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

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

**HEARING 3 – FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**INTRODUCTION**

The Court enters these Findings of Fact and Conclusions of Law to address evidence offered and admitted in the evidentiary hearing involving objectors Mission Irrigation District and the Jocko Irrigation District (collectively, “Mission-Jocko”). Mission-Jocko objected to the Water Rights Compact (“Compact”) entered into by and among the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (“Tribes”), the State of Montana (the “State”), and the United States of America on behalf of the Tribes (“United States”) (collectively, the “Compact Parties”).

On April 1, 2025, the Water Court issued an Order on Pending Motions Regarding Compact Approval (“Order on Motions”). (Doc. 2336.00). The Order on Motions concluded the Compact is fundamentally fair, adequate, and reasonable, and that the Compact conforms to applicable law. The Order on Motions shifted the burden to parties who filed objections to the Compact (“Objectors”), including Mission-Jocko, to prove

their interests are materially injured by operation of the Compact. Order on Motions, at 73.

Although the Order on Motions concluded the Compact Parties met their threshold burden as a matter of law, the Order on Motions provided the opportunity for any Objector to request an evidentiary hearing as to their burden to prove material injury. Most Objectors did not request a hearing, but several did, including Mission-Jocko. This Order addresses evidence of alleged material injury specific to Mission-Jocko.

### **PROCEDURAL BACKGROUND**

1. On June 9, 2022, the Water Court issued a Preliminary Decree based on a motion by the Compact Parties to incorporate the water rights described in the Compact into decrees for nine hydrologic basins in western Montana.<sup>1</sup> (Doc. 19.00). Issuance of the Preliminary Decree commenced a statutory period for potentially interested parties to file objections to the Compact.

2. Mission-Jocko filed an objection to the Compact on February 9, 2023. (Doc. 991.00).

3. On July 10, 2024, Mission-Jocko filed a Motion for Summary Judgment and Brief in Support. (Doc. 1815.00). The Court denied the motion as part of the Order on Motions.

4. After the Court issued its Order on Motions, Mission-Jocko filed a Request for Evidentiary Hearing on February 21, 2025. (Doc. 2125.00). The Court consolidated Mission-Jocko's hearing request as Evidentiary Hearing No. 3. The hearing took place on April 23, 2025, at the Missoula County Courthouse.

5. Pursuant to Case Management Order No. 6 (Doc. 2142.00), Mission-Jocko filed the pre-filed direct testimony of their witness Ray Swenson. (Doc. 2378.00).

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<sup>1</sup> The Preliminary Decree contains three appendices. Appendix 1 is the full text of the Compact as ratified by the Montana Legislature, codified in § 85-20-1901, MCA, and approved by the Secretary of Interior. Appendix 2 contains the abstracts that document the elements of the Tribal Water Right. Appendix 3 contains lists and abstracts of the Tribe's water rights co-owned with FWP. These three appendices are referenced as "Decree Appendix" or "Decree Appx." Decree Appendix 2 also includes several numbered appendices from the Compact. These are referred to as "Compact Appendix" or "Compact Appx."

Swenson was present at the hearing on behalf of Mission-Jocko and was available for cross-examination. The Compact Parties did not call any witnesses for this hearing. The testimony and exhibits admitted for this hearing are summarized in the Hearing 3 – Court Minutes. (Doc. 2522.00).

Following the hearing and preparation of a hearing transcript, each party filed post hearing briefs pursuant to the briefing schedule set by the Court. Mission-Jocko filed their opening brief on August 22, 2025. (Doc. 2651.00). The Compact Parties filed their opening brief the same day. (Doc. 2640.00). The Compact Parties (Doc. 2681.00) and Mission-Jocko (Doc. 2683.00) filed responses on September 19, 2025.

Based upon the record, the Court makes the following findings of fact and conclusions of law as to the issues raised in Evidentiary Hearing No. 3:

#### **FINDINGS OF FACT**

1. Mission-Jocko are not parties to the Compact.
2. The Mission Irrigation District and the Jocko Irrigation District both are located within the boundaries of the Flathead Reservation. The Mission District covers about 15,000 acres. The Jocko District covers about 7,000 acres.
3. Mission-Jocko do not currently deliver any water within the Flathead Indian Irrigation Project (“FIIP”). (Agreed Facts, ¶ 1).<sup>2</sup> Mission-Jocko testified that they receive water through the Flathead Indian Irrigation Project (“FIIP”) delivery system.<sup>3</sup>
4. The United States Bureau of Indian Affairs (“BIA”) operates the FIIP water delivery system. The FIIP system includes canals, diversions, reservoirs, and other infrastructure. BIA follows a set of Operation and Maintenance Guidelines to guide its FIIP operations. (H-3 CP Ex. 2).<sup>4</sup>
5. The water right abstracts for FIIP incorporated into the Compact identify an irrigation period use as April 15 to September 15. (Compact, Appx. 5 – water right nos.

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<sup>2</sup> The agreed facts are contained in the Hearing 3 Prehearing Order. (Doc. 2494.00).

<sup>3</sup> Ray Swenson’s testimony erroneously refers to FIIP as the “Flathead Irrigation Project.”

<sup>4</sup> Exhibit references are to the hearing number (H-1) and either the Compact Parties (“CP”) or Mission-Jocko (“MJ”), followed by the exhibit number.

76L 30052930, 76L 30052931, and 76L 30052932). Under the terms of the Compact, each of these water rights have July 16, 1855 priority dates. The Compact refers to these three water rights collectively as the “FIIP Water Use Right.”<sup>5</sup>

6. The FIIP water delivery system operations also are subject to the provisions of a Biological Opinion that specifies measures to protect bull trout listed as a threatened species under the Endangered Species Act. The Biological Opinion resulted from consultation with the United States Fish and Wildlife Service. (H-3 CP Ex. 3). Mission-Jocko’s witness Ray Swenson testified that he is aware the FIIP is operated in accordance with the Biological Opinion. (H-3 Tr. 18:14-18).<sup>6</sup>

7. Swenson testified that in 2021 water was not available to the districts until after the middle of May even though it historically had been available by this date. Swenson testified that he raised this concern with the BIA in connection with BIA’s FIIP operations. (Doc. 2378.00, at 6).<sup>7</sup>

8. On cross-examination, Swenson acknowledged that a variety of factors may affect the dates on which water deliveries begin. Some of the factors include snowpack levels, spring runoff, spring reservoir levels, rainfall, canal capacity, and canal maintenance. (H-3 Tr. 13:18-14:18).

9. Swenson also identified several concerns about water management. He observed what he understood to be “flushing flows,” which were springtime instream flows for the benefit of bull trout. (Doc. 2378.00, at 7). Swenson testified he understood the water source for these flows to either be water released from a storage project or water that would otherwise be stored during spring runoff. Swenson stated Mission-Jocko historically had paid some of the costs for construction of these storage projects. (Doc.

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<sup>5</sup> The Compact defines this term as “the water right set forth in Article III.C.1.a that is dedicated to use by the FIIP and FIIP irrigators and includes uses of water for irrigation and Incidental Purposes allowed by the FIIP through water service contracts. This water right is the source for the entitlement to delivery of available irrigation water for assessed parcels as provided by Article IV.D.2.” Compact, Art. II.32.

<sup>6</sup> All transcript references (“H-3 Tr.”) in this document are to the page and line numbers of the Evidentiary Hearing No. 3 written transcript.

<sup>7</sup> Citations to the prehearing testimony (Doc. 2378.00) are to the page number of the testimony, not to the pdf page number.

2378.00, at 8). Swenson also testified that his understanding was the flushing flows are related to the Biological Opinion. (H-3 Tr. 19:15-19).

10. Swenson identified concerns with water delivery efficiency improvements. He testified that lining canals and replacing flood irrigation with sprinkler irrigation results in less water infiltrating into the groundwater system, resulting in less water available later in the irrigation season.

11. Mission-Jocko did not appeal any decision about the operation of the FIIP during the 2022, 2023, and 2024 irrigation seasons as provided for in 25 C.F.R. Part 171. (Agreed Facts, ¶ 2).

## CONCLUSIONS OF LAW

### *Standard*

1. The standard followed by the Court when reviewing a compact requires an objector to prove the objector's interests are "materially injured" by "operation of the Compact." *In re Crow Water Compact*, 2015 MT 353, ¶ 18, 382 Mont. 46, 364 P.3d 584. To meet this standard, an objector must (1) identify a legally protected interest, (2) prove material injury to that interest, and (3) establish a link between the proven injury and an operative provision of the Compact. This standard requires the objector to meet a "heavy burden" to prove the Compact is unreasonable as applied to the objector. *Id.*

### *Alleged Modifications to Water Delivery Season*

2. Mission-Jocko raises three arguments to support their claim of material injury. First, Mission-Jocko argues the Compact has resulted in FIIP water deliveries beginning later and ending earlier during the irrigation seasons. Mission-Jocko contends the shortened season deprives members of the districts from receiving water they historically received.

3. Mission-Jocko's first argument does not identify material injury to an interest caused by operation of the Compact. The FIIP abstracts included with the Compact specify a period of use that authorizes FIIP to divert water any time between April 15 to September 15, and to deliver water for irrigation use between April 15 and October 15. Compact Appx. 5 (abstracts for water right nos. 76L 30052930, 76L

30052931, and 76L 30052932). Whether water is available within these windows during any particular year is a matter of physical water availability and the FIIP's internal operation decisions, as set out in the FIIP Operation and Maintenance Manual. Mission-Jocko did not identify any legal constraint to the period of use.

4. Mission-Jocko does not dispute that the BIA, not the Tribes, operates the FIIP pursuant to a set of Operation and Maintenance Guidelines. (H-3 CP Ex. 2). To the extent Mission-Jocko takes issue with the manner in which BIA is operating the system, Mission-Jocko did not identify any inconsistency with the Guidelines, nor any instance where it pursued an appeal of its operational concerns.

5. Mission-Jocko's period of use argument also ignores the priority scheme that has been in place since long before the Compact was ratified. In *Joint Bd. of Control of Flathead, Mission & Jocko Irr. Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987), the Ninth Circuit held the Tribes' instream rights are senior to all irrigation rights because they are based on an aboriginal fishing right with a time immemorial priority date. To the extent the Tribes' rights provide the basis for the instream flows Mission-Jocko identifies as injurious, Mission-Jocko fails to identify any new Compact-related measure that changes the priority scheme already upheld by the Ninth Circuit.

6. As Mission-Jocko acknowledged, bull trout are listed as a threatened species under the Endangered Species Act. 16 U.S.C. § 1531 *et seq.* BIA's operation of the FIIP system is subject to the terms of the Biological Opinion. Mission-Jocko did not offer any evidence to demonstrate the Compact modifies the terms of the Biological Opinion as it relates to operation of the FIIP system.

#### ***Alleged Injury Related to Infrastructure Improvements***

7. Mission-Jocko argues they will be injured by increased water delivery efficiencies caused by infrastructure improvements made possible via funding mechanisms embedded in the Compact. Mission-Jocko contends improvements to canal efficiency will deprive the hydrologic system from recharge that historically occurred thereby providing a source of water later into the irrigation season. (Doc. 2651.00, at 1-7). However, other than Swenson's anecdotal testimony, Mission-Jocko did not offer any

hydrological data or other evidence supporting this testimony. Without more, Mission-Jocko's hydrologic recharge argument fails to prove material injury.

***Alleged Injury Related to Judicial Review Forum***

8. Mission-Jocko argues the judicial review provisions of the Compact deprive the districts from the right to access a state court forum to review decisions of the Water Management Board. (Doc. 2651.00, at 9). The Court already addressed and resolved this issue in the Order on Motions. Moreover, Mission-Jocko did not offer evidence to prove it has attempted to exercise appeal rights to the Water Management Board. Without more, Mission-Jocko's allegations are speculative and fail to prove material injury.

***Conclusion***

9. The evidence and testimony offered by Mission-Jocko fails to prove material injury by operation of the Compact.

**ORDER**

Therefore, it is ORDERED that these Findings of Fact and Conclusions of Law shall be incorporated by reference into the Court's Final Order Approving the Compact.

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Stephen R. Brown  
Chief Water Judge

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