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COUNSEL FOR INTERVENOR-DEFENDANT

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

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CONFEDERATED SALISH AND  
KOOTENAI TRIBES,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF  
INTERIOR SECRETARY SARAH  
"SALLY" JEWELL; UNITED STATES  
BUREAU OF INDIAN AFFAIRS; JOCKO  
VALLEY IRRIGATION DISTRICT;  
MISSION IRRIGATION DISTRICT;  
FLATHEAD IRRIGATION DISTRICT;  
DISTRICT COURT FOR THE  
TWENTIETH JUDICIAL DISTRICT OF  
MONTANA; MONTANA WATER  
COURT; MICHAEL G. MCLATCHY,  
BLANCHE CREPEAU, and ALEX  
CREPEAU; JUDY HARMS and ROBERT  
HARMS; BETTY A. STICKEL; and AN  
UNKNOWN NUMBER OF JOHN DOE  
DEFENDANTS CLAIMING FIP  
IRRIGATION WATER AS A PERSONAL  
WATER RIGHT,

Defendants.

)  
) Case No. 9:14-cv-00044-DLC  
)

)  
) **MONTANA ATTORNEY**  
) **GENERAL'S MEMORANDUM**  
) **IN SUPPORT OF MOTION FOR**  
) **LEAVE TO INTERVENE**  
)

## INTRODUCTION

The Montana Attorney General (“the Attorney General”) moves to intervene for the limited purpose of seeking dismissal of this case. There is no express or implied waiver of sovereign immunity by virtue of this limited intervention. *See Southwest Ctr. For Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515, 519-20 (9th Cir. 1998) (recognizing state interest in intervening for purpose of seeking dismissal); *see also Zych v. Wrecked Vessel Believed to be Lady Elgin*, 960 F.2d 665, 667-68 (7th Cir. 1991) (finding that a federal court has authority to entertain a motion to intervene for the limited purpose of seeking dismissal). In filing the motion to intervene and this memorandum in support, the Attorney General does not waive the State of Montana’s sovereign immunity from suit nor consents to be sued with regard to any issue or claim now or hereafter presented in this case or otherwise, and expressly reserves its sovereign immunity from suit.

The Confederated Salish and Kootenai Tribes (the Tribes) filed this action seeking declaratory and injunctive relief, alleging that pending actions in Montana’s Twentieth Judicial District and the Montana Water Court (collectively “the State Courts”) threaten to violate the general adjudication requirements of the McCarran Amendment, 43 U.S.C. § 666, by allowing piecemeal adjudication in the absence of necessary and indispensable parties. (Doc. 27, ¶¶ 120, 121.)

The Tribes seek to enjoin the State Courts, and now their judges, from proceeding with the pending actions because they fear the State Courts may issue inconsistent or conflicting rulings, and in doing so may waste judicial resources by ultimately issuing a judgment that is unenforceable against the Tribes and the United States. (Doc. 27 at 40, ¶ 7; and at 41, ¶ 14.)

The Attorney General has a significant interest in protecting and preserving the integrity of the process for state-wide adjudication of water rights under the Montana Water Use Act, Mont. Code Ann. Title 85, chapter 2, and ensuring its on-going compliance with the McCarran Amendment, 42 U.S.C. § 666. The Attorney General's interest has constitutional underpinnings. *See* Mont. Const. Art. IX, § 3. The Attorney General's interest may be impaired if the Court grants the Tribes' requested relief; therefore, he seeks leave of the Court to intervene under Fed. R. Civ. P. 24 for the limited purpose of seeking dismissal.

### **BACKGROUND**

On the eve of its dissolution, the Flathead Joint Board of Control (dissolved FJBC)<sup>1</sup> filed a motion (the FJBC Motion) in the Water Court seeking a declaratory judgment as to the "characteristics" of ownership of certain water rights ostensibly secured by claims filed by the dissolved FJBC on behalf of its irrigator-landowners within the Flathead, Mission and Jocko Valley

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<sup>1</sup> The Flathead Joint Board of Control dissolved on December 12, 2013.

Irrigation Districts. *See In the Matter of the Adjudication of Existing and Reserved Water Rights to the Use of Water, Both Surface and Underground of the Federal Flathead Indian Reservation Basin 76L; In Re: Flathead Joint Board of the Flathead, Mission, and Jocko Valley Irrigation Districts*, Case No. WC-2013-Basin 76L, Montana Water Court, Combined Motion to Interplead, for Declaratory Judgment and for Permission to Deposit Property in the Court, filed Dec. 6, 2013, attached as Ex. A.

The FJBC dissolved on December 11, 2013. The following day, the dissolved FJBC, along with one of its member districts, the Flathead Irrigation District (FID), filed a complaint (the FJBC Complaint) in the Montana Twentieth Judicial District Court that is nearly identical to the FJBC Motion in the Montana Water Court. *See Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts, and Flathead Irrigations District v. United States Bureau of Indian Affairs*, Case No. DV-13-313, Twentieth Judicial District (Lake County), Compl. filed Dec. 11, 2013, attached as Ex. B.

Both the FJBC Complaint and the FJBC Motion state that the “character” of the ownership of the water rights asserted in the claims is uncertain because the Bureau of Indian Affairs has filed “almost identical” water rights claims and the Tribes also asserts ownership of “all or part of” these same water rights but have not yet filed their claims. *See Ex. A at 7; Ex. B at 6.* Under the guise of protecting

the dissolved FJBC from liability and litigation over ownership of the water right claims, the FJBC Complaint and the FJBC Motion also ask that it be allowed to deposit them with both Montana State Courts under Mont R. Civ. P. 67. See Ex. A at 9; Ex. B at 9. On May 20, 2014, the Attorney General moved for leave to file amicus curiae briefs in both State Courts.<sup>2</sup>

Two other cases concerning the ownership of water rights claims related to the Flathead Indian Irrigation Project (“the FIIP”) and the dissolved FJBC are also pending before the Twentieth Judicial District Court. See Ex. C at 5, n.3 (*discussing Western Montana Water Users Ass’n v. Mission Irrigation Dist., Jocko Valley Irrigation Dist., Flathead Irrigation Dist., and Flathead Joint Board of Control*, Cause No. DV 12-327, and *Ingraham v. Flathead Joint Board of Control*, Cause No. DV 13-102.) As noted in the Attorney General’s proposed amicus brief lodged in the Twentieth Judicial District Court, the validity of water rights claims should be determined in the Adjudication.

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<sup>2</sup> The first motion and proposed brief were filed in the Montana Twentieth Judicial District Court, Lake County, Cause No. DV-13-313. A true and correct copy of the motion and proposed amicus brief (without exhibits) is attached as Ex. C. The Attorney General also filed a motion for leave to file an amicus curiae brief in Water Court of the State of Montana, Cause No. WC-2013-05. A true and correct copy of the motion and proposed amicus brief (without exhibits) is attached as Ex. D.

Here, the Tribes are seeking declaratory and injunctive relief, alleging that the pending actions in the State Courts threaten to violate the terms of the waiver of federal and tribal sovereign immunity contained in the McCarran Amendment, 43 U.S.C. § 666. More specifically, the Tribes assert that the McCarran Amendment requires comprehensive ("*inter sese*") adjudication while the pending actions constitute piecemeal adjudication in the absence of necessary and indispensable parties--Tribes and the United States. (Doc. 27, ¶ 9, pp. 40-41.) Consequently, the Tribes seek to enjoin the State Courts from proceeding with the pending actions because they allegedly fear the State Courts may issue inconsistent or conflicting rulings, and in doing so may waste judicial resources by ultimately issuing a judgment that is unenforceable against Tribes and the United States. (Doc. 27, ¶¶ 7, 11, 14, pp. 40-41.)

The Tribes also seek a declaratory ruling that the water rights for the FIIP belong to the United States--as opposed to, among other possibilities, the dissolved FJBC, the Flathead, Jocko and Mission irrigation districts or individual irrigators served by the FIIP--and that the United States' rights for water used on the FIIP derive from the Tribes' own water rights established pursuant to the Hellgate Treaty of 1855. (Doc. 27, ¶¶ 2, 5, pp. 42-43.)

**I. THE ATTORNEY GENERAL MEETS THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT PURSUANT TO FED. R. CIV. P. 24(a)**

Rule 24(a)(2), Fed. R. Civ. P., authorizes anyone to intervene in an action as of right when the applicant demonstrates: (1) the application is timely; (2) the applicant has a “significant protectable interest” in the action; (3) “the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect its interest;” and (4) “the existing parties may not adequately represent the applicant’s interest.” *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011). The Ninth Circuit upholds a liberal policy in favor of intervention. *Wilderness Soc’y v. United States Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011). Such a policy allows for “both efficient resolution of issues and broadened access to the courts.” *Id.* (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)). It follows that if Fed. R. Civ. P. 24(a) is to be “construed broadly in favor of intervention, the four part test should also be construed broadly.” *Wildlands CPR v. United States Forest Service*, CV 10-104-M-DWM, 2011 U.S. Dist. LEXIS 12813, at \*3-\*4 (D. Mont. Feb. 9, 2011).

In evaluating whether the requirements are met, courts are “guided primarily by practical considerations, not technical distinctions.” *Southwest Ctr. for*

*Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). As the Ninth Circuit has explained:

A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, [courts] often prevent or simplify future litigation involving related issues; at the same time, [they] allow an additional interested party to express its views before the court.

*United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002).

The State meets all four parts of the test and is entitled to intervene as of right.

**A. The Attorney General's Application is Timely.**

Whether a motion to intervene--permissive or otherwise--is considered timely is ultimately up to the discretion of the court. *NAACP v. New York*, 413 U.S. 345, 366 (1973) ("Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review."). In the Ninth Circuit "[t]imeliness is measured by reference to '(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for the length of the delay.'"

*United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002), citing *County of Orange v. Air Calif.*, 799 F.2d 535, 537 (9th Cir. 1986).



The Attorney General has filed its Motion less than a week after the Tribes filed their amended complaint (Doc. 27). A motion to intervene at such an early stage of the proceedings is timely. *Citizens for Balanced Use*, 647 F.3d. at 897 (motion to intervene was timely when filed less than three months after the complaint and less than two weeks after an answer).

**B. The Attorney General Has a Protectable Interest Relating to the Subject of the Action.**

Whether an applicant has a “significantly protectable” interest necessary for intervention depends on: (i) whether the interest is protectable under some law; and (ii) whether there is a relationship between the legally protected interest and the claims at issue. *Wilderness Soc’y*, 630 F.3d at 1179. The two prongs of the “significantly protectable” interest test are closely related because an applicant “has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.” *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). “Although an applicant cannot rely on an interest that is wholly remote and speculative, the intervention may be based on an interest that is contingent upon the outcome of the litigation.” *City of Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010) (quoting *United States v. Union Elec.*, 64 F.3d 1152, 1162 (8th Cir. 1995)); see also *United States v. Aerojet General*, 606 F.3d 1142, 1150 (9th Cir. 2010).

Here, the Attorney General has a significant interest in protecting and preserving the integrity of the process for state-wide adjudication of water rights under the Montana Water Use Act, Mont. Code Ann. Title 85, chapter 2. This interest is particularly significant as it pertains to assuring the compliance of the Adjudication with the waiver of federal and tribal sovereign immunity embodied in the McCarran Amendment, 43 U.S.C. § 666, which allows Montana state courts to exercise jurisdiction over the water rights claims of the United States and Indian tribes within Montana's borders. *See State ex rel. Greely v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 762 (Mont. 1985). The Montana General Stream Adjudication proceeds according to a specific statutory process. As the Montana Supreme Court has explained:

Persons who claim water rights that existed prior to July 1, 1973, were required to file statements of their claims, which are then compiled and examined by the Department of Natural Resources and Conservation under the direction of the Water Court. The Water Court then issues an interlocutory, temporary preliminary, or preliminary decree of water rights based on the claims, on data from the DNRC, on other information obtained by the water judge, and on water compacts where applicable. Public notice of the decree provides opportunity for interested persons to review and object to the decree for good cause. The Water Court holds hearings on the issues raised by the objections and issues a final decree.

*Montana Trout Unlimited v. Beaverhead Water*, 361 Mont. 77, 255 P.3d 179, 181 (Mont. 2011) (internal citations omitted).

Mont. Code Ann, § 85-2-248(7)(a) requires the Water Court to join the State of Montana, through the Attorney General, to each Water Court case in which:

(1) a Department of Natural Resources and Conservation (DNRC) issue remark placed on a water rights claim during the examination phase gives rise to a question of nonperfection or abandonment; and (2) that issue remark has not been resolved through the claimant's informal consultation with the DNRC or during the regular course of the objection process. The State's role in such cases is to ensure the accuracy of the Adjudication so as to vindicate the State's constitutionally assigned role as owner of all the water in Montana. *See* Mont. Const. Art. IX, §3.

In these cases, the Attorney General does not represent the interests of any particular water rights claimant or objector, or other stakeholder in the Adjudication. *See* Mont. Code Ann. § 85-2-248(7).

Given the Attorney General's statutory role in ensuring the integrity of the state-wide adjudication process, the Tribes' claims that the proceedings before the State Courts threaten to violate that process and its on-going compliance with the McCarran Amendment directly implicate the Attorney General's interests. Moreover, the Tribes' requested relief--to enjoin the State Courts--could impair or impede the Attorney General's ability to protect and preserve the state-wide adjudication process through the State Courts which also makes the Attorney General's interest a "significantly protectable interest."

**C. The Attorney General's Interests Would Be Impaired or Impeded by the Outcome of the Litigation.**

A proposed intervenor need only demonstrate that the outcome of litigation “may” “impair or impede” its legally protectable interests, not that impairment is certain to occur. Fed. R. Civ. P. 24(a)(2); *United States v. City of Los Angeles*, Cal., 288 F.3d 391, 397-98 (9th Cir. 2002). As described above, the Tribes’ requested injunctive relief, if granted, could impede the Attorney General’s ability to protect and preserve the state-wide adjudication process through the State Courts and ensure its continued compliance with the requirements of the McCarran Amendment.

**D. The Montana State Courts Cannot Adequately Represent the Attorney General's Interests.**

Lastly, the fourth requirement of Fed. R. Civ. P. 24(a)(2)--that the Attorney General’s interests are not adequately represented by an existing party--is satisfied if he can demonstrate that the representation of its interests “may be” inadequate. *See Citizens for Balanced Use*, 647 F.3d at 898 (citing *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). In determining the adequacy of representation the Court examines three factors: “(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor’s arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary

elements to the proceeding that other parties would neglect.” *Id.* quoting *Arakaki*, 324 F.3d at 1086.

While the State Courts, their judges, and the Attorney General share an interest in protecting and preserving the integrity of Montana’s state-wide adjudication process, as well as ensuring its on-going compliance with the McCarran Amendment, their respective roles in the process are different. The Attorney General’s statutory role in the state-wide adjudication process (Mont. Code Ann. § 85-2-248(7)(a) requires Attorney General to be joined as a party to certain claims), as well as his unconditional right to intervene as a party in unresolved claims (Mont. Code Ann. § 85-2-248(7)(b)), and his particular interest in ensuring the compliance of the Adjudication with the McCarran amendment, makes his interest separate and distinct from that of the State Courts.

Further, though both the State Courts and the Attorney General may have the same “ultimate objective” of having the State Courts dismissed from this case, neither the State Courts nor their judges can be expected to make all the arguments that the Attorney General will make because of their differing roles in the adjudication process. The State Courts or the judges in their official capacities defense of their role in the adjudication process will likely take priority for them over the Attorney General’s interest.

## **II. THE ATTORNEY GENERAL MEETS THE REQUIREMENTS FOR PERMISSIVE INTERVENTION.**

If this Court denies the Attorney General's request to intervene as of right, the Attorney General respectfully requests, in the alternative, to be allowed to intervene permissively under Fed. R. Civ. P. 24(b). Rule 24(b) provides two avenues for permissive intervention--one specifically for a government officer or agency, and another for any person (including a government officer or agency). Here, the Attorney General may be granted permissive intervention under either Rule 24(b)(1) or (b)(2).

Fed. R. Civ. P. 24(b)(2) provides:

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

Here, the Tribes' allegations directly implicate the adequacy and integrity of the process for state-wide adjudication of water rights under the Montana Water Use Act, Mont. Code Ann. Title 85, chapter 2. As discussed above, the Montana Water Use Act assigns the Attorney General certain statutory obligations, as well as affords him certain rights. *See* Mont. Code Ann. §§ 85-2-248(7)(a), (b). The Attorney General also has a long-standing role in ensuring the accuracy of the

Adjudication and its compliance with the McCarran Amendment. See, e.g., *State ex rel. Greely v. Confederated Salish Kootenai Tribes*, 712 P.2d at 762. Thus, the Attorney General has a role in the administration of the Montana Water Use Act and may be granted permissive intervention under Rule 24(b)(2)(B).

This Court may also grant permissive intervention pursuant to Rule 24(b)(1) when an applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely, and (3) the applicant's claim or defense, and the main action have a question of law or fact in common. See Fed. R. Civ. P. 24(b)(1); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109-11 (9th Cir. 2002); see also *Friends of the Wild Swan, et al. v. Jewell, United States Fish and Wildlife Service, et al.*, Case No. CV-13-61-M-DWM (D. Mont. July 1, 2013) (Doc. 16) (granting permissive intervention to State agencies).

First, the Attorney General need not establish independent grounds for jurisdiction because Tribes assert federal-question jurisdiction under 28 U.S.C. § 1331, and the Attorney General raises no new claims in his proposed motion to dismiss. See *Freedom From Religion Found. v. Geithner*, 644 F.3d 836, 843-844 (9th Cir. 2011) (“We therefore clarify that the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims.”).

Second, as explained above, the Attorney General's motion is timely because it was at an early stage of the proceedings--before all defendants filed an answer. *See Fund for Animals v. Norton*, 322 F.3d 728, 735 (9th Cir. 2003) (motion to intervene was timely when filed "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer.").

Third, the commonality requirement of Rule 24(b)(1)(B) "does not specify any particular interest that will suffice for permissive intervention," and "it plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *Kootenai Tribe of Idaho*, 313 F.3d at 1108 (quoting 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1911, 357-63 (2d. ed. 1986)).

Here, the Attorney General's interest in protecting and preserving the integrity of the state-wide adjudication process under the Montana Use Act, as discussed in Section I above, demonstrates a legally protectable interest directly relating to the subject of the action, and thus, easily meets the "common question of law and fact" requirement for permissive intervention.

Finally, in exercising its discretion, a court must also consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(3). Montana's timely application and participation will not unduly delay the case or prejudice the original parties.



**CONCLUSION**

For the reasons stated herein, the Attorney General requests that the Court grant leave to intervene for the limited purpose of filing a motion to dismiss.

Respectfully submitted this 22nd day of May, 2014.

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By: 

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing document to be mailed, first class postage paid, to:

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Dated: May 22, 2014



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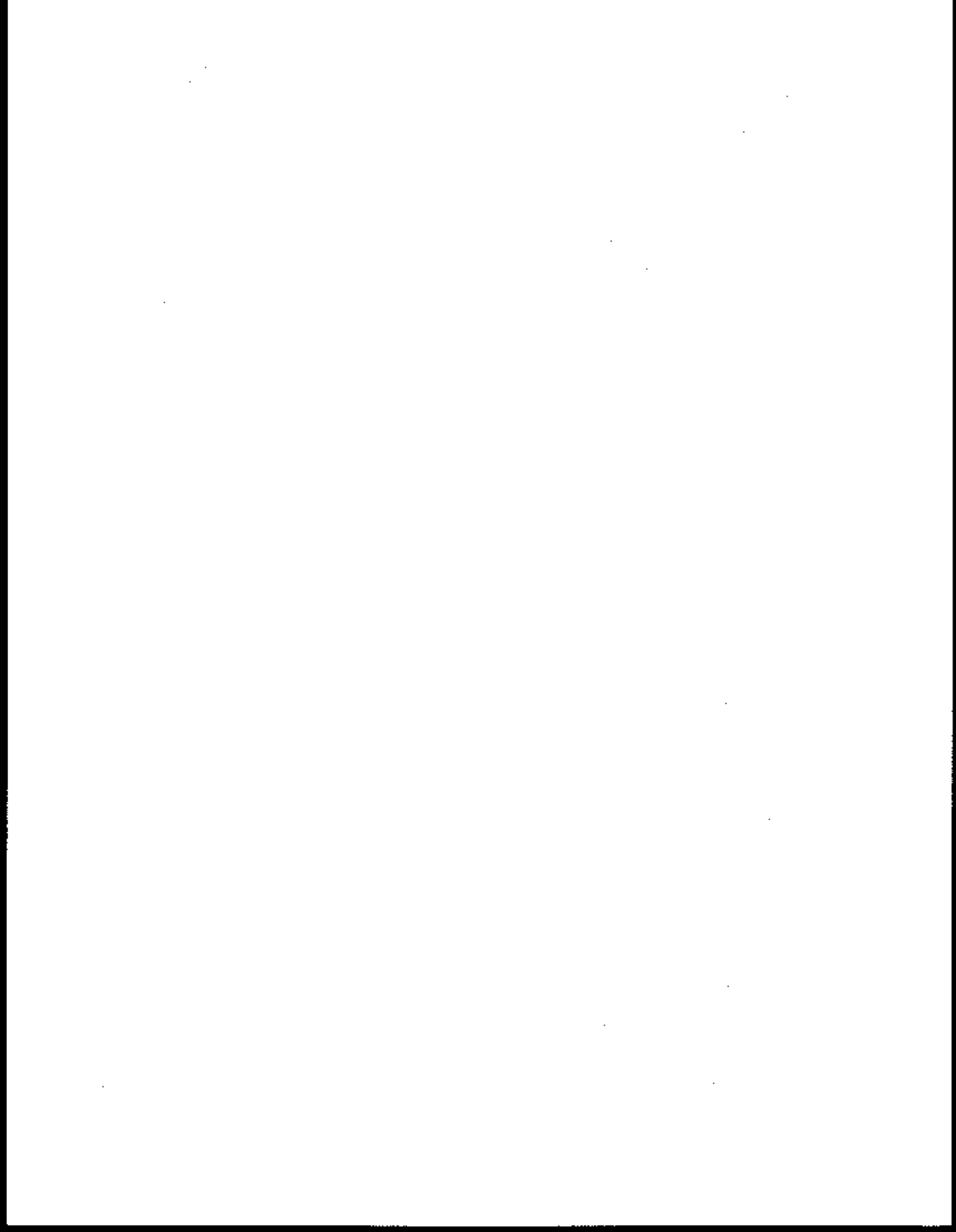
**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,562 words, excluding certificate of service and certificate of compliance.



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**E-MAIL FILED**

**DEC 06 2013**

**Montana Water Court**

Attorneys for *Flathead Joint Board of Control of the  
Flathead, Mission, and Jocko Valley Irrigation  
Districts*

IN THE WATER COURT OF THE STATE OF MONTANA

IN THE MATTER OF THE ADJUDICATION OF EXISTING AND RESERVED RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND OF THE FEDERAL FLATHEAD INDIAN RESERVATION, BASIN 76L.	Case No. WC-2013-  Basin and Water Right Claim Nos.  BASIN 76L  76F 166696 00 76L 166596 00 76L 166597 00 76L 166598 00 76L 166599 00 76L 166600 00 76L 166601 00 76L 166602 00 76L 166603 00 76L 166604 00 76L 166605 00 76L 166606 00 76L 166607 00 76L 166608 00 76L 166609 00 76L 166610 00 76L 166611 00 76L 166612 00 76L 166613 00 76L 166614 00 76L 166615 00 76L 166616 00 76L 166617 00 76L 166618 00 76L 166619 00 76L 166620 00 76L 166621 00 76L 166622 00 76L 166623 00 76L 166624 00 76L 166625 00 76L 166626 00 76L 166627 00 76L 166628 00 76L 166629 00 76L 166630 00 76L 166631 00 76L 166632 00 76L 166633 00 76L 166634 00 76L 166635 00 76L 166636 00 76L 166637 00 76L 166638 00 76L 166639 00 76L 166640 00 76L 166641 00 76L 166642 00 76L 166643 00 76L 166644 00 76L 166645 00 76L 166646 00 76L 166647 00 76L 166648 00 76L 166649 00 76L 166650 00 76L 166651 00 76L 166652 00 76L 166653 00 76L 166654 00 76L 166655 00 76L 166656 00 76L 166657 00 76L 166658 00 76L 166659 00 76L 166660 00 76L 166661 00 76L 166662 00 76L 166663 00 76L 166664 00 76L 166665 00 76L 166666 00 76L 166667 00 76L 166668 00
IN RE:    Water Right Owner  FLATHEAD JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION, AND JOCKO VALLEY IRRIGATION DISTRICTS	



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76L 166672 00	76L 166673 00	76L 166674 00
76L 166675 00	76L 166676 00	76L 166677 00
76L 166678 00	76L 166679 00	76L 166685 00
76L 166686 00	76L 166687 00	76L 166688 00
76L 166689 00	76L 166690 00	76L 166691 00
76L 166692 00	76L 166693 00	76L 166694 00
76L 166697 00	76L 166698 00	76L 166699 00
76L 166700 00	76L 166701 00	76L 166702 00
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76L 166731 00	76L 166732 00	76L 166733 00
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76L 166743 00	76L 166744 00	76L 166745 00
76LJ 166680 00	76LJ 166681 00	76LJ 166682 00
76LJ 166683 00	76LJ 166684 00	76LJ 166695 00

**COMBINED MOTION TO INTERPLEAD, FOR DECLARATORY JUDGMENT, AND  
FOR PERMISSION TO DEPOSIT PROPERTY IN THE COURT AND SUPPORTING  
BRIEF**

**MOTION**

Movant Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts (FJBC) respectfully files this motion for Interpleader under Rule 22, M. R. Civ. P., for Declaratory Judgment under rule 57, M. R. Civ. P., and Title 27, Ch. 8, MCA, and for an Order under Rule 67, M. R. Civ. P., and Title 25, Ch. 8, MCA, permitting it to deposit its existing water right claims, listed in the caption, in this Court. The purpose of this motion is to secure possession of and control over the captioned water rights claims, made and owned by the FJBC, and the existing water rights to which they accord prima facie status, §85-2-227, MCA, by this Court pending its determination of the rightful legal and beneficial ownership of the water

rights and the characteristics of that ownership in a declaratory judgment.

It is imperative for the FJBC to lodge these claims in the Court at this time for two, interrelated reasons: First, there are unresolved conflicting claims to their ownership and concerning the characteristics of their ownership which protracted negotiations among all claimants and potential claimants have failed to resolve. These conflicts include a demand made, this day, December 6, 2013, to sign over these claims to other entities. Second, the FJBC, as explained more fully below, is involuntarily dissolving as a local government entity, casting uncertainty on and imperiling the ownership and the characteristics thereof of these claims and water rights, which are vital to the existence of hundreds of irrigators of approximately 109,000 acres.

Since, the FJBC is the only one of the claimants and potential claimants that legally represents all the affected irrigators and that filed its water rights claims in a timely manner, to protect the irrigators who are the beneficial users and owners of these water rights, it is necessary to secure these valuable property interests by depositing them in this Court.

The "characteristics" of the ownership of these claims and water rights, for the purposes of this motion, references whether they are owned in trust, with fiduciary obligations owing to the owners of the land irrigated by putting the water rights to beneficial use, as the FJBC asserts; or are they owned in toto by the individual land owners, as some land owners assert; or are they owned by some other entity, for example the federal Bureau of Indian Affairs (BIA), which has also made claims to these water rights, without the obligations and standards applicable to a fiduciary owner; or are they owned by the individual Districts, two of which now demand to receive a deed to the claims without, apparently any conditions as to the characteristics of their ownership.

Thus, the FJBC respectfully requests this Court grant its motions to not only fulfill its fiduciary duty to Land Owners in regard to these water rights but to protect the Land Owners themselves from adverse effects to them that would result from the loss of these rights or their compromise in a manner other than keeping with a fiduciary standard.

### **SUPPORTING BRIEF**

#### **Background**

1. These claims are to the irrigation water rights appurtenant to fee land served by the federal Flathead Irrigation Project (Project) in Basin 76L. The land to which these claims secure appurtenant water rights is owned in fee. It was acquired by the current owners' predecessors in interest and it is owned pursuant to the provisions of the Flathead Allotment Act (FAA), 33 Stat. 302, Act of April 23, 1904, as amended, in particular by the Act of May 29, 1908, 35 Stat. 448, in which Congress authorized the construction of the Project. The reimbursable costs of constructing the Project were, for about eight (8) decades, a lien on these lands, which Congress specifically required. See §9, FAA, as amended by Act of May 29, 1908, 33 Stat. 448; and see Act of May 10, 1926, 44 Stat. 453, 464, requiring formation and operation of irrigation districts under state law to execute repayment contracts guaranteeing these liens and representing all such land. Those liens have been fully repaid.
2. The land to which these claims secure appurtenant water rights is within the boundaries of the federal Flathead Indian Reservation and is owned in fee.
3. The suspension of all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights pending compact negotiations terminated July 1, 2013. §85-2-217, MCA (2013). No legal obstacle exists to any party to this litigation, including the FJBC, invoking this Court's jurisdiction to protect its claims and rights implicated in such adjudication, equally with every and any other litigant and water rights claimant. The State of Montana Water



Court has jurisdiction over all these claims. *State ex. rel. Grealey, v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 219 Mont. 76, 712 P.2d 754 (1985).

4. The FJBC is a political subdivision of the state of Montana. §85-7-1612, (3) and (5) MCA; *Love v. Harlem Irr. Dist.* 802 P.2d 611, (1991). It serves as the "central control agency," §85-7-1605, MCA, of the three irrigation districts (Districts), which are also political subdivisions of the State. §85-7-109, MCA. The decision-making body of the FJBC consists of the elected commissioners of the three Districts plus one at-large appointed commissioner. There are twelve commissioners, five from the Flathead Irrigation district (FID), three each from the Mission (MID) and Jocko Valley (JVID) districts, and the at-large commissioner. The FID has approximately 87, 088 acres within its jurisdiction, the MID approximately 15, 089 acres, and the JVID approximately 7,031, for a total of 109, 208 acres.

5. These three Districts were established and have been operated under Montana law pursuant to specific congressional direction and authorization. Act of May 10, 1926, 44 Stat. 453, 464.

6. The FJBC made these claims in performance of its fiduciary duty to and on behalf of the irrigators-owners (Land Owners) of the fee-owned land on which the water is put to beneficial use. The FJBC asserts it owns the nominal or bare legal title to these claims and rights as a fiduciary for these Land Owners. *See Nevada v. U.S.*, 463 U.S. 110 (1983), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *Ickes v. Fox*, 300 U.S. 82 (1937); *In re SRBA Case No. 39576, U.S. v. Pioneer Irrigation District*, 157 P.3d 600 (2007). The FJBC further asserts the Land Owners, who put the water to beneficial use, are the beneficial owners of these claims and rights. *Id.* Therefore, while both the FJBC and the Land Owners own property rights in them, the FJBC's ownership is as a fiduciary for the Land Owners and its actions in relation to them must

meet the high standards of a fiduciary. In any case, the beneficial ownership of the FJBC's claims and the water rights they represent is attached to the land and held by the owner thereof who put the water to beneficial use, perfecting the water right. The FJBC recently reaffirmed this duty in a Resolution, number 2013-7, adopted Wednesday, December 4, 2013. Exhibit 1.

7. The FJBC's ownership of the water rights these water right claims secure and the characteristics of that ownership—i.e. whether as a fiduciary for Land Owners or not—is contested. Some irrigators, many organized as part of an entity named the Western Montana Water Users Association, LLC (WMWUA), assert the Land Owners own the water right appurtenant to their land pursuant to Montana and federal law and, they argue, the FJBC merely filed these claims on their behalf as their authorized representative and holds no ownership interest in the water rights whatsoever. The United States Bureau of Indian Affairs (BIA) filed almost identical claims and also asserts ownership, but, it appears, not as a fiduciary. Additionally, the Confederated Salish and Kootenai Tribes of the Flathead Nation (CSKT or Flathead Tribes) assert their ownership of all or part of the water rights represented by these claims, though they have not yet filed their claims in this Court and are not required to until July 1, 2015. §85-2-702(3), MCA. In addition, two of the three Districts assert a right to ownership of these rights, but, like the BIA, it appears not as a fiduciary. Exhibit 2.

8. The FJBC's ownership, possession, and control of these claims, and the water rights they represent, may be adversely affected by a change in its status in the near future. Two of the three commissioners from both the MID and JVID voted September 13, 2013, to withdraw their districts from the FJBC. If that is not rescinded or otherwise halted, the FJBC will dissolve after December 12, 2013. On November 22, these same commissioners finally stated publicly, and only in response to a direct question, that they will not rescind their decision to withdraw the

MID and JVID, even though a majority of their irrigator constituents urged them by Referendum to do so. Not until today, Friday, December 6, however, did these breakaway districts state their determination to take these water rights away. Exhibit 2. They provided no information whatsoever as to what they intend to do with them. Thus, these water rights, claimed and owned by the FJBC as a fiduciary for individual Land Owners, are not only contested but imminently threatened.

#### Argument

The water rights claims and existing water rights they represent are property owned or held by the FJBC that is the subject of multiple conflicting claims, exposing the FJBC to double or multiple vexatious legal actions and liability, and these claims are, therefore, the proper subject of Rule 22 Interpleader.

9. Interpleader and deposit in this Court are necessary both because of the conflicting claims to ownership of all or part of the property right in these water rights and because of the possible imminent dissolution of the FJBC. The FJBC and other claimants, including the WMWUA and the MID and JVID, are and have been engaged in controversies relating to the ownership and final disposition of these water rights, which, could expose the FJBC to double or multiple liability to Land Owners dependent on those water rights, particularly in light of the FJBC's fiduciary duty to them. It could also be exposed to multiple vexatious litigation arising from other claimants to these water rights. For example, the Twentieth Judicial District Court has issued two alternative writs of prohibition still in force preventing the execution of any WUA or other disposition that divests the Land Owners of their ownership interest in these water rights. See *Western Montana Water Users Association, LLC v. Mission Irrigation District, Jocko Valley Irrigation District, Flathead Irrigation District, and Flathead Joint Board of Control*, DV-12-327, Findings of Fact, Conclusions of Law, and Mandate, dated February 15, 2013. (Exhibit 3.); and see *F. L. Ingraham v. Flathead Joint Board of Control*, DV 13-102, Alternative Writ of

Prohibition, dated April 15, 2013. (Exhibit 4.) These may be dissolved without resolving these ownership issues, however. Thus, the exposure of the FJBC to multiple liability and the vexation of litigations is clear as is the need for the proper court to decide the question of ownership of these water claims and rights and the characteristics of that ownership.

10. Additionally, these water right claims and water rights had been one of the objects of negotiations between the FJBC, the Flathead Tribes, and the United States, to develop a Water Use Agreement (WUA) controlling the operation of the Project, in particular its delivery of water, resolving the conflicting claims to the water rights appurtenant to the Land Owners' real property. The existing, proposed WUA, unexecuted, would have assigned the irrigation water right ownership to the Tribes. As such, it had been envisioned that such an agreement would be an Appendix to any Compact resolving the Flathead Tribes' reserved water rights claims. No such agreement has been concluded, in large part because of the conflicting claims regarding the ownership, and characteristics thereof, of the FJBC's water rights claims. Consequently, negotiations on that Compact have stopped, and the suspension of all proceedings in relation to this adjudication ended on July 1, 2013. §85-2-217, MCA (2013).

11. In light of the possible imminent dissolution of the FJBC, therefore, it is imperative that the ownership and control of these water rights claims, and the water rights they represent, be interpleaded and deposited for security purposes in the Water Court until it can be determined who owns them and what the characteristics of that ownership are; whether, in fact and law, the owner of the bare legal title holds them as a fiduciary for the Land Owners, as the FJBC asserts, whether the Land Owners themselves own so much of those claims and rights as are appurtenant to their land, or whether they are owned by some other person or entity or with some other legal characteristics.

Rule 67 permission to deposit these claims in this Court is appropriate to protect them for the beneficial users until ownership and the characteristics thereof can be determined.

12. The imminent dissolution of the FJBC presents a threat to the security of these claims and the water rights. First, if the FJBC dissolves as a legal entity, it is unknown whether these claims will survive and, if so, under whose ownership and with what ownership characteristics. Second, if the ownership of these claims does, in fact, devolve, at least in part, to another entity, such as the MID and JVID, if the characteristics of that ownership are not determined by this Court, they may compromise these claims in a manner violating the fiduciary duty to Land Owners. As noted above, the commissioners who voted to withdraw the MID and JVID from the FJBC have refused to state what their plans are in this regard. But their decision to withdraw, first taken June 14, 2013, was in large part in response to the rejection by the FJBC of the existing Proposed WUA, which would have required the FJBC to dismiss these claims and assigned ownership of the water rights to this water to the Flathead Tribes. Such an agreement would patently violate the FJBC's fiduciary duty to Land Owners.

13. Thus, deposit in this Court is necessary, and appropriate, to prevent disposition of these claims until their ownership and the characteristics of that ownership, which will necessarily affect the terms on which these claims may be either adjudicated or settled through compromise, is determined.

Declaratory judgment is appropriate on this motion, and the FJBC respectfully requests the Court to establish a schedule for discovery and briefing.

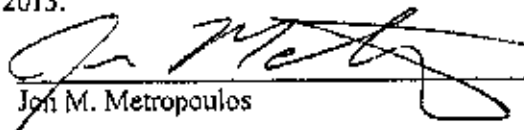
14. The issues presented by this motion as to the ownership of the FJBC's water rights claims and water rights and the characteristics of that ownership, are appropriate for a declaratory judgment ruling under Rule 57, M. R. Civ. P., and Title 27, Chapter 8, MCA. The pressing issue at this time, however, concerns the interpleader and deposit in this Court of the FJBC's water

rights claims, as explained above. Consequently, movant FJBC provides notice to the Court that it intends to file a brief supporting its motion for declaratory judgment in due time, as this matter procedurally is settled and a schedule established. The FJBC will therefore ask the Court, in due time, to establish a schedule for processing this motion, including discovery, and ensuring that all appropriate parties are given the opportunity to submit evidence and arguments.

Conclusion

The FJBC, for all the reasons stated above respectfully requests that this Court grant its motions. This motion is made in the interests of justice, to ensure the rights of all parties and claimants, and for no improper purpose.

Dated this 6th day of December, 2013.

  
Jon M. Metropoulos

CERTIFICATE OF SERVICE

This document has been served on the following attorneys known to represent stakeholders and claimants by U.S. mail and electronically. Movant understands the Water Court will also post notice in accordance with its procedures.

F.L. Ingraham  
Ingraham Law Offices, LLC  
10 Adams Street, S.E.  
Ronan, MT 59864  
Attorney for F.L. Ingraham

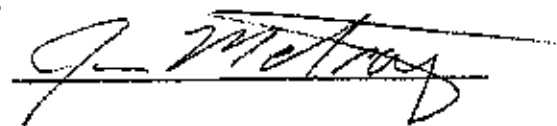
Brian C. Shuck,  
Law Office of Brian C. Shuck  
P.O. Box 3029  
Cheyenne, Wyoming 82003

John Tietz  
Steve Wade  
Browning, Kaleczyc, Berry & Hoven, P.C.  
P.O. Box 1697  
Helena, MT 59624

Duane Mechem  
U.S. BIA  
By email only

Ronald MacDonald  
By email only

Dated this 6th day of December, 2013.



Flathead Joint Board of Control  
Resolution 2013-7

Be it resolved by the Flathead Joint Board of Control, that:

Whereas, the majority commissioners of the Mission and Jocko Valley Irrigation Districts, Paul Wadsworth, Jerry Johnson, Kerry Doney, and Roger Christopher, who are a minority of the FJBC, voted twice to withdraw from the FJBC;

Whereas, a Referendum intended to ascertain the will of irrigators regarding these issues returned a vote of a majority of irrigators opposing the withdrawal of the MID and JVID from the FJBC, but, on November 22, those minority commissioners stated they would nevertheless proceed with their determination to withdraw the districts they represent from the FJBC;

Whereas, the FJBC and its commissioners owe a fiduciary duty to the irrigators and the constitutions of the United States and the State of Montana require that they respect irrigators' property rights in land and water rights and not assist in a taking of irrigators' valuable real property rights and water rights without compensation;

Whereas, none of the three irrigation districts filed water right claims in the Water Court, and the majority commissioners of the MID and JVID have refused to state their intentions as to the FJBC's claims, appearing to be willing to dismiss them in favor of another claimant;

Whereas, the legal effect of the involuntary dissolution of the FJBC on its water rights claims is uncertain and may be adverse to the irrigators to whom the FJBC owes a fiduciary duty;

Resolved that the FJBC, by and through its Chairman, is authorized and directed to take all available legal steps to amend its water right claims and to secure, protect, defend, and prevent such real property rights from any relinquishment or compromise in contravention of its fiduciary duty, including, but not limited to, amending those claims in administrative and judicial institutions.

Resolved, that the FJBC Chairman is directed to take all steps necessary to amend all 146 water right claims to accomplish the following purposes. First, the FJBC shall amend the owner name on all 146 water rights claims to identify two alternatives to the ownership of the water rights. Second, this amendment shall seek to ensure that, if the Water Court determines the FJBC owns the water rights, then the claim reflects the fact the FJBC owns them merely as a fiduciary for fee land owners of irrigable land in accordance with the applicable legal foundations, including but not limited to, the individual owners' title to land and water rights obtained pursuant to the Flathead Allotment Act, 33 Stat. 302, Act of April 23, 1904, as amended. See *Nevada v. U.S.*, 463 U.S. 110 (1983), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *Icker v. Fox*, 300 U.S. 82 (1937); *In re SRBA Case No. 39376, U.S. v. Pioneer Irrigation District*, 157 P.3d 600 (2007) supporting both alternative forms of ownership of the water right. This amendment reflects the legal fact that the landowners are either the owners of the water rights appurtenant to their land in toto or, at the least, they are the beneficial owners of the water rights, possessing a legally

enforceable real property right to receive irrigation water. The irrigated landowners received the water right by virtue of their patents and operation of federal and state law. Further, the irrigated landowners and their predecessors, not the FJBC or any other entity, put the water to beneficial use. The individual landowners' beneficial ownership of these water rights, after adjudication, must result in the issuance of decrees by the Water Court either in the names of the individual landowners or the FJBC, as fiduciary for them; *Nevada v. U.S.*, 463 U.S. 110 (1983); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Lakes v. Fox*, 300 U.S. 82 (1937); *In re SRBA Case No. 39576*; *U.S. v. Pioneer Irrigation District*, 157 P.3d 600 (2007). Third, the FJBC shall amend the claimed priority dates back to the claims originally asserted--various dates. In conjunction with the amendment of the name, this clarifies that the legal bases of these water rights is both the water law of the State of Montana and federal common law and case law applicable to Walton water rights. Further, under the doctrine of "relation back" or "tacking," this amendment shall assert that the priority dates in appropriate instances may be earlier than the dates water was put to beneficial use and shall reserve the right to argue for an earlier priority date.

Adopted this day 04 DEC 2013

Approved Daniel Bruce Cole

Attested Jim L. Baker






---

**Monday FJBC meeting**


---

John Tietz <john@bkbh.com>  
 To: Jon Metropoulos <jon@metropouloslaw.com>  
 Cc: Steve Wade <stevew@bkbh.com>

Fri, Dec 6, 2013 at 8:53 AM

Jon,

A draft quitclaim deed for the FJBC property is attached for your review.

In addition to the building, it is also going to be necessary for the FJBC to quitclaim the water rights held in its name to each of the individual irrigation districts before the FJBC dissolves on December 12th. If the FJBC does not convey the water rights now, there will be no entity to effectuate the transfer after dissolution. I am working on a draft QTC for each of the districts, and will try to get copies to you for review early this afternoon.

John,

W. John Tietz  
 Browning, Kalczyk, Berry & Hoven, PC  
 800 N. Last Chance Gulch, Suite 101  
 P.O. Box 1697  
 Helena, MT 59624

(406) 443-6820  
 (406) 443-6883 (fax)

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—Original Message—

From: Jon Metropoulos [mailto:jon@metropouloslaw.com]  
 [Quoted text hidden]

FJBC QTC.pdf  
 9K

Exhibit 2

1 Hon. C.B. McNeil  
2 District Judge  
3 Lake County Courthouse  
4 106 Fourth Avenue East  
5 Polson, MT 59860  
6 (406) 883-7250

7  
8 MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

9 WESTERN MONTANA WATER USERS  
10 ASSOCIATION, LLC, on behalf of its  
11 members, who own irrigated lands with  
12 appurtenant water and other water rights  
13 within the Mission, Jocko Valley, and  
14 Flathead Irrigation Districts,

15 Plaintiff,

16 vs.

17 MISSION IRRIGATION DISTRICT, JOCKO  
18 VALLEY IRRIGATION DISTRICT,  
19 FLATHEAD IRRIGATION DISTRICT, AND  
20 FLATHEAD JOINT BOARD OF CONTROL,

21 Defendants.

Cause No. DV-12-327

22 FINDINGS OF FACT,  
23 CONCLUSIONS OF LAW  
24 AND  
25 WRIT OF MANDATE

26 The above cause came before the Court February 14, 2013 pursuant to Mont. Code  
Ann. § 27-26-301 for a return and hearing upon the Alternate Writ of Mandate issued by this  
Court December 14, 2012;

Plaintiff appeared by its counsel, Brian C. Shuck and Bob Fain; Defendants appeared  
by their counsel Jon Metropoulos;

Good cause appearing therefore, the Court makes the following:

Exhibit 3

FINDINGS OF FACT

- 1  
2 1. That on December 12, 2012, Plaintiff filed a Petition for Writ of Mandate and  
3 Complaint for Injunctive and Declaratory Relief.
- 4 2. That Mont. Code Ann., § 27-26-102 provides for a Writ of Mandamus to compel  
5 the performance of an act that the law specifically enjoins as a duty resulting from an  
6 office, trust or station.
- 7 3. That Plaintiff's first claim for relief relies upon Mont. Code Ann., § 27-8-101, *et*  
8 *seq.*, the Uniform Declaratory Judgment Act and upon Mont. Code Ann., § 27-19-101  
9 *et seq.* for injunctive relief.
- 10 4. That pursuant to Plaintiff's second claim for relief, Writ of Mandamus, this Court  
11 issued on December 14, 2012 an Alternate Writ of Mandamus commanding  
12 Defendants to comply with Mont. Code Ann., § 85-7-1956 and submit the final  
13 proposed Flathead Irrigation Project Agreement to a vote of the Irrigators and to first  
14 submit the proposed agreement to this Court, pursuant to Mont. Code Ann., § 85-7-  
15 1957 QR that Defendants file an Answer within 30 days of the Alternate Writ.
- 16 5. That Defendants did file an Answer January 16, 2013. That ¶ 15 of Defendants'  
17 Answer admits that approval of the FIP Agreement by the Flathead Joint Board of  
18 Control (hereinafter "FJBC") would be illegal for several reasons.
- 19 6. That Plaintiff is an LLC organized under the laws of the State of Montana and its  
20 members (hereinafter "Irrigators") all own fee simple lands with appurtenant water  
21 rights within the Defendants' Irrigation District and all are physically located within the  
22 exterior boundaries of the Flathead Indian Reservation.
- 23 7. The Defendants Mission, Jocko Valley and Flathead Irrigation Districts were all  
24 formed under the laws of the State of Montana for the purpose of providing effective  
25 public agencies for the improvement, development, operation, maintenance and  
26 administration of irrigation systems.

1 8. That the creation of said districts under Mont. Code Ann., § 85-7-101, *et seq.*  
2 expressly states that said law does not contemplate the acquisition by the districts of  
3 the existing water, water rights or systems or works owned by the Irrigators who are  
4 respective water rights owners within the districts.

5 9. That the Defendant Flathead Joint Board of Control was created under Montana  
6 Law under Mont. Code Ann., § 85-7-1601 *et seq.* when the Board of Commissioners of  
7 the three irrigation districts deemed it advisable for the best interest of their district to  
8 operate, manage, supervise and maintain the operation of their district jointly with  
9 other districts. That said FJBC has no ownership interest in any water rights.

10 10. That Article IX, Section 3 of the Montana Constitution recognizes and confirms all  
11 existing rights to the use of any waters for beneficial purposes, provides that all waters  
12 within the boundaries of the State are the property of the State subject to appropriation  
13 for beneficial uses as provided by law.

14 11. That Article II, Section 16 of the Montana Constitution provides that courts of  
15 justice shall be open to every person and speedy remedy afforded for every injury of  
16 person, property or character.

17 12. That Article II, Section 17 of the Montana Constitution provides that no person  
18 shall be deprived of life, liberty or property without due process of law.

19 13. That Article II, Section 29 prohibits the taking of private property without just  
20 compensation.

21 14. That Title 3, Chapter 7 of the Montana Code Annotated established water courts  
22 to adjudicate water rights in the State of Montana.

23 15. That Title 2, Chapter 15, Part 33 RCM established the Montana Department of  
24 Natural Resources and Title 85 Chapter 2, Mont. Code Ann., § 101, *et seq.* provided  
25 for the administration, control and regulation of water rights and established a system  
26 of centralized records of all water rights.