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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
In Answer to Brief of Compacting Parties
Evidentiary Hearing No. 3

Comes now the Mission and Jocko Irrigation Districts ("Districts"), by and through their attorneys, and respectfully submit their Answer Brief to the Compacting Parties' Post-Evidentiary Hearing Brief.

Argument

Measured by today's technologies and resources, the dozens of miles of canals and the smattering of reservoirs that is the Flathead Irrigation Project may not qualify as engineering spectacle. However, at the turn of the 20th century, they unmistakably underscore the commitment of Congress to give entrymen to the available lands within the Reservation a viable chance at making a living in agriculture. Land by itself was not enough; as it was a water supply that allowed that land to answer to the necessary efforts attendant to farms and ranches. Accordingly,

the United States constructed an elaborate system of canals, and because the natural flow of the creeks and rivers yielded insufficient water to irrigate that targeted lands in the hot summer months, the United States added a number of reservoirs to store water from spring snowmelt runoff to afford supplies in those otherwise lean months.

At least as compared to today's standards, Congress also acted with unusual clarity in identifying the entitlements of those willing to give hope a leg up on experience by entering those lands and forging a life in farming and ranching. Public Law 60-156 expressly provided that entryman was entitled to a "water right" sufficient to irrigate his entry. 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, and all his proportionate share of the operation and maintenance expenses. *Id.*

The confirmation of a water right for entryman by the United States was not some cryptic declaration of a nascent federal system of water rights. Congress has steadfastly deferred to state authorities for that purpose. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142 (1935). Instead, the statute affirms a federal intent to imbue these water uses with the same property interests inuring in any appropriation in Montana. *See Middle Creek Ditch Co. v Henry*, 15 Mont. 558, 39 P. 1054 (1895). Given this context, the members of Mission and Jocko Irrigation Districts are not vassals stranded in a world dependent upon the continuing largesse of the federal government. They are property owners entitle to exercise those property rights they bought and paid for.

Presumably it is these principles that properly lead the compacting parties in their opening brief to renounce any authority under the Compact to truncate diversions for irrigation until the

early part of June and then to likewise terminate them after September 1st, thereby enhancing instream flows through like periods. According to the compacting parties, these results arise from the Endangered Species Act, 16 U.S.C. 1531 *et. seq.*, and in particular, from the Biological Opinion of the United States Fish and Wildlife Service offered as Exhibit 3. According to the compacting parties, diversions for irrigation are curtailed under this Opinion to provide for instream flows in amounts required to flush accumulated sediments downstream.

However, this observation does not answer to the problem. Indeed, it exacerbates the issue by underscoring that the compacting parties have tendered to this Court the wrong analytical framework for evaluating the Compact.

Every compact this Court has reviewed has struck a balance between the reserved or aboriginal rights set forth therein and the existing water uses that they may otherwise affect. This Compact attempts this same sort of tensile offsetting. Accordingly, the Montana legislature and Congress were advised that notwithstanding the instream flows created for the United States, the historic diversions for the irrigation of lands under the Flathead Irrigation Project are to be preserved. *See* Art. II (36) (Defining Historic Farm Deliveries as amounts historically diverted for irrigation); Art II (58) (Defining River Diversion Allowance as amounts authorized for diversion for irrigation of Flathead Irrigation Project lands.); Art.II (32) (Defining Flathead Water Use Right as entitlements under Flathead Irrigation Project.): Art III (C)(1)(a) (Defining Flathead Irrigation Project entitlements as River Diversion Allowances for irrigation.) Indeed, the Compact expressly confirms that these diversions to sustain generations of farmers and ranchers are now subject to only minimum enforceable instream flows, *see* Art. IV (C)(1), as that term is defined in Art. II (48).

None of the plain text of the Compact has anything to do with the preemption of diversions for Mission and Jocko users for all of May, or after the end of August. As Mr. Swenson explained, water at those times was virtually bank full in the sources of supply, yet diversions for irrigation were locked out. Accordingly, the entire structure of the Compact itself shows that such depletions are material injury, were it otherwise necessary to add Mr. Swenson's testimony that such ongoing deprivations are likely the slow strangulation of his and his neighbor's farms and ranches.

It is no answer to claim that this injury does not result from the United States acting through the Bureau of Indian Affairs, but instead is a product of the United States acting through the Fish and Wildlife Service. In both instances, diversions for irrigation are preempted to preserve water instream.

The Districts regret not being able to provide this Court with a more detailed summary of the Fish and Wildlife actions. However, no discovery was available to the Districts in the initial part of these proceedings, and only a limited ability was accorded the Districts and other litigants in the material injury phase of these proceedings. As a result, the Districts cannot apprise this Court of any scientific grounding thar relates the instream flow demands of the United States to any particular sediment deposition and transport along various reaches and nodes of the relevant drainages. In this respect, the Districts find themselves as the Montana Legislature and Congress, as on this record it does not appear that either entity was apprised that the United States had different instream flow plans for Mission and Jocko other than as set forth in the Compact.

The opinion of the USFW, after all, is dated 2018, and its text implies that discussions of high instream flow requirements were occurring before the Montana Legislature acted. It was obviously was issued before Congress acted. Accordingly, the record does not confirm that either entity was ever aware that the Historic Farm Deliveries promised to the irrigators would not be

available because of the United States acting through the Fish and Wildlife Servies. *See* Section 7(a)(1), Montana Water Right Protection Act (One of purposes of Act is "to protect . . . Historic Farm Deliveries.") To be sure, this issue could have arisen well down the road long after the implementation of the Compact, and in that circumstance, Section 4(c)(1) directs the Secretary of the Interior to comply with the Endangered Species Act. The point is that it didn't arise well down the road. It arose at or before the time that Congress and the Montana legislature acted. This is an equitable proceeding, and out of the larger edict that those who seek equity must do equity, *Hall v. Lommasson,* 113 Mont. 272, 281-282, 124 P.2d 694 698(1942), the "fair and reasonable" way to proceed was to acquaint these decision makers with the problems portended by the USFW opinion. Perhaps Congress could have funded pumping from the Flathead River to offset this dry up of irrigator's entitlements,[1] or otherwise provided for rejiggering the storage system such that carry-over was available for the early spring and early fall months. We can't know precisely because the record does not show that they were acquainted with the problem.

The users under the Mission and Jocko were guaranteed their historic deliveries under the Compact. In return, the Tribes secured eye watering funding, lands, and other resources. What was earmarked for the irrigators is, however, not there. This is a material injury to the property rights Congress created in the Districts' uses.

Finally, the compacting parties fail to apply elemental principles of water law in declaring that Mission and Jocko can just elect to litigate the Tribes' entitlements to increased instream flows when they incorporate water savings measures in the irrigation system that result in reduced demand at the headgate. There is nothing at all that shows that any change of water right is required to answer the Tribes' plans.

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[1] Mission and Jocko cannot do this on their own. The cost of this pumping vitiates the value of anything commodity any farm or ranch could produce.

Every water user is entitled to improve the efficiency of his own system of using water. By definition, that increased efficiency results in more water available immediately below the headgate of the diversion, because less water is required to fulfill the underlying use. However, this does not mean that the holder of the water right must secure a change of water right for savings attendant to his increased efficiency, even where it in fact benefits the fishery by increased flows at this point. That benefit arises solely as a result of the priority system, which limits diversions at any given time to the amount then actually needed, regardless of the amount of the appropriative right.

The Compact's "water conservation" program does not contemplate more. It does not require an assessment of where and when the leakage or seepage returned to the source historically for use by other members of the Flathead Irrigation Project or other irrigators generally, and indeed the relevant language seeks simply a confirmation of reduced demand at the headgate. *See* Art. II(57). These savings then reduce the RDA's for that diversion. Art. iV(D)(1)(d). Indeed, the definition of Reallocated Water is tied exclusively to "that portion of any given FIIP diversion or RDA that is made available through increased efficiency resulting from Rehabilitation and Betterment projects." Art II (57). The relevant "River Diversion Allowance" is then "reduced by the volume of Reallocated Water made available by a particular Rehabilitation and Betterment project." Art ii(58).

To be sure, should the BIA decide that it wants to enforce the additional water for instream flow arising from that increased efficiency against others not claiming water supplies under the Tribal Right, a change of water right is required. However, the BIA is by the text of the Compact fully warranted in depending upon gravity and stream gradients for instream flow enhancements. That being the case, nothing in the text of the methodology requires any assessment of whether

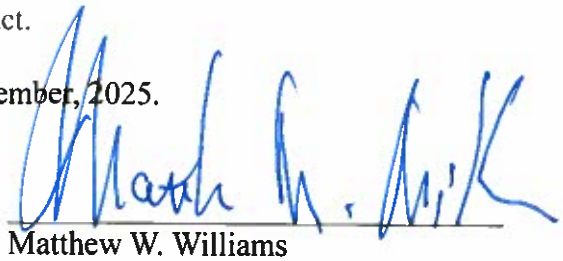
those saved waters returned to the source at times of the year that other diversions are short, and accordingly they can reduce the amounts of water physically available at those other points of diversion.

The BIA does have the right to administer the operation of the system. However, this right does not eat its own tail by any correlative authority to rewrite the property interests inuring in the "water rights" provided for by Congress for entrymen. Indeed, any such authority is inimical to the concept of such property interests. As a consequence, this Court should reject the further dry-up of those property rights by the reallocation of portions of them to instream flow. On this scale, such losses result in material injury to the property rights confirmed by Congress.

Conclusion

On this record, neither the Montana Legislature nor Congress weighed in on the proper allocation of any shortfalls arising under Fish and Wildlife authorities. This Court should not make the same mistake. It should not confirm the Compact.

Respectfully submitted this 19th day of September, 2025.



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CERTIFICATE OF SERVICE

I certify that the foregoing was served to the following persons as noted below on the 19th day of September, 2025.

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