenson, Dkt No.2378, at p. 4. Jocko Irrigation District encloses about 7,000 acres. *Id.* All of this land is irrigated. Indeed, lands not benefitted by irrigation supplies are excluded from the boundaries of any irrigation district, because it is not the intent of the Act to do other than provide for irrigation. *See* MCA 85-7-104, 85-7-107.

Irrigation is central to the landowners within the the Mission and Jocko Districts. The farms and ranches within the Districts are not particularly large by Montana standards, and accordingly preserving the economic vitality of agriculture on this scale requires relatively intensive production. An adequate water supply is a foundation of that resilience. See Prefiled Swenson, at p. 9.

At one time, the United States acted as if it understood this reality. When formerly reservation lands were made available for entry by non-Tribal members, the Flathead Irrigation Project was authorized by Congress to provide water supplies for those lands pursuant to Public Law 60- 156, 35 State 441 (1908). Public Law 58-159, 33 State 302, (1904) had previously provided for the survey of Reservation lands, and their allotment to members of the Tribes. The remaining surplus lands were earmarked for entry by members of the public. *Id*

Public Law 60-156 provided that those seeking ownership of any of those surplus lands must reclaim them for agricultural purposes, and of course pay for those lands at designated rates. In addition to ownership of a parcel of land, Congress assured such families seeking a life in farming and ranching "a water right" to irrigate their new holdings. Entrymen were required to pay for their water right a proportionate amount of the construction charges attendant to the new reservoirs, ditches, canals, and other diversion works required for the exercise of their water right. *Id*. Members of the Tribes that were allocated parcels were not required to pay these construction charges for the "water required to irrigate such lands," *Id*. and all users were required to pay their share of operation and maintenance

expenses. *Id.*

The diversion system underwritten by Congress was as broad as its promises. As the exhibits to the prefiled testimony of Mr. Swenson show, the “as-builts” of the Flathead Irrigation Project reveal an elaborate network of canals and ditches calibrated to provide water for those who entered the offered lands with the confidence and hope necessary to forge a living in agriculture. Exhibit B, C, and D.

Congress understood at the time that ditches and canals were not enough to fulfill its promises. The amount of water required to irrigate the lands that it transferred to entrymen was simply not available in the sources of supply after spring snowmelt runoff. To answer to that deficit, the United States constructed a smattering of reservoirs to store water during runoff and the non-irrigation season. These stored waters were then available for release during summer and early fall months to answer to the requirements of crops on the acreages the United States envisioned when it planned the Project.¹

As explained by Mr. Swenson, the Project in his early years supplied water in a manner commensurate with the promises of the United States. The Mission and Jocko Districts diverted water for irrigation with a period of diversion from approximately April 15th to October 15th. Prefiled Testimony at p. 7.. see generally Rule 16(a)(1), WR.C.E.R. (Describing presumptively correct periods of diversion.) To be sure, diversions at the tail ends of this period were sporadic, as they were on many occasions preempted by Montana’s weather. Colder springs or earlier winters meant water was not diverted until May, and it was shut off by October. *Id.*

¹ These storage rights are reflected by the abstracts for statements of claim that name a reservoir as a part of the diversions system.

Nonetheless, the Districts and their members got what they paid for under their obligations to repay the United States for the diversion works. The resulting water supplies had sustained their agricultural production, and frameworked the communities that these farmers and ranchers created.

Since the formation of the Districts under Montana law in the 1920's, the individual obligations assessed against each entryman for the diversion works was supplanted by contracts between the United States and each District. Under these contracts, the aggregate unpaid balances of each district's members became the obligation of the Districts themselves. Prefiled Testimony at pp 4-5. This arrangement benefitted the United States as the ad valorem taxing powers of the districts secured the debts of their members, and alleviated any requirement on the part of the United States to collect any obligations outstanding at any given time. *Id.*

The debts of the Mission and Jocko to the United States have now been fully paid and retired. Prefiled Testimony at p. 5. Accordingly, each member of the Districts has now fully complied with all the requirements identified by the United States for the water right and water supplies promised to that entrymen by the United States.

From the time of the adoption of the so-called interim instream flows by the BIA, diversions for irrigation have not commenced until around May 15th, and they do not survive after September 15th. *Id.*, at p. 7. Mr. Swenson frankly acknowledges that accommodating these instream flows has cost the members of Mission and Jocko Districts lost production on occasion. *Id.* at p. 6. Nonetheless, he notes that the members of the Districts and their families live on the Reservation as well, and that a majority of them willingly tolerate this foregone production in order to sustain a viable fishery. *Id.*

The Compact threatens to rewrite the rules, and abrogate the promises made to the entrymen by the United States that were calculated to encourage the settlement of the very lands now owned by the members. As explained by Mr. Swenson, in 2021, as spring snowmelt runoff was well underway, the diversions for the Mission and Jocko remained shuttered in mid-May. As Mr. Swenson is on the board of directors of the Joint Board of Control of the Mission and Jocko Districts, he became a focal point for the steadily increasing concerns and complaints of the farmers and ranchers within the Districts. As the United States had told neither District anything about any preemption of their diversions, before the complaints reached a crescendo Mr. Swenson went and talked with the Project Operator for the BIA, the CKST fish biologist, and CITT officials to identify what was happening. *Id.* at pp 6-7. He learned nothing of substance as to why the Mission and Jocko farmers and ranchers were being locked out, but he was advised that neither Mission or Jocko should anticipate any water under the Compact until the early part of June, and never beyond September 15th.

Neither the Mission nor the Jocko Districts have been able to commence irrigation until June since 2021.

This truncation of irrigation supplies is aggravated by the Compact's efforts to commandeer the storage bought and paid for by members of the Districts. See. Appendix 8 to Compact. As explained by Mr. Swenson, the Compact reallocates capacity in the reservoirs such that significant parts of stored waters are now earmarked for fishery purposes. *Id.* at p. 8.

These tandem results are the pincers that sound a death knell for the Districts. It is no answer to claim that the Compact expressly preserves the historic use of the Districts. As noted in Article II(36), "'Historic Farm Deliveries'" means the *aggregate annual volume* of water for

irrigation and Incidental Purposes on the FIIP that was delivered to all farm turnouts....” prior to the adoption of the Compact. (Emphasis added.)

Preserving any measure of volumetric use, however, whether calculated as a mean or median of historic deliveries, does not assure that the farmers and ranchers dependent upon that supply will be able to sustain the production that they made with their diversions giving rise to that computed volume. Stated another way, allocating water in July in amounts that offset the amounts historically available in May does not result in a supply that can sustain the same production.

Mr. Swenson explains why. Irrigation as a science and as a craft is all about providing the total consumptive needs of the crop, as divided by the on-farm efficiency of a particular irrigation system, so that this volume is available to the crops when they need water to sustain their viability or growth. In this context, Mr. Swenson notes that irrigation is less about watering crops than it is about filling the soil with its water-holding capacity to the depth of the root systems of the crop in order that the crop has what it needs when it needs it. *Id.* at p. 8.

This framework speaks beyond any common sense observation that it frustrates production if one waits for current demand for consumptive use requirements prior to initiating irrigation. Doing that assures lost production, or the outright loss of the crop, as it is ordinarily impossible to irrigate all of one’s land at the same time.

Sprinkler systems, while much more efficient than flood irrigation, aggravate this tension. As noted by Mr. Swenson, sprinkler systems are designed with application rates that provide water to irrigated acreage at rates that allow that crop to meet its peak consumptive use requirements in July and August by storing water in the soil profile in amounts earlier in the

irrigation season to answer to these peaks. *Id.* at 8. It is precisely for this reason the preempting diversions through May is so significant.

The members of the Mission and Jocko Districts are farmers and ranchers. As Mr. Swenson succinctly puts it, “(i)t is what we do and who we are.” Swenson Testimony at p. 6. “Unfortunately, agriculture exists at the margins any more, so lost production is inevitably a big issue for use.” *Id.*

Taking water relied upon by Mission and Jocko for generations and taking water promised them by the federal government in ways that further threaten the viability of their farms and ranches is material injury, and this Court should so find.²

B.) The Compact Creates Material Injury by Providing for Enhanced Instream Flow Rights Based on Unlawful Standards.

The Compact allocates funds to increase efficiencies within the Flathead Irrigation Project in ways that will result in material injury to other water users. The Districts acknowledge that they presented this glitch in their Motion for Summary Judgment, and that the Court did not sustain its position. The Districts incorporate their position again in this phase of the proceeding, because it relates to material injury as well, and they want to make a complete record.

To summarize, the Compact appears to suggest that when measures are taken to improve irrigation efficiencies, the amount of the increased efficiency will increase the size of the

² The Tribes deserve at least a rich sense of irony to hear the Mission and Jocko Irrigation Districts complain of promises made by the United States that are not fulfilled. However, there is enduring truth to the adage that in an eye for an eye world, we all end up blind.

instream flow right. For example, where a canal is diverting 100 cfs, and 40 cfs is lost by seepage and evaporative losses, piping the diversion would nominally save 40 cfs.

No one argues that this 40 cfs should not stay in the source of supply in the event of such a pipeline, where it eliminates the need for the diversion of this amount. The prohibition against diverting water not then needed is an enduring feature of the prior appropriation system, even where the then need is less than the decreed flow rate. *Cook v. Hudson*, 110 Mont. 263, 103 P.2d 137 (1946). As a result, these savings enhance instream flow in the sense that they will flow downhill, and remain in the source of supply absent diversions under other water rights.

This is not the same thing, however, as saying that this 40 cfs should be added to the instream flow rate in a way that this 40 cfs can now be exercised against other appropriators under the priority date of the instream right.

Water saving measures do not create water supplies. They displace them in some measure from where they otherwise would have been, and crucially for this purpose, when they otherwise appear in the source of supply. The priority system was developed not so much to allocate insufficient water as computed on an annual basis. Rather, the enduring problem in the West is that most of the water comes during the limited period of spring snowmelt runoff. Accordingly, while often in Montana priority dates are inconsequential during the runoff period, these same priority dates are critical during summer and fall months.

Given this context, it is not enough to simply determine that amount of water saved by the incorporation of any water savings measure, as contemplated by the Compact. Instead, the law requires an accounting of the historic destiny of that water.

For example, given the attenuated connection of ground and surface water, the water seeping from the canal in May may have induced recharge into the source of supply above some or all of the diversions of Jocko and Mission in July and August, and likewise for the diversions through the remainder of the irrigation season. The amount of the savings in those months is therefore not 40 cfs as a result of the pipeline, but rather that 40 cfs as reduced by the amount of water eliminated by that pipeline that otherwise would have recharged the source of supply or otherwise provided water to any part of the irrigated system. *See Swenson Testimony at p. 9.*

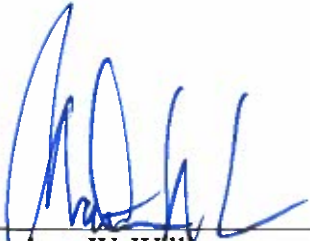
There is simply no principle in the Compact that gives effect to this necessary analytical framework. Indeed, the Compact in this regard exacerbates the frisson implicit in attempting to administer rights only within the Reservation, even though the rights as so expressed are intended to be given effect outside those boundaries. A user upstream need not respond to a call from a right framed by increasing entitlements by nominal measures of water savings where he is not subject to any proceedings purporting to define those entitlements.

All of these lacunae amount to material injury, as they threaten to take water from their lawful users.


C. The Compact Works Injury by Failing to Define a Court that Can Provide a Speedy Remedy afforded for every injury of person, property, or character.

The Compact fails to identify what if any Court is competent to review the decisions of the Board. The Districts acknowledge that they have presented this issue to the Court under the motion for summary judgment, and the Court did not sustain this position. Because the Compact does not define any eligible Court, it fails to answer to each Montana's individual right to a speedy remedy. Mont. Const. Art II, Section 16. Because this issue relates to material injury, see Swenson Testimony at p. 9, it is incorporated again in this filing to make a complete record.

Respectfully submitted this 22nd day of August, 2024.



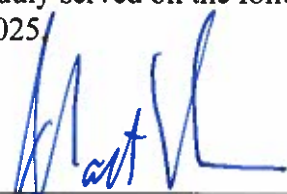
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Certificate of Service

I certify that a copy of the foregoing was duly served on the following at the noted address electronically this 22nd day of August, 2025.



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