

1 Hon. James A. Manley  
District Judge  
2 Lake County Courthouse  
106 Fourth Avenue East  
3 Polson, Montana 59860  
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4

CLERK OF THE  
DISTRICT COURT  
LYNN PRITCHARD

2013 NOV 1 PM 2 25

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6 MONTANA, TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY  
7

8 MISSION IRRIGATION DISTRICT, and  
9 JOCKO VALLEY IRRIGATION DISTRICT,

10 Plaintiffs,

11 vs.

12 LAKE COUNTY,

13 Defendant.  
14

Case No. DV-13-266

ORDER DENYING MOTION  
FOR PRELIMINARY INJUNCTION

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16 *"Whiskey is for drinking; water is for fighting."*  
17

18 This old quote, sometimes attributed to Mark Twain, may serve as a reminder  
19 that intense water disputes are neither new nor unusual in the West, and that this  
20 dispute, too, will ultimately be resolved.

21 This is the second action filed in peripheral battles by water users in attempts to  
22 influence whether the recent water compact, negotiated by various governmental  
23 entities, will be accepted, rejected or further negotiated by the duly elected  
24 representatives. Failing agreement, the determination of substantive water rights will  
25 be decided by a Montana Water Court Judge, pursuant to Title 3, Chapter 7 of the  
26 Montana Code, but not, ultimately, by filing lawsuits in this District Court.  
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## BACKGROUND

The facts and procedural history do not appear to be in dispute:

- In 1981, three irrigation districts (Flathead, Mission and Jocko Valley) formed the Flathead Joint Board of Control (FJBC), pursuant to MCA 85-7-1601. FJBC directed the joint operation of the irrigation system, comprised of over 100,000 acres, for 32 years.

- In 2013, political divisions formed over whether the FJBC should agree to the water compact, and which faction would control that decision.

- In June, the Mission and Jocko Valley Districts ("the Districts") sent an initial notice of intent to withdraw, pursuant to MCA 85-7-1603. (Ex. A) (For reasons unexplained, the Districts apparently decided this notice had to be redone at a later date).

- September 5, the FJBC passed Resolution 2013-5 for a mail-in ballot asking the water users of the Districts whether the Districts should withdraw from FJBC. (Ex. B) The resolution is arguably unclear, but the transcript and other filings herein establish that this vote would be advisory only, and not binding on the governing authorities of the Districts.

- September 9, the Districts voted to withdraw from FJBC, by 2-1 votes of their respective governing boards.

- September 12, the Districts sent FJBC their respective 90 day notices of intent to withdraw from FJBC. This set the effective withdrawal date as December 12, 2013. (Ex. E)

- September 23, the Districts provided the County with written objections to the proposed referendum vote. The FJBC provided its written response thereafter. (Ex. F)

- October 2, the County considered the objections and indicated its intent to proceed with the mail-in ballot. (Ex. F) It is apparently uncontested that the Secretary of State approved the ballot. The County planned to mail out the ballots on October 25, for election day of November 19. (Ex. G) There is some indication that the ballots could be mailed out as late as November 1.

- October 16, Plaintiffs filed their complaint and motions for temporary restraining order and preliminary injunction.

- 1 - October 22, this Court, with the Honorable Deborah Kim Christopher in  
2 jurisdiction for the retired C.B. McNeil, issued an Order of Abeyance which  
3 prohibited the parties from further action until the new judge took jurisdiction.  
4 - October 28, the FJBC and 34 individual water uses moved to intervene as  
5 interested parties. The FJBC also filed a proposed Answer and Brief. The  
6 County indicated no objection to the motion. Plaintiffs have not yet responded.  
7 - October 30, the County filed its answer, generally denying the allegations of the  
8 complaint, and seeking to defer to the Intervenors for further substantive  
9 response.  
10 - November 1, the undersigned was sworn in and took jurisdiction of the case.

#### 11 TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

12 Plaintiffs filed this complaint for temporary restraining order, preliminary  
13 injunction, permanent injunction, declaratory judgment and attorneys fees. Only the  
14 temporary restraining order and preliminary injunction issues are decided here,  
15 necessarily, as this may be the last day for ruling, given the deadline for mailing ballots.  
16 A delay and rescheduling would likely put the vote beyond December 12, 2013, on  
17 which date the Districts will withdraw from FJBC per statute. Any vote thereafter would  
18 serve little purpose.

19 The FJBC seeks an advisory vote by the affected water users, on whether their  
20 respective Districts should withdraw from the FJBC. FJBC seeks the vote for  
21 informational purposes, apparently to clarify the wishes of the Districts' water users, and  
22 hoping the information may be considered by the Districts' governing boards to  
23 determine whether the planned December 12, 2013 withdrawal from FJBC should go  
24 forward or not. One concern stated by Plaintiffs is that the vote could "potentially be  
25 interpreted as binding" on the Districts. That concern is unnecessary. This Court  
26 interprets the vote as advisory and informational only, and not binding.  
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1 Plaintiffs seek restraining order and preliminary injunction pursuant to MCA 27-  
2 19-201. If Plaintiffs make a *prima facie* showing under any of the subsections of that  
3 statute, a preliminary injunction is appropriate during the pendency of the case to  
4 preserve the status quo. *Shammel v. Canyon Resources Corporation*, 2003 MT 372, ¶  
5 15, 319 Mont. 132, 82 P.3d 912.

6 For subsection (1), Plaintiffs allege the FJBC exceeded its statutory authority by  
7 its resolution seeking the election, that the vote would impair and deprive the Districts'  
8 rights to govern themselves and strip the Districts of their statutory rights to withdraw,  
9 and therefore the Plaintiffs are entitled to the relief demanded.

10 The FJBC was formed pursuant to MCA 85-7-1601, with powers enumerated in  
11 85-7-1612. MCA 85-7-1612 includes:

12  
13 *"(5). The board of control may perform all the other acts necessary and*  
14 *appropriate to fully carry out the purposes of this part."*

15 This indicates a legislative intent to broadly grant the enumerated powers.

16  
17 The Plaintiffs do not explain how the vote would impair or deprive the Districts'  
18 rights to govern themselves, or how the vote would strip the Districts of their statutory  
19 rights to withdraw from FJBC. Given the interpretation of the Court, that the vote is  
20 informational and advisory only, and not binding on the Districts' governing bodies, the  
21 vote would not result in these deprivations. Plaintiffs have not made a *prima facie* case  
22 or shown a likelihood of success on the merits, for preliminary injunction purposes.

23 Plaintiffs allege the FJBC, by this action, "appears to be seeking to waste public  
24 resources". There is no evidentiary basis offered for this allegation of FJBC's intent. If  
25 the mail-in election goes forward, the cost of the election will be taxed to the FJBC.  
26 Whether such expenditure constitutes a waste of FJBC money is a determination within  
27 the appropriate discretion of the FJBC. Plaintiffs also allege the vote unnecessarily  
28

1 forces the Districts “to tap into their budgets and contribute valuable time to address the  
2 situation.” The vote does not force the Districts to do that, or to do anything. The  
3 Districts could decide to let the vote proceed. If the Districts decide to use their  
4 resources to pursue this legal action or otherwise, that decision is within the appropriate  
5 discretion of the Districts’ governing bodies.

6  
7 Plaintiffs next allege, pursuant to MCA 27-19-201(2), that they will suffer great or  
8 irreparable harm if the preliminary injunction does not issue. Plaintiffs have not made a  
9 *prima facie* case that the vote will impair or deprive the Districts of their statutory  
10 authority. Plaintiffs have not shown a likelihood of any legally-recognized harm at all.  
11 While the informational vote may affect some factions within the Districts politically, that  
12 is not a legally-recognized harm for purposes of a preliminary injunction. Even the  
13 political “harm” is speculative. It is possible the voters will agree with the position taken  
14 by the FJBC or the position taken by the respective Districts’ boards. Either way, the  
15 result of the vote will likely be more information available to the various decision-  
16 makers, which would appear to be a positive consequence in a system of participatory  
17 democracy.

18  
19 Finally, pursuant to MCA 27-19-201(3), Plaintiffs allege the County is about to do  
20 some act in violation of Plaintiffs’ rights. Having failed to make the requisite *prima facie*  
21 case of violation of Plaintiffs’ rights, as discussed regarding subsection (1) above, of  
22 either likely success on the merits of complaint, or of great or irreparable harm,  
23 preliminary injunction is not appropriate. *Bitterrooters for Planning v. Board of County*  
24 *Commissioners*, 2008 MT 249, ¶ 29, 344 Mont. 529, 189 P.3d 624.

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26 The Court must also consider that, if the preliminary injunction were to issue, it  
27 would effectively strip the FJBC of its ability to seek input and involvement of the  
28 affected water users in the decision whether to withdraw from FJBC, because of the

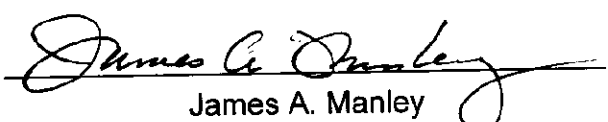
1 December 12, 2013 date for withdrawal of the Districts from FJBC. Balancing the  
2 interests, this Court should encourage more rather than less participation of the  
3 affected property owners.

4 ORDER

5 Wherefore, the Court enters the following Orders:

- 6
- 7 1. The Order of Abeyance of October 22, 2013, is vacated.
  - 8 2. The Motion for Temporary Restraining Order and Preliminary Injunction is  
9 denied.
  - 10 3. The County may proceed with mailing the ballots, if that can still be timely  
11 done, considering the date for the election.
- 12

13 DATED this 1<sup>st</sup> day of November, 2013.

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15   
16 James A. Manley  
17 District Judge

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21  
22 cc faxed 11/1/13 to:

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