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

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CASE NO. WC-0001-C-2021
CONSOLIDATED EVIDENTIARY HEARING NO. 3

COMPACT PARTIES' POST-HEARING RESPONSE BRIEF REGARDING MATERIAL INJURY HEARING NO. 3 [Mission and Jocko Irrigation Districts]

Under the governing order,[1] the Confederated Salish and Kootenai Tribes ("CSKT"), the State of Montana, and the United States (collectively, "Compact Parties") submit this post-hearing response brief opposing the assertions of Objectors Mission Irrigation District and Jocko Irrigation District ("Objectors" or "Districts") in their *Post Hearing Brief Hearing 3*, Dkt. No. 2651.00 (August 21, 2025) ("Districts' Opening"). Although the Districts' Opening has no discussion of the relevant law, this Court and the Montana Supreme Court have held that to demonstrate material injury from a compact, an objector must establish, through admissible evidence, a concrete injury to water rights or other real property interests caused by operation of that Montana–CSKT–United States Compact ("Compact").[2] *Post-Hearing Opening Brief Regarding Material Injury Hearing No. 3*, Dkt. No. 2640.00, 2-3 (Aug. 22, 2025) ("Compact Parties' Opening").

As explained in the Compact Parties' Opening, and as shown below, the limited evidence offered by the Districts failed to satisfy any element of this heavy burden. *Id.* Instead, the Districts simply repackaged their complaints that CSKT's instream flow water rights under the Compact are not fully subordinated to the water use of the Districts' membership, ignoring the decades-old precedent rejecting the requirement that tribes were required to subordinate to all existing uses. *See In re Adjudication of Existing and Reserved Rights of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation within the State of Montana in Basins 40E, 40EJ, 40O, 40Q, 40R, & 40S*, WC-92-1, 2001 WL 36525512, at *22 (Mont. Water Ct., Aug. 10, 2001) ("*Fort Peck*") (not requiring the Tribes to subordinate to all water users in compact terms). 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 (July 10, 2024) ("Motion") and approve the Compact.

[1] *Order Modifying Briefing Schedule*, Dkt. No. 2626.00 (August 13, 2025).
[2] Sections 85-20-1901, -1902, MCA.

I. THE DISTRICTS FAILED TO PROVE THE ELEMENTS OF THEIR BURDEN OF PROOF

A. The Districts Failed to Prove Ownership of Water Rights or Other Real Property Interest

Astonishingly, the Districts offered no evidence that they (or their members) own a water right or other real property interest. The Districts' only evidence was offered through the nine-page pre-filed written direct testimony of Ray Swenson. Dkt. No. 2378.00. In that written testimony, Swenson stated that "members of that District get their water from the Flathead [Indian] Irrigation Project." *Id*. at 2.[3] The Flathead Indian Irrigation Project ("FIIP" or Project") is a federal irrigation project operated by the Bureau of Indian Affairs ("BIA"). *Id*. at 3, 6. The water rights for the Project are provided for under Compact, § 85-20-1901, MCA, Article III.C.1.a and the Abstracts contained in Compact Appendix 5 (*Preliminary Decree*, Dkt. No. 19.00, App. 2 at Decree report pages 1-62). The Districts' Opening attempts to remedy their omission and establish District ownership of FIIP and its water supply by reiterating arguments previously made during the summary judgment phase of this case: "When formerly[4] reservation lands were made available for entry by non-Tribal members, the Flathead [Indian] Irrigation Project was authorized by Congress to provide water supplies to those lands pursuant to Public Law 60-156, 35 Stat 441 (1908)." Districts' Opening at 2. The Districts then summarily conclude that "Congress assured such families seeking a life of 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 constructions charges attendant to the new" irrigation system. *Id*.

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[3] Like other Objectors in these proceedings, both Swenson and the Districts refer to the "Flathead Indian Irrigation Project" as the "Flathead Irrigation Project" in disregard of the formal name of the Project. *See* Hearing 3_Compact Parties Ex02_001 (title page of the Operation and Maintenance Guidelines for the "Flathead Indian Irrigation Project"); Hearing 3_Compact Parties Ex03_001 (title page of the Biological Opinion for the "Flathead Indian Irrigation Project").

[4] The Flathead Reservation has not been diminished, which this Court has already recognized. As the Court explained, the Flathead Allotment Act and Presidential Proclamation "led to some of the land within the Reservation being owned by non-tribal persons, but the actions did not terminate the legal status of the Reservation." *Order on Pending Motions Regarding Compact Approval, Dkt. No. 2336.00* at 2 (*citing Confederated Salish & Kootenai Tribes of Flathead Rsrv. v. Namen*, 665 F.2d 951 (9th Cir. 1982)).

The Compact Parties have previously addressed these arguments and demonstrated that neither the Districts nor their members possess any water rights beyond their members' conditional entitlements to use FIIP water. *See* Motion at 41-44; *Compact Parties' Answer Brief to Objectors Mission and Jocko Irrigation Districts' Motion for Summary Judgment and Brief in Support (Dkt. No. 1815.00)*, Dkt. No. 1933.00 at 17-21 (Sep. 13, 2024). Ultimately, the Court rejected the Districts' arguments and specifically held: "To the extent the districts claim water through FIIP, that is outside what the Compact covers and the scope of the Court's jurisdiction for this case." *Order on Pending Motions Regarding Compact Approval*, Dkt. No. 2336.00, at 49 (Apr. 1, 2025) ("*Compact Validity Order*"). Importantly, even Swenson referred to FIIP water uses by the Districts' members as "our entitlements." Dkt. No. 2378.00 at 9.

Having failed to establish the Districts' ownership of any water right or other interest in real property, the Court need not conduct any inquiry relating to material injury because the Districts hold nothing subject to injury. On this basis alone, the Court should overrule the Districts' objections and decree the Compact.

B. Even If the Districts Had Proven the Existence of a Right or Interest, They Have Not Proven Any Material Injury Caused by the Compact

Assuming for the sake of argument that the Districts hold some protectable interest in water or real property, the Districts failed to prove any injury from the Compact. The Districts' Opening presented three theories attempting to establish material injury. First, they assert a shortened FIIP irrigation season since 2021. Districts' Opening at 1-7. Second, they claim that enhanced instream flows are based on unlawful standards. *Id.* at 7-9. Finally, they once again incorrectly assert that the Compact fails to define a court to remedy the Districts' injuries. *Id.* at 9. As shown below, none of these theories establish injury by operation of the Compact.

1. Irrigation seasons are set by the BIA under applicable federal law and regulation, not the Compact

The Districts dedicate the first seven pages of their Opening to the allegation that the Compact somehow delays the start of FIIP water deliveries and causes material injury. Districts' Opening at 1-7. The connection to the Compact of these supposed delays, however, is based upon a single paragraph in the prepared testimony of Ray Swenson that provided only a vague reference to the Compact:

> I didn't understand "flushing" flow, and was concerned that this signaled a further restriction attendant to discussions between USFW and the BIA relating to bull trout of which we were not informed. However, it did become clear to me from

> the Project Operator, the fish biologist for the CSKT, and CITT members that they believed that answering to the base instream flows under the Compact would limit us to an irrigation season of roughly June 1 through September 15th.

Dkt. No. 2378.00 at 7.

This general statement does not constitute material injury. Neither Swenson's prepared statement nor the Districts' Opening reference any specific provisions of the Compact that might somehow cause a shortened irrigation season. Indeed, no provision of the Compact limits FIIP irrigation deliveries to a start date of June 1. To the contrary, the Abstracts of the FIIP Water Use Right set forth in Compact Appendix 5 prescribe general periods of use from April 15 to October 15. Compact App. 5 (Preliminary Decree App. 2 at Decree report pages 1-62). As demonstrated in the Compact Parties' Opening, Swenson acknowledged on cross-examination that under applicable laws and regulations, FIIP's irrigation season is set broadly between April 15 and September 15, but that actual within-season annual dates are influenced by several factors including weather, water availability, and reservoir storage, as well as requirements for channel maintenance flows required by the Endangered Species Act. Compact Parties' Opening at 4. Thus, the Districts specify no Compact provision that causes their perceived harm and no rationale for how Project operations differ from the governing operational documents.[5]

The Districts also suggest that the Compact somehow improperly authorizes the use of FIIP reservoir storage for instream flow purposes. However, the Districts' Opening identifies no specific provisions of the Compact to support this claim other than a citation to Compact Appendix 8, which has nothing to do with FIIP reservoirs (Compact Appendix 8 is the Biological Impact Evaluation for the Hungry Horse Allocation). District's Opening at 5. Likewise, Swenson's testimony—without any reference to the Compact—claims "water was being discharged in the non-irrigation season to fill instream flow demand." Dkt. No. 2378 at 8. Here again, the Districts' complaints of injury are not a result of the Compact, but rather long-standing law and policy governing the BIA's operation of FIIP. The 2008 Operation and Maintenance Guidelines for the "Flathead Indian Irrigation Project specifically provides:

> The water stored in the reservoirs will mainly be utilized to serve irrigation needs. However, stored water may be released when necessary to meet instream flows for treaty fisheries needs.

[5] Hearing 3_Compact Parties Ex02_001 (Operation and Maintenance Guidelines for the Flathead Indian Irrigation Project); Hearing 3_Compact Parties Ex03_001 (Biological Opinion for the Flathead Indian Irrigation Project).

Hearing 3_Compact Parties Ex02_57.

Finally, the Districts hypothesize that the Compact alters the timing of FIIP water deliveries and argue that the Compact's attempt to protect Historic Farm Deliveries—a significant benefit that may not have occurred through adjudication—does not shield the Districts from a "taking." Districts' Opening at 5-7. This "taking" claim is unsupported by any specific facts, but rather by a single lay observation: "[i]t is probably more accurate to think of irrigation less as watering crops per se than as watering the ground…." Dkt. No. 2378.00 at 8. This testimony does not establish that the Compact causes change in timing of FIIP deliveries, nor is there any provision of the Compact that does so. Like the FIIP irrigation season generally, the timing of deliveries is determined by several factors all unrelated to the Compact. Compact Parties' Opening at 4. *See* Compact Parties Ex 02_62-64, 74. Finally, even if the Districts had proven that the Compact somehow affects irrigation deliveries, that does not equate to material injury. Because the Tribes' instream flow rights are senior to all irrigation uses, the Districts' complaints are a consequence of the prior appropriation system which does not constitute material injury. *See Compact Validity Order* at 75-76.

2. Improvements to FIIP do not constitute material injury

Next the Districts reassert hyperbolic complaints unsuccessfully advanced in summary judgment concerning what they refer to as "enhanced" instream flows that might result from FIIP improvements. Districts' Opening at 7-9. Their complaints are supported by only a single paragraph of Swenson's testimony. Dkt. No. 2378.00 at 9 (response to Q. 36). These complaints about the incorrect calculation of the amount of water saved from improvements to the Project under Article IV.D.1 should be rejected for numerous reasons. One, the Districts' argument, by their own admission, is a rehash of one lodged during the legal motions phase and not accepted and is simply offered now for a "complete record." Districts' Opening at 7. Two, neither Swenson nor the Districts' Opening reference any specific Compact provision to support the material injury claim. Three, Swenson's testimony is lay opinion and rife with speculation about what would be determined at some future proceeding concerning a hypothetical savings of 40 cfs, all defined in one line of text. The Districts offered no expert testimony to support this theory that an incorrect amount of water would be determined in the future. *Id*. at 8-9 (hypothesizing miscalculation of "40 cfs" in the future that is not tied to Swenson's testimony nor any location on the Flathead Reservation). Four, the Districts mischaracterize what gets

evaluated and continuously reevaluated under the Compact. In fact, the Compact provides for perpetual adjustments to River Diversion Allowances (the amount diverted for irrigation by the Project, Art. II.58)—not instream flows—following completion of Rehabilitation and Betterment under Compact Article IV.D.1. Five, as Swenson acknowledges, Dkt. No. 2378.00 at 9 (response to Q. 37), these future calculations of water saved will be the subject of expert consultants and subject to appeal and review. The Districts admit that they can participate in the evaluation of such future determinations and point to no part of the Compact that will skew those future calculations.

3. The Compact adequately addresses judicial review

Without citation, the Districts incorporate by reference their summary judgment argument that the Compact fails to define a court to review decisions of the Flathead Reservation Water Management Board ("Board"). Districts' Opening at 9. The Court previously rejected this and related arguments. *Compact Validity Order* at 71-73. The Districts attempt to reinvoke this claim as a component of material injury based upon Swenson's response to the final direct examination question of his pre-filed testimony: "Are there any other particulars of the Compact that cause you injury?" Dkt. No. 2378.00 at 9. In response, Swenson discusses "management or mismanagement" of FIIP and claims that irrigators cannot afford to seek review of every BIA decision. *Id.* Swenson then says: "The problem is exacerbated where it is unclear whether any Court can hear a dispute over a Board determination…." *Id.* However, Swenson does not articulate any scenario under which a District member would be subject to a Board decision because of FIIP water use. As the Court has explained:

> Moreover, 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. *See generally*, 25 C.F.R. Part 171 (BIA regulations governing Indian irrigation projects); *see also*, Doc. 1949.00, Ex. A (Compact Parties' Response to Sego-Slack, citing Bureau of Indian Affs., U.S. Dep't of Interior, Operation and Maintenance Guidelines: Flathead Indian Irrigation Project (2008)).

Compact Validity Order at 49; *see* § 85-20-1902, MCA, § 3-1-101(1) (providing that the Board does not have any jurisdiction over how FIIP distributes water to its customers). Cascading speculation that District members might someday not have the resources to pursue a possible future appeal of potential BIA mismanagement of FIIP, and that such a problem might be exacerbated by which court might review a potentially unfavorable (and unrelated) decision of

the Board, certainly does not constitute the concrete, non-speculative material injury required by governing precedents issued by this Court or the Montana Supreme Court.

II. THE DISTRICTS' DEMAND FOR BENEFITS THE COMPACT NEED NOT PROVIDE—A COMPLETE SUBORDINATION TO ALL WATER USERS—MUST BE REJECTED

The Districts' Opening is replete with equitable language regarding promises allegedly made to the Districts' members, the perceived rewriting of "rules" that are quite beneficial to the Districts, and the self-identified "taking" of water from the Districts. Districts' Opening at 3, 4, 7. The Court should disregard all such arguments, as they merely reflect the Districts' dissatisfaction with the consequences of the prior appropriation system, and thus cannot establish material injury. *Compact Validity Order* at 75-76 ("[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."). The FIIP water conditionally used by District members, as described in Section I.A above, is junior to CSKT's instream flow rights. The Court already recognized the Ninth Circuit's decision in *Joint Bd. of Control of Flathead, Mission & Jocko Irr. Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987), which held that CSKT's instream rights are senior to all irrigation rights because they are based on an aboriginal fishing right with a time immemorial priority date. *Compact Validity Order* at 5.

In the Districts' view, the Compact should have protected any and all irrigation uses from enforcement by the Tribes' senior rights—*i.e.*, complete subordination of the Tribal Water Right to all FIIP water users. However, the Court rejected that standard with its approval of the very first compact negotiated in Montana. Indeed, the Court held:

> While it was apparently worth subordinating part of their Tribal Water Right to a limited number of existing uses on a limited number of sources, it would be unreasonable to expect the Tribes to do the same for all existing junior uses on every water source that "might" be influenced by the exercise of the Tribal Water Right. Requiring all concessions to be applied equally across-the-board would unduly restrict and likely defeat the negotiation and settlement process.

Fort Peck, 2001 WL 36525512, at *22. The Districts' exposition of the purported deficiencies of the CSKT Compact is contrary to the litigation history regarding FIIP that formed the backdrop for the Compact, *Compact Validity Order* at 4-6, and with the Court's guiding principles for substantive Compact fairness, *id.* at 32 (discussing call protections as an example of the

"numerous" compriomises CSKT made in agreeing to the Compact).[6]

III. CONCLUSION

For these reasons, the Compact Parties request that the Court dismiss all objections, including those of the Districts, and approve the CSKT Compact.

Respectfully submitted this 19th day of September, 2025.

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[6] For example, FIIP water entitlements are partially protected from exercise of CSKT's FIIP instream flow rights. FIIP's water supply is provided through the River Diversion Allowances, which are junior to CSKT's Minimum Enforceable Instream Flows but have priority over CSKT's Target Instream Flows. Section 85-20-1901, MCA, Art. IV.C.1. In times of shortage, FIIP water supplies are protected in other ways from being curtailed. *Id*., Art. IV.E. None of these protections would be available if CSKT's rights are litigated.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Post-Hearing Response Brief* for Hearing No. 3 was served by email to the counsel for the Objectors and email to counsel for the Compact Parties as set forth below this 19th day of September, 2025.

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